

**FINAL AWARD DENYING COMPENSATION**  
(Affirming Award and Decision of Administrative Law Judge  
by Supplemental Opinion)

Injury No.: 07-057037

Employee: Donald Kaucher  
Employer: MODOT (Settled)  
Insurer: Missouri Highway & Transportation (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence, read the briefs, and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms and adopts the findings, conclusions, decision, and award of the administrative law judge dated January 3, 2012, to the extent they are not inconsistent with the supplemental opinion set forth below. We specifically do not adopt any personal interpretations or personal diagnoses of the administrative law judge regarding the parties' medical evidence.

**Introduction**

Employee suffered a left shoulder injury after working three full days of shoveling asphalt. The last day was approximately June 13, 2007. Pursuant to an Agreement for Compromise Lump Sum Settlement executed February 3, 2011 (Settlement Agreement), employer and employee settled all workers' compensation claims arising out of such injury (June 13, 2007, injury). The Second Injury Fund was not a party to the Settlement Agreement, and the issue of the Second Injury Fund's liability was left open. The case before us dealt with that open issue.

The administrative law judge determined that employee had a pre-existing disability in his left shoulder and that employee sustained an additional 10% disability to that shoulder as a result of the June 13, 2007, injury. Accordingly, the administrative law judge held that employee failed to meet one of the threshold requirements set forth in § 287.220.1 RSMo and denied liability against the Second Injury Fund.

**Findings of Fact and Conclusions of Law**

A work incident on approximately August 20, 2004, resulted in employee filing a workers' compensation claim against employer in Injury No. 04-096397. Employee injured both shoulders. Although the nature and extent of employee's shoulder disabilities were disputed, the parties settled this claim based on 22.5% and 15% disabilities for, respectively, the right and left shoulders.

Dr. Richard Hulseley treated employee's shoulder complaints. An MRI performed on both employee's shoulders suggested a partial bursal surface tear on both sides. Dr. Hulseley

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performed arthroscopic surgery on employee's right shoulder on April 13, 2005. His post-operative notes indicate that he found no discrete tear but that the bursa was thickened and frayed. His diagnosis was impingement syndrome in the right shoulder with acromioclavicular joint (AC joint) arthritis. During this procedure, Dr. Hulsey performed a subacromial decompression and excised the distal clavicle.

During this same general period of time, Dr. Hulsey noted that the left shoulder examinations revealed problems after August 20, 2004, very similar to those in the right (although perhaps not as pronounced as in the right shoulder). He believed that employee suffered from impingement syndrome, as well as a possible rotator cuff tear. He talked to employee about doing the same type of surgery for the left shoulder as had been done on the right, but employee declined that option.

Notes from employee's medical examinations between August 20, 2004, and February 14, 2006 (the last time Dr. David Volarich saw employee before the June 13, 2007, injury), reveal that employee continued to complain of persistent pain in his left shoulder. During this time, though, employee continued to perform his duties for employer. He received consistently positive evaluations of his work. While his work duties had not changed, employee made some changes in the way he performed those duties. He was not working under any doctor restrictions. As of February 14, 2006, Dr. Volarich's examination confirmed that employee suffered from impingement syndrome and a partial rotator cuff tear in the left shoulder. Dr. Volarich determined that employee had a permanent partial disability relative to his left shoulder of 20%.

Shortly after the June 13, 2007, injury, employee sought help from Dr. James Emanuel. Ultimately, Dr. Emanuel performed a surgery on September 26, 2007, that was very similar to the one Dr. Hulsey had performed on the right shoulder in 2005. He performed a subacromial decompression and distal clavicle resection. His post-operative diagnosis for the left shoulder was subacromial bursitis with a spur and AC joint arthritis.

As of December 21, 2007 (after a couple of follow-up examinations that showed employee's continuing improvement regarding pain and function), Dr. Emanuel's office issued the following report:

Patient is doing very well with no complaints of the shoulder. . . . He has full range of motion his left shoulder symmetrical the right passive and active. 5/5 strength with negative speeds and supinator tests. . . . He is discharged from our care concerning the shoulder.

Employee's only complaint during that examination was regarding pain in his knee.

