

FINAL AWARD ALLOWING COMPENSATION
(Modifying Award and Decision of Administrative Law Judge)

Injury No.: 10-060756

Employee: Wolfgang Kaschner
Employer: Schlueter Painting Co.
Insurer: Acuity Mutual Insurance Company

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Preliminaries

The parties asked the administrative law judge to resolve the following issues: (1) whether employer is liable for temporary total disability and temporary partial disability benefits from October 1, 2011, through February 29, 2012; (2) whether employer is liable for permanent partial disability benefits; and (3) whether employer is liable for permanent total disability benefits.

The administrative law judge rendered the following findings and conclusions: (1) employer is not liable for permanent total disability benefits; (2) employer is liable for 139.2 weeks of permanent partial disability benefits; and (3) employee did not prove entitlement to temporary total or temporary partial disability benefits.

Employee filed a timely Application for Review with the Commission alleging the administrative law judge erred: (1) in finding employer is not liable for permanent total disability benefits; and (2) in applying § 490.065 RSMo as to the issue whether employee's witness, Michael Wilcox, should be considered an expert witness.

On October 14, 2013, the Commission received a Motion to Submit Additional Evidence filed by employee. On December 17, 2013, the Commission denied employee's Motion to Submit Additional Evidence.

For the reasons stated below, we modify the award of the administrative law judge as to the issue of the nature and extent of disability employee suffered as a result of the work injury.

Discussion

Nature and extent of disability resulting from the work injury

The administrative law judge found that, as a result of the work injury, employee sustained a 60% permanent partial disability of the right shoulder, and did not suffer permanent total disability. In so finding, the administrative law judge speculated that employee may be permanently and totally disabled owing to a combination of the effects of the work injury with employee's preexisting conditions of ill-being, or possibly

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owing to post-accident worsening of employee's condition. For the following reasons, we disagree with the administrative law judge's determinations as to this issue.

While this case has been marked by significant confusion and errors on the part of rating and evaluating experts for both parties (such as Dr. Pelikan's report incorrectly suggesting employee's injury affected his left upper extremity and Mr. Dolan's report referencing an individual named Mr. Butler rather than the employee in this matter) there is no confusion or dispute with regard to the following facts.

As of July 31, 2010, the date of the work injury, employee was a 56-year-old high school graduate with some experience as a tile setter's helper but with a vocational history otherwise limited entirely to work as a painter. As a result of the July 2010 accident, wherein employee fell off a work bench and down a staircase, employee suffered a severe comminuted bone fracture injury to his dominant right upper extremity which ultimately necessitated three surgeries, including a partial shoulder replacement. The course of employee's treatment also required the removal of all of his teeth, because the authorized treating surgeon, Dr. Nogalski, determined that employee's dental issues posed an increased risk of infection. Upon releasing employee from his care, Dr. Nogalski identified a severely reduced range of motion of the right shoulder, and opined that employee is permanently restricted from lifting more than 5 pounds and cannot use his right arm at all above chest height as a result of the work injury. Employee requires the use of pain medications to relieve ongoing pain in his shoulder, and must take antibiotics three times a day for the rest of his life in order to prevent further infections.

Employee credibly testified regarding the effects of the work injury; from this evidence we find as follows. Employee has tried to learn to use his non-dominant left hand to perform the tasks of everyday life, but has experienced considerable difficulty with activities such as shaving. Employee is unable to drive because he can't use his right arm to operate even an automatic transmission. As a result of the removal of all of his teeth, employee must now wear dentures, but employee prefers not to wear them because he is unable to get used to having them in his mouth. As of September 30, 2011, the date employee reached maximum medical improvement, he was 57 years of age. After his release from medical treatment for the work injury, employee attempted to return to work performing light duty tasks on a part-time basis for his former employer, but was unable to continue owing to an inability to use his right upper extremity effectively, and he has never returned to full-duty work. Employee believes no other employer would have hired him to perform such work, because he worked so slowly owing to his right shoulder injury. Employee feels that the right shoulder injury has rendered him unable to perform any work. Employee receives Social Security disability payments as his sole source of income.

The test for permanent total disability is whether the worker is able to compete in the open labor market. The critical question is whether, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition.

Molder v. Mo. State Treasurer, 342 S.W.3d 406, 411 (Mo. App. 2011)(citation omitted).