After examining employee on October 15, 2008, Dr. Volarich found that employee's June 13, 2007, injury was the substantial contributing factor and the prevailing factor causing the progression of employee's left shoulder impingement syndrome that ultimately led to the surgery by Dr. Emanuel. Dr. Volarich admitted that his diagnosis for employee was the same as he made in February 2006 and that such problem was

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the same one from which employee had suffered since 2004. Dr. Volarich opined that employee's left shoulder disability had increased by another 25%. He based this opinion primarily on the loss of additional range of motion and the fact that bursitis was present when Dr. Emanuel performed the surgery and had not been present before June 13, 2007.

Dr. Volarich admitted, though, that bursitis was not a condition that usually would show up on the MRIs previously performed. He also admitted that employee may have had a "little bit" of bursitis and may have had a thickened bursa prior to June 13, 2007.

In his October 15, 2008, report, Dr. Volarich cites Dr. Emanuel as support because Dr. Emanuel was employee's surgeon and because Dr. Emanuel opined that employee's June 13, 2007, injury was the prevailing factor in the development of the left shoulder condition. But Dr. Volarich admitted that Dr. Emanuel's opinion was based on an inaccurate history provided by employee -- that employee did not suffer from left shoulder pain prior to the June 13, 2007, injury. Dr. Volarich admitted that the bone spur and arthritis pre-dated June 13, 2007. He admitted that prior to such date, employee suffered from all the following complaints connected with the left shoulder: pain, pain with overhead activity, limited range of motion, popping and cracking, difficulty lifting, pain radiating into the neck and down the left arm, increased pain when lying down, increased pain when the arm was used extensively, increased pain after driving more than an hour, and some atrophy.

Lastly, Dr. Volarich testified that his additional disability rating was influenced by employee's decision to surgically address his on-going left shoulder problems, even though a number of factors may have played a part in employee's decision to earlier decline such option (including the fact that he was still trying to recuperate from surgery on his right shoulder, which had not gone as well as hoped).

During his October 2008 examination and in his testimony, employee indicated that he had returned to work without restrictions and continued with his regular duties in June 2007 after seeking initial care from Barnes Care West and Dr. Emanuel (who initially administered an injection into employee's shoulder). Employee was involved in strenuous work activity up through some point approximately a month after the June 13, 2007, injury. At that later time, employee was performing concrete work and suffered a flare-up of his low back problems. Employee and Dr. Volarich both ultimately attributed employee's inability to work and inability to compete in the open market to employee's back problems after June 13, 2007. Employee testified that his back issues were in no way linked to the June 13, 2007, injury. Delores Gonzalez, employee's vocational expert, also made her assessments after including employee's back problems that arose after the June 13, 2007, injury that is the subject of the workers' compensation claim before us.

Dr. Russell Cantrell examined employee on August 11, 2009. Consistent with Dr. Emanuel's post-operative report in December 2007, Dr. Cantrell no longer found any symptoms in employee that pointed to subacromial bursitis or impingement syndrome. But employee did have such symptoms leading up to his September 2007 surgery. Dr. Cantrell did not believe that the June 13, 2007, injury was the prevailing factor in causing the left shoulder injury that

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necessitated employee's surgery. He based this opinion on the chronic left shoulder symptoms and diagnoses dating back to 2004. Both the AC joint arthritis and impingement syndrome pre-existed June 2007. And employee had consistently reported his left shoulder complaints since 2004.

Dr. Cantrell testified that the June 13, 2007, injury may have aggravated employee's pre-existing arthritis and impingement; but that such activity was not the prevailing factor for causing employee's shoulder problems or the resulting surgery. Dr. Cantrell believed employee had a 10% disability relative strictly to the left shoulder. He assessed only 3%, however, of such total permanent partial disability to the June 13, 2007, injury. Dr. Cantrell confirmed that employee had sustained additional loss in his left shoulder's range of motion as a result of the June 13, 2007, injury.

Like the administrative law judge, we found the evidence from Dr. Cantrell to be more consistent, logical, and credible than the evidence of Dr. Volarich and Ms. Gonzalez. Even Dr. Cantrell, though, confirmed that employee suffered an increase in his left shoulder disability as a result of the June 13, 2007, injury. Dr. Cantrell assessed an additional 3% disability with respect to that incident. Dr. Volarich assessed an additional 25% disability related to such incident. Like the administrative law judge, we are persuaded that 10% represents the best estimate of employee's increased disability directly attributable to the June 13, 2007, injury.

And employee did not become permanently totally disabled as a result of the activities leading up to such date. As indicated above, employee had returned to his normal duties after June 13, 2007. It was only after a later event, in which employee was performing concrete work, that employee suffered additional back problems that appeared to have caused him to stop working for employer. That later event is not the subject of this claim or appeal. Consequently, we conclude that employee suffered a 10% permanent partial disability referable to his left shoulder as a result of the June 13, 2007, injury.

The question that remains is to what extent the Second Injury Fund should be liable for employee's increased disability. Section 287.220.1 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "[a]ll cases of permanent disability where there has been previous disability . . . ." The statute sets forth certain percentage disability thresholds that both the primary injury and the combined preexisting disabilities must meet (when the primary injury does not result in permanent total disability) in order to assess Second Injury Fund liability. Before analyzing any synergistic effect of the primary injury and preexisting disabilities, employee must prove that both the primary injury, by itself, and the preexisting disabilities, by themselves, result in a minimum of 12.5% permanent partial disability of the body as a whole or, if the injury is to a major extremity, 15% permanent partial disability to such extremity. If the primary injury and preexisting disabilities do not both satisfy either of these threshold percentage disability requirements, the analysis stops and the claim against the Second Injury Fund is denied.

In the case before us, we have found that employee was not permanently totally disabled as of the June 13, 2007, primary injury. Thus, under the statute, employee had

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to prove that he met the applicable threshold requirements. His primary disability related to a major extremity (his shoulder) not to his body as a whole. Therefore, the statute provides that he must have sustained at least a 15% disability with respect to his left shoulder in connection with the June 13, 2007, injury.

As indicated above, employee proved only a 10% disability. This percentage is insufficient to satisfy the 15% threshold. Accordingly, we must deny employee's claim against the Second Injury Fund because the primary injury did not meet the 15% permanent partial disability threshold required for such liability in § 287.220.1.

**Award**

We supplement the award of the administrative law judge with the above findings and conclusions. In all other respects and except as indicated above and to the extent it is inconsistent with such findings and conclusions, we affirm the award.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued January 3, 2012, is attached and incorporated herein as described above.

Given at Jefferson City, State of Missouri, this \_\_\_\_\_ day of August 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

## AWARD

Employee: Donald Kaucher Injury No.: 07-057037  
Dependents: N/A Before the  
Employer: MODOT (Settled) **Division of Workers'**  
**Compensation**  
Additional Party: Second Injury Fund Department of Labor and Industrial  
Relations of Missouri  
Insurer: Missouri Highway & Transportation Jefferson City, Missouri  
Hearing Date: September 27, 2011 Checked by: JED:sw

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
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: June 13, 2007 (alleged)
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:  
Employee sustained aggravation of shoulder condition after a three-day period of heavy asphalt shoveling.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Left upper extremity
14. Nature and extent of any permanent disability: 10% PPD of left upper extremity; no SIF liability.
15. Compensation paid to-date for temporary disability: \$ -0-
16. Value necessary medical aid paid to date by employer/insurer? \$ -0-

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- 17. Value necessary medical aid not furnished by employer/insurer? None sought
- 18. Employee's average weekly wages: Unknown
- 19. Weekly compensation rate: \$\$409.17/\$354.05
- 20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

23.2 weeks PPD from Employer	(Settled)
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22. Second Injury Fund liability: No

TOTAL:	\$ -0-
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23. Future requirements awarded: N/A

Said payments to begin immediately 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:

Evan Beatty

**FINDINGS OF FACT and RULINGS OF LAW:**

Employee:	Donald Kaucher	Injury No.: 07-057037
Dependents:	N/A	Before the
Employer:	MODOT (Settled)	<b>Division of Workers'</b>
Additional Party:	Second Injury Fund	<b>Compensation</b>
Insurer:	Missouri Highway & Transportation	Department of Labor and Industrial
Hearing Date:	September 27, 2011	Relations of Missouri
		Jefferson City, Missouri
		Checked by: JED:sw

This case involves an aggravation of a left shoulder condition resulting to Claimant with the reported onset date of June 13, 2007 with myriad allegations of synergistic PPD against the Second injury Fund (“SIF”). Employer/Insurer paid no benefits and settled its risk of liability. The single issue for trial is the liability of the SIF. Both parties are represented by counsel. Claimant seeks permanent total disability benefits.