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The question presently before us is whether a 57-year-old man with little effective use of his dominant upper extremity can secure and maintain substantial and gainful employment on the open labor market. Employer's vocational expert, J. Stephen Dolan, answers that question in the affirmative, opining that employee could find work as a fast food counter worker or a pizza delivery person. We are not persuaded, and find this opinion so completely unrealistic as to undermine Mr. Dolan's credibility generally.

In light of the foregoing considerations, we are persuaded that employer has failed to present any credible evidence to rebut the opinion from employee's vocational expert, Timothy Kaver, that employee is currently unable to work, and that his reemployment possibilities are poor given his skills, disabilities, and physical restrictions. After careful consideration, we find most persuasive Mr. Kaver's opinion on this issue.

We find that employee is permanently and totally disabled as a result of the July 2010 work injury. Employer is liable for permanent total disability benefits.

Conclusion

We modify the award of the administrative law judge as to the issue of the nature and extent of permanent disability resulting from the work injury. Beginning September 30, 2011, employer is liable for weekly payments of permanent total disability benefits at the stipulated rate of \$404.51. The weekly payments shall continue thereafter for employee's lifetime, or until modified by law.

The Commission approves and affirms the administrative law judge's allowance of an attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

The award and decision of Administrative Law Judge Suzette Carlisle, issued August 20, 2013, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

Given at Jefferson City, State of Missouri, this 17th day of March 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee:	Wolfgang Kaschner	Injury No.:	10-060756
Dependents:	N/A		Before the
Employer:	Schlueter Painting Co.		Division of Workers'
Additional Party:	N/A		Compensation
Insurer:	Acuity Mutual Insurance Company		Department of Labor and Industrial
Hearing Date:	May 20, 2013		Relations of Missouri
			Jefferson City, Missouri
		Checked by:	SC

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: July 31, 2010
5. State location where accident occurred or occupational disease was contracted: St. Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant fell from a work bench and injured his right shoulder.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right shoulder
14. Nature and extent of any permanent disability: 60% permanent partial disability of the right shoulder
15. Compensation paid to-date for temporary disability: \$27,588.57
16. Value necessary medical aid paid to date by employer/insurer? \$89,933.61

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- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$606.77
- 19. Weekly compensation rate: \$404.51
- 20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable:

139.2 weeks of permanent partial disability from Employer	\$56,307.79
TTD underpayment	\$ 1,646.40

22. Second Injury Fund liability: No

TOTAL: \$57,954.19

23. Future requirements awarded: As stated in this award

Said payments to begin and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Jeffrey Atkinson

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Wolfgang Kaschner	Injury No.: 10-060756
Dependents:	N/A	Before the
Employer:	Schlueter Painting Company	Division of Workers'
Additional Party:	N/A	Compensation
		Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
Insurer:	Acuity Mutual Insurance Company	Checked by: SC

PRELIMINARIES

The parties appeared before the undersigned administrative law judge on May 20, 2013, for a final hearing at the Missouri Division of Workers' Compensation ("Division") to determine the liability of Schlueter Painting Company, ("Employer") and Acuity Mutual Insurance Company ("Insurer"),¹ at the request of Wolfgang Kaschner ("Claimant"). Attorney Jeffrey Atkinson represented Claimant. Attorney Dennis Lassa represented Employer. The Second Injury Fund is not a party to this case. Jurisdiction lies with the Division of Workers' Compensation. Venue is proper in St. Louis. The record closed after presentation of the evidence. The court reporter was Maria Krawat.

The parties stipulated that on or about July 31, 2010:²

1. Claimant was employed by Employer in St. Louis County.
2. Claimant sustained an accident which arose out of and in the course of employment.
3. The Employer and Claimant operated under the Missouri Workers' Compensation Law.³
4. Employer's liability was fully insured by Acuity Insurance Company.
5. Employer had notice of the injury.
6. A Claim for Compensation was timely filed.
7. Claimant's average weekly wage was \$606.77 which resulted in a compensation rate of \$404.51 for temporary total disability ("TTD"), permanent partial disability ("PPD"), and permanent total disability ("PTD") benefits.
8. Employer paid TTD totaling \$27,588.57, representing 60 weeks from August 1, 2010 to September 30, 2011, and medical benefits totaling \$89,933.61.
9. Claimant reached maximum medical improvement ("MMI") on September 30, 2011.
10. Claimant was underpaid TTD benefits totaling \$1,646.40 from August 1, 2010 to September 30, 2011.
11. Medical benefits are to remain open for treatment with Drs. Gutwein and Nogalski.
12. If the court finds TTD and temporary partial disability ("TPD") benefits are owed between October 1, 2011 and February 29, 2012, the amount Employer owes is \$3,418.59.