Concurrent with this SIF claim is a severe low back claim occurring one month later on July 27, 2007, which remains pending. This low back claim, and accompanying disability, are addressed by Claimant’s experts in the evidence but is not presented for hearing.

Issues for Trial

1. Jurisdiction of occupation disease claims;
2. incidence of occupational disease (exposure and medical causation);
3. nature and extent of permanent disability;
3. liability of the Second Injury Fund.

FINDINGS OF FACT

*Primary Injury*

Claimant sustained left shoulder injury as the result of heavy manual labor including overhead shoveling of asphalt from the rear of a dump truck. Claimant’s activity was varied. He used an array of heavy road construction tools on the job.

In 2004, Claimant had previously diagnosed and treated his left shoulder for impingement syndrome. In 2006, Claimant’s expert, Dr. David Volarich, rated the left shoulder PPD at twenty

percent. Claimant settled that WC claim for fifteen percent PPD (gleaned from Exhibit B; larger settlement including right shoulder).

Subsequently, on September 26, 2007, the left shoulder was arthroscopically treated for subacromial bursitis and AC joint arthritis (September 26, 2007 operative report reveals numerous anatomic inspections were normal). Claimant was released by Dr. Emanuel a few months later on December 21, 2007: "OBJECTIVE: He has full range of motion his left shoulder symmetrical [to] the right passive and active. 5/5 strength with negative speed's and supinator tests."

Claimant's expert, Dr. Volarich asserted that, in addition to his understanding of Claimant's work duties, that the surgeon believed the 2007 left shoulder to be work related. However, Dr. Volarich admitted, on cross-examination, that Claimant's surgeon, Dr. James Emanuel, relied on an incorrect patient history from Claimant: "The patient is right hand dominant he (sic) of injury or complaints referable to the left shoulder." Dr. Emanuel apparently reiterated this idea in a letter. Dr. Volarich apparently also admitted that the 2007 left shoulder surgery was also intended to treat a longstanding [degenerative] condition. (Group Exhibit A, notes of HISTORY AND PHSYICAL dated July 19, 2007; Exhibit J, pp. 32-37, 47-48.)

A thorough reading of the left shoulder operative report reveals no evidence of any traumatic injury that might be related to a three-day shoveling episode. Rather, it seems Claimant's arthroscopy revealed ongoing degenerative changes that were probably accelerated by the ongoing heavy manual labor provided by Employer. As stated, the degenerative condition was already identified and compensated in 2004. Dr. Volarich also admitted the complaints and findings were chronic and disabling prior to June 2007 (Exhibit J, p. 37). Dr. Volarich assigned a 20 percent left shoulder PPD rating in 2006 and another 25 percent PPD to the same shoulder in a separate IME/report in 2008.

Dr. Russell Cantrell examined Claimant on August 11, 2009. He reviewed the complete history of the left shoulder and did not find the reported exposure to be the prevailing cause of the left shoulder *surgery*. Nevertheless, he assigned an overall 10 percent PPD rating to the left shoulder only 3 points of which was related to the 2007 aggravation.

#### *Other Prior Injuries and Rating Evidence*

In 1996, CTS wrists settled for 18 percent PPD each, \$17,629.90 (rated at 25 each).

In 1999, cervical strain settled for 7.5 percent BAW PPD, \$9,090.30 (rated at 12.5).

In 2001, right radial tunnel surgery settled for 25 percent PPD, \$17,260.43 (rated at 25).

In 2003, low back strain settled for 8.25 percent PPD, \$11,452.65 (rated at 12.5).

In 2004, right partial rotator cuff tear/impingement surgery settled for 22.5%, \$30,802.351

Total prior weeks PPD compensated is 265. Total weeks pre-existing PPD rated by Dr. Volarich is 407.6. Claimant has no WC injuries or settlements prior to working for Employer.