¹ All references in this award to the Employer also refer to the Insurer unless otherwise stated.

² The date of injury was incorrectly stated on the record as July 31, 2012. The correct date is July 31, 2010.

³ Statutory references are to the Revised Statutes of Missouri, (2013 Supp.) unless otherwise stated.

The parties raised the following issues for disposition:

1. Is Employer liable for TTD and TPD benefits from October 1, 2011 to February 29, 2012?
2. What is the nature and extent of Employer's liability for either PPD or PTD benefits, if any?

Exhibits

Claimant's Exhibits A through K and Employer's Exhibits 1 through 6 were offered and received into evidence without objection. Any objections not expressly ruled on during the hearing or in this award are now overruled. To the extent there are marks or highlights contained in the exhibits, they were made before becoming a part of this record, and were not placed there by the undersigned administrative law judge.

SUMMARY OF THE EVIDENCE

All evidence was reviewed but only evidence that supports this award is discussed below.

Witness 1- Claimant

At the time of the hearing Claimant was a single, 59-year-old high school graduate with average grades. Claimant attended community college for one semester on a track scholarship. Claimant has no vocational or computer training. He rents from his former supervisor.

Preexisting Disabilities

In 2000, Claimant fractured his left hip and had surgery to insert hardware. He returned to work and resumed all his duties. Left hip pain after 2010 caused Claimant to sit down frequently and paint while sitting.

Prior to 2010, Claimant had the small toe amputated on his right foot. The foot has worsened and does not heal properly. Claimant appeared for the hearing in a wheelchair to keep pressure off the foot. Claimant was scheduled to have tests performed the day after the hearing. Foot problems may be caused by poor circulation. Each day Claimant smokes a pack of cigarettes and doctors have strongly recommended he quit.

Claimant worked physically demanding jobs. From 1985 to 1990, Claimant worked as a tile setter's helper. For 15 years Claimant worked as a painter for Employer. He painted exterior and interior walls and ceilings. Claimant trimmed around windows, doors, and baseboards.

The Work Accident

On July 31, 2010, Claimant stood on a workbench located near stairs. The bench fell down the stairs and he fractured his right shoulder. X-rays and a CT scan of the right shoulder revealed a

comminuted proximal right humeral fracture with no extension into the articular surface, and a surgical neck fracture.

Prior to surgery, Claimant's teeth were extracted to avoid possible infection. On August 6, 2010, Dr. Nogalski performed an open reduction and internal fixation of the right humeral head to secure the fracture. In November 2010, Dr. Nogalski concluded the first surgery was a failure and kept Claimant off work. On December 16, 2010, Dr. Nogalski performed a partial shoulder replacement. On February 8, 2011, Dr. Nogalski released Claimant to light-duty work, with the right arm if available, and strongly recommended Claimant stop smoking to help the healing process.

After the second surgery, Claimant developed an infection, which required a third surgery on March 3, 2011 to clean up the area. Dr. Nogalski restricted Claimant's work to light duty through May 25, 2011, with no lifting over 5 pounds with the right arm. On July 29, 2011, Dr. Nogalski permanently restricted lifting to 5 pounds with the right arm and no use of the right arm above chest level, and he recommended annual x-rays to monitor the implant.

Rehab1 Network provided Claimant with physical therapy from August 2010 until June 2011. Michael B. Gutwein, M.D., began treating Claimant in 2011 for the infection and continues to treat him today.

On September 30, 2011, Dr. Nogalski opined Claimant had reached MMI and released him from care with the following permanent restrictions: no lifting over 5 pounds with the right upper extremity, and no use of the right arm above chest level.

As a result of the infection, Claimant will take antibiotics three times a day for the remainder of his life. Also, he takes pain medication.

Right shoulder complaints include tenderness, numbness, and stiffness. Claimant is right-handed but performs many daily activities with his left hand since the accident. Claimant's family assists him with laundry and other needs. He no longer drives due to problems shifting automatic gears.

Claimant returned to work in October 2011 after Dr. Nogalski released him, and he worked as a painter until February 29, 2012. Employer and Claimant agreed he would stop working because he could no longer perform the work. He has not looked for work since he quit.

Now Claimant receives Social Security benefits. His daily activities include watching television, reading the newspaper, drinking a six pack of beer and smoking a pack of cigarettes.

Subsequent Disability

Early in 2013 Claimant fell at home and fractured his right hip and wrist. Hardware was inserted into the right hip. The right wrist was casted. At the hearing, Claimant "fidgeted" in his wheelchair because of pain to both hips and his right foot. Right hip complaints are greater than left hip complaints, which limit standing to ten minutes and sitting to four hours. Claimant is fearful he may fall again. After the 2013 fall Claimant chose not to renew his driver's license.

Witness 2-Mr. Michael A. Wilcox

Mr. Michael Wilcox testified on behalf of Employer. Mr. Wilcox graduated from the University of Missouri in Columbia with a degree in financial management, and an MBA from Webster University. Mr. Wilcox is an adjunct professor at Webster University and teaches entrepreneurship and small business management.

Mr. Wilcox's commercial cleaning career lasted from 2010 to 2013 as the owner of Vivid Cleaning, a commercial cleaning company. He performed all aspects of cleaning. He interviewed over 100 applicants for 20 positions. Currently, he works for 4M, as a regional sales manager. 4M is also a commercial cleaning business. The major difference between the two companies is the size of the buildings cleaned.

Based on Mr. Wilcox's experience in the cleaning industry, and a review of depositions by Claimant, Mr. Dolan, and Drs. Pelikan and Lehman, he concluded Claimant would not be hired to clean at either company, Vivid Cleaning or 4M. He cited Claimant's inability to use both hands to mop, use an extended duster, wear a backpack, lift and operate a vacuum cleaner or change belts. Also, Mr. Wilcox questioned Claimant's ability to perform tasks accurately and in a timely manner. He did not interview Claimant.

Expert Medical Opinion

On May 9, 2012, Mark S. Pelikan, D.O., performed an Independent Medical Examination on behalf of Claimant. Dr. Pelikan reported the following injuries related to the work accident: right shoulder arthroplasty with infection, amputation of the right fifth toe, and right hip fracture. A section of the report labeled "Conclusion regarding primary work related injury" was left blank. However, Dr. Pelikan opined the infection was related to the failed right shoulder implant. Later in the report Dr. Pelikan listed the preexisting disabilities as a toe amputation and left hip procedure.

Dr. Pelikan rated 45% of the body for the right shoulder, and concluded Claimant was unable to return to work because of his disabilities.

Dr. Pelikan imposed the following restrictions: For the right shoulder: a 5 pound lifting restriction, twice per hour, no abduction or flexion, no use of the right arm, no pushing and pulling, lifting, climbing or carrying. For the left shoulder: limit pushing/pulling to 10 pounds, three times per hour.

Dr. Richard Lehman, M.D., a board certified orthopedic surgeon, testified on behalf of Employer. On October 23, 2012, Dr. Lehman examined Claimant and concluded smoking two packs of cigarettes affected Claimant's ability to heal after surgery. Examination revealed limited range of motion and overhead use, internal rotation 0/60 and 0/85 for external rotation, 30/150 for abduction, and flexion 40/160.

Dr. Lehman recommended Claimant limit his activities to those in front of him. He diagnosed a fractured proximal humerus, post infection with a head splitting humeral fracture.

Dr. Lehman found Claimant had achieved MMI from the work accident, and did not recommend additional medical treatment except for ongoing antibiotics. He further opined Claimant could return to light-duty work with the following restrictions: no lifting over 10 pounds, no overhead work or repetitive stress on the shoulder. He had no problem with Claimant attempting to work within the restriction he recommended. Dr. Lehman rated 35% PPD of the right shoulder from the work accident.

Expert Vocational Evidence

Mr. Tim Kaver, a vocational rehabilitation counselor, interviewed Claimant on June 4, 2012 at the request of his attorney. Mr. Kaver administered the Wide Range Achievement Test ("WRAT") which revealed Claimant spelled at the high school level and performed math at the seventh grade level. Claimant scored at the seventh grade level on the "ABLE" test which measures reading comprehension. Mr. Kaver concluded Claimant recognized words at the high school level and recommended remedial training in reading and math.

Mr. Kaver based his opinion on right arm restrictions set by Drs. Pelikan and Nogalski.