In addition, Dr. Volarich rated the following PPD items for Claimant: 20 percent myofascial pain/fibromyalgia PPD (80 weeks), 7.5 percent sleep apnea BAW PPD (30 weeks), 20 percent left foot PPD (31 weeks), 12.5 percent COPD BAW PPD (50 weeks). Dr. Volarich did not rate the depression claim. (These PPD items are not well-documented in the record.) Total additional weeks pre-existing PPD is 191. Total overall pre-existing PPD weeks rated by Dr. Volarich is 598.6.

#### *Disability on the Reported Accident Date*

Claimant's heavy work requirements were, nevertheless, met both prior to and on the reported accident date herein (and through July 27, 2007) despite these PPD settlements and ratings. When asked about his supervisory status, Claimant quipped that that meant he had to work even harder to cover for any absenteeism of other workers. Claimant was capable of unusually hard labor as of the reported accident date. Dr. Volarich's assigned restrictions track the numerous pathologies, both treated and untreated.

Claimant, age 46, is not working but is ambulatory. As early as 2003, MRI study of the low back revealed hypertrophic arthritic changes at L5-S1. This medical evidence seems to be the basis of Claimant's ongoing severe low back symptoms. He takes prescription narcotics for his low back condition. Claimant's testimony was somewhat overstated that sometimes lacked cogency between the complaints of severe symptoms and his record of continuous hard work up to July 27, 2007.

Claimant offered the opinion evidence of Delores Gonzales, a vocational expert, as Exhibit K. She interviewed Claimant and relied on Dr. Volarich's report. She found Claimant unemployable in the open labor market.

### RULINGS OF LAW

#### Provision for Award of Benefits for Occupational Disease

The SIF raises a threshold jurisdictional issue asserting the non-compensable nature of occupational disease as an "injury" by definition, and, thus, non-liability of the SIF since Claimant's primary injury is an occupational disease. The assistant attorney general essentially ignores the meaning of the many sections on occupational disease cases preserved by the legislature. Section 287.063, et seq., RSMo (2005).

Here, the court is guided by the most general of construction canons that all code sections be read together and given meaning without rendering any section a nullity. Thus, with greater regard for the simple language of subsection 287.067.7 allowing "benefits under this chapter as an occupational disease," the court concludes benefits are payable in occupational disease cases

in the conventional manner. Sections 287.120, 287.160, 287.170, RSMo (2000). It is not reasonable to suggest that a definitional section might derogate multiple substantive sections.

The SIF cites subsection 287.020.3(5) which states in relevant part, after defining injury as “violence to the physical structure of the body,” that:

These terms shall in no case except as specifically provided in this chapter be construed to include occupational disease in any form, nor shall they be construed to include any contagious or infectious disease contracted during the course of employment, nor shall they include death due to natural causes occurring while the worker is at work. (Emphasis added.)

The plain language of this subsection means that, unless recognized by the legislature, no employer shall be liable for an unrecognized occupational disease in any form. The legislature recognizes repetitive trauma injury at Section 287.063, et seq., RSMo (Cum. Supp. 2008). Similarly, the legislature recognizes pulmonary disease from airborne irritants and industrial noise resulting in hearing deficits. The SIF mistakenly compares the term injury alternatively with “occupational disease,” which is but one mechanism of injury. The other mechanism is “accident.” Either may lead to a *First Report of Injury* by an employer. As stated, the legislature simply excluded the possibility of other occupational diseases not recognized at Section 287.063, et seq.

Claimant presented sufficient evidence of continued exposure to repetitive trauma to his left shoulder to predicate a finding of occupational disease.

### Medical Causation

#### PROBATIVE VALUE OF PROFFERED OPINION

Claimant proffered the opinion evidence of Dr. Volarich as proof of the medical causal connection between Claimant’s work exposure and his left shoulder symptoms and surgery by Dr. Emanuel. Dr. Volarich’s opinions are undercut by the surgical facts and his admissions. The surgical report exhaustively lists both the normal appearance of so many parts of the shoulder (dovetailing with the numerous negative findings by Dr. Emanuel on clinical examination) and detailing degenerative appearances of a limited number of anatomical parts. Removal of a 6 mm spur and excavation of a significantly arthritic clavicle are the essential tasks undertaken in surgery.

As with all proofs in complex medical