Based on a lack of transferable skills and use of one non-dominant hand, Mr. Kaver concluded Claimant was limited to sedentary to light duty work, such as office clerk, customer service representative, dispatcher, order taker, reservationist, and security alarm monitor. These jobs require computer skills and a one-handed keyboard for Claimant.

If Claimant obtained remedial training for reading and math, Mr. Kaver predicted Claimant may be employable "on paper" but poor communication skills make him a less than desirable candidate for employment. Therefore, Mr. Kaver concluded Claimant is currently unemployable based on low reading and math skills, and a lack of computer skills and modified equipment.

Mr. Joseph S. Dolan, a vocational rehabilitation counselor, interviewed Claimant on November 13, 2012 on behalf of Employer. Mr. Dolan administered the WRAT 4 test and Claimant scored at the upper end of high school in reading, spelling and math, with math being the highest score. Mr. Dolan noted Mr. Kaver used the Wide Range Achievement Test 3, which is out of date. The fourth edition has been in existence for a long time.

Mr. Dolan predicted Claimant's painting skills could narrowly transfer to other painting jobs, but conceded no prospective employer would hire him to paint.

Mr. Dolan identified two vocational problems: limited use of Claimant's right arm and problems standing because of his left hip and right foot.

Mr. Dolan concluded if Claimant had no hip and foot complaints there were multiple jobs he could perform within Dr. Nogalski's arm restrictions, including fast food, cashier, unarmed security guard, commercial cleaning, or pizza delivery. Mr. Dolan testified Claimant could use one hand to clean sinks and toilets.

Mr. Dolan further concluded the combination of problems with Claimant's right arm, left hip and right foot reduce his employment opportunities. Based on Dr. Nogalski's restrictions and his

own assessment, Mr. Dolan opined Claimant could still work as a cashier at a parking lot or garage, where he could change positions as needed. Mr. Dolan predicted Claimant will not find a job without looking.

Mr. Dolan found Dr. Pelikan's restrictions were confusing. Dr. Pelikan restricted reaching to twice an hour with the right arm but concluded Claimant had no use of his right arm. Mr. Dolan observed Claimant used his right hand during vocational testing. Also, Dr. Pelikan restricted left arm pushing and pulling to 10 pounds of force; however, Claimant reported no problems using his left arm. Based on Dr. Pelikan's restrictions, Mr. Dolan found Claimant unable to work.

FINDINGS OF FACT and CONCLUSIONS OF LAW

Claimant is not permanently and totally disabled from the shoulder injury alone

Claimant asserts he is PTD due to the right shoulder injury alone. After giving careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented at the hearing, Claimant's demeanor during the hearing, and the applicable law of the State of Missouri, I find Claimant did not meet his burden to prove he is PTD due to the shoulder injury alone for the reasons stated below.

In a workers' compensation proceeding, the employee has the burden to prove by a preponderance of credible evidence all material elements of his claim *Meilves v. Morris*, 422 S.W.2d 335, 339 (Mo. 1968). Section 287.808 requires claimants establish the proposition is more likely to be true than not true. Claimant must establish he sustained a compensable work injury and prove the nature and extent of disability to a reasonable degree of certainty. *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo. App. 1995).⁴

To establish entitlement to permanent total disability benefits, Claimant must also prove ... the last injury resulted in the employee being permanently and totally disabled. *Boring v. Treasurer*, 947 S.W. 2d 483 (Mo. App. 1997). The test for permanent total disability is the worker's ability to compete in the open labor market in that it measures the worker's potential for returning to employment. *Sutton v. Vee Jay Cement Contracting Co.*, 37 S.W.3d 803, 811 (Mo. App. 2000). The primary determination is whether an employer can reasonably be expected to hire the employee, given his present physical condition, and reasonably expect the employee to successfully perform the work. *Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 635 (Mo.App.2007). Chapter 287.020.6 states the term "**total disability**"... shall mean inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident.

In *Abt v. Mississippi Lime Co.* 388 S.W.3d 571, 578 (Mo.App. 2012), the court "deferred to the fact finder on issues involving the credibility of witnesses and the weight to be given testimony, and acknowledged that the fact finder may decide a case upon its disbelief of uncontradicted and unimpeached testimony." (Citations omitted). However, "where the record reveals no conflict in the evidence or impeachment of any witness, the reviewing court may find

⁴ Several cases herein were overruled by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003) on grounds other than those for which the cases are cited. No further reference will be made to *Hampton*.

the award was not based upon disbelief of the testimony of the witnesses.” *Id.*

The issue is whether Claimant is PTD from the shoulder injury alone. I find he is not. However, I find Claimant to be generally credible.

I find the opinions of Drs. Nogalski, Dr. Lehman, and Mr. Dolan more persuasive than the opinions of Dr. Pelikan and Mr. Kaver. Dr. Nogalski, the treating physician, rated 43% PPD of the right shoulder, and imposed permanent restrictions of no lifting more than 5 pounds with the right upper extremity, and no use of the right arm above chest level. The Employer’s IME expert, Dr. Lehman, is an orthopedic surgeon, and rated 35% PPD of the right shoulder, restricted lifting to 10 pounds with no use of the right shoulder overhead, and no repetitive stress on the shoulder.

On the other hand, Dr. Pelikan is the only doctor that found Claimant to be PTD from the work accident. I find Dr. Pelikan’s opinion is not credible. Dr. Pelikan is not an orthopedic surgeon, and it is not clear from his report whether he found Claimant unable to work because of the right shoulder injury alone or because of the combination of the preexisting disabilities and the right shoulder.

For example, Dr. Pelikan rated “45% of the body as a whole” for the shoulder injury, but included Claimant’s amputated right fifth toe and right hip fractures as part of the “Primary Work-related Injury.” However, the right hip fracture occurred after the shoulder injury. Also, Dr. Pelikan identified Claimant’s preexisting disabilities as the amputated toe and a left hip fracture, but concluded they were not related to Claimant’s current disability. Claimant testified both hips and his right foot contribute to his inability to sit or stand for prolonged periods.

If Dr. Pelikan found Claimant PTD from the shoulder injury alone, he mischaracterized the evidence to reach that conclusion. Dr. Pelikan imposed a 10 pound lifting restriction on Claimant’s left upper extremity, no more than three times an hour, because he mistakenly concluded Claimant’s “ability to push and pull with his left arm was severely limited” because of right shoulder problems. Dr. Pelikan’s report describes “gross deformity” of the left shoulder, with range of motion measurements despite no history of left shoulder injury or complaints.

In contrast, the report contains no examination of the right shoulder despite Claimant’s history of pain and injury. At the hearing, Claimant testified he has no problems with his left shoulder, and performs daily tasks with his left arm since the accident.

Also, Dr. Pelikan limited lifting with the right arm to 5 pounds twice an hour, but later said Claimant cannot use the right shoulder at all. During the hearing, I observed Claimant have difficulty raising his right hand for his testimony to be sworn or affirmed. However, he uses his right arm to write and has no right elbow or wrist problems.⁵

Dr. Pelikan assigned no disability to the preexisting toe amputation or left hip surgery; however, Claimant testified when he returned to work after shoulder surgery he sat down to paint because of left hip pain.

⁵ Claimant testified he fractured his right wrist when he fell at home in February 2013; however, it is healing well.

I find Mr. Kaver's PTD opinion is not persuasive because he relied on Dr. Pelikan's faulty report, including left arm restrictions. Mr. Dolan's opinion is credible that Mr. Kaver used an older version of the WRAT, which may account for the difference in the reading and math scores found between the experts. The WRAT 4, administered by Mr. Dolan, placed Claimant at the high school level for spelling, and sentence comprehension, Claimant scored at the twelfth grade level in math. Claimant scored at the seventh grade level with Mr. Kaver's test.

Mr. Dolan's assessment is persuasive that Claimant can communicate well. During the hearing, I did not have trouble understanding Claimant and I did not observe other people having trouble understanding him.

Mr. Dolan identified numerous jobs Claimant could work based on Dr. Nogalski's shoulder restrictions alone, but concluded Claimant was unwilling to look for work. However, Mr. Dolan concluded the number of available jobs decreased when Mr. Dolan considered Claimant's inability to stand or walk for long periods because of pain to his right foot and both hips. Given these constraints, Mr. Dolan believed Claimant may be limited to work as a cashier at a parking lot or a parking garage.

Mr. Wilcox testified credibly about his experience in the commercial cleaning business. However, he is not a vocational expert and is not qualified to give an opinion about Claimant's ability to work.

If Claimant is PTD it may be due to problems with both hips, and the right foot combined with the right shoulder. At the hearing Claimant testified the main problems are his right shoulder, both hips and right foot. During the hearing he fidgeted in his wheelchair because of pain in both hips and his right foot. The right hip is the main source of pain with sitting and standing. He has not slept well since the right hip fracture which is still healing.

Also, the area where the toe was amputated has worsened. In fact, Claimant appeared at the hearing in a wheelchair because doctors wanted him to keep pressure off the right foot. The day after the hearing Claimant planned to have tests performed on his right foot. However, the record contains no medical opinion that Claimant is PTD because of the combination of these injuries with the shoulder, and there is no claim filed against the Second Injury Fund.

The evidence shows Claimant has right shoulder soreness, stiffness, and very limited range of motion. However, he has no elbow or wrist problems, aside from his recent wrist fracture, and he can write. Claimant testified he had no other injuries related to the July 31, 2010 work accident, including the left arm.

Therefore, based on persuasive evidence from Drs. Nogalski and Lehman, and Mr. Dolan, and less than persuasive evidence from Dr. Pelikan and Mr. Kaver, I find Claimant did not meet his burden to show no employer could reasonably be expected to hire him with his right shoulder condition, and reasonably expect him to successfully perform the work. I find Claimant is not PTD as a result of the right shoulder injury alone.

Employer is liable for permanent partial disability benefits

Having found Claimant is not PTD, the inquiry turns to what degree, if any, Claimant is permanently and partially disabled. The extent and percentage of disability is a finding of fact within the special province of the [fact finder], ***Lowery v. AFC Industries, Incorporated***, 428 S.W.2d 7, 10(3) (Mo.App.1968), (Citations omitted), and the [fact finder] is not bound by the medical testimony but may consider all the evidence, including the testimony of the employee, and draw all reasonable inferences from other testimony in arriving at the percentage of disability, ***Fogelsong v. Banquet Foods Corp.***, 526 S.W.2d 886, 892 (Mo.App. 1975) (Citations omitted).

Based on persuasive evidence presented by Drs. Nogalski and Lehman, and Claimant, I find Claimant sustained 60% PPD of the right shoulder from the work accident on July 31, 2010.

Employer is not liable for additional TTD or TPD benefits

Claimant contends he is entitled to TTD or TPD benefits from October 1, 2011 to February 29, 2012. Employer contends no TTD or TPD benefits are owed because Claimant had reached MMI. I find Claimant did not meet his burden to show he is entitled to TTD or TPD benefits.

TTD benefits are intended to cover a period of time from injury until such time as claimant can return to work. ***Phelps v. Jeff Wolk Construction Co.***, 803 S.W.2d 641 (Mo.App. 1991). The test for entitlement to TTD “is not whether an employee is able to do some work, but whether the employee is able to compete in the open labor market under his physical condition.” ***Boyles v. USA Rebar Placement, Inc.***, 26 S.W.3d 418, 424 (Mo.App. 2000). Thus, TTD benefits are intended to cover the employee's healing period from a work-related accident until he can find employment or his condition has reached a level of maximum medical improvement. *Id.* Once further medical progress is no longer expected, a temporary award is no longer warranted. *Id.*

Section 287.180 states: For temporary partial disability, compensation shall be paid during such disability but not for more than one hundred weeks, and shall be sixty-six and two-thirds percent of the difference between the average earnings prior to the accident and the amount which the employee, in the exercise of reasonable diligence, will be able to earn during the disability, to be determined in view of the nature and extent of the injury and the ability of the employee to compete in an open labor market.

On September 30, 2011, Dr. Nogalski opined Claimant had reached MMI and released him from care with the permanent restrictions. Dr. Lehman opined Claimant had reached MMI and released him to work within restrictions. Claimant testified he worked from October until February 29, 2012 when he and Employer agreed he should leave because he could not perform the work. However, Claimant was not terminated or disciplined for failure to perform his job duties. He voluntarily chose not to renew his driver's license but no doctor restricted him from driving.

Exhibit K shows Claimant earned \$7,007.50 from October 14, 2011 to March 2, 2012.

However, the hours worked each week were not listed. Furthermore, the record contains no evidence of Claimant's actual earnings before the work accident. Therefore, a change in earnings after the accident cannot be determined. For these reasons, I find Claimant did not prove entitlement to TTD or TPD benefits.

CONCLUSION

Claimant is permanently and partially disabled from the work injury. Employer is not liable for additional TTD or TPD benefits. The case remains open for future medical treatment as stated in this award. The award is subject to a lien in favor of Claimant's attorney for legal services rendered.

Made by: _____
Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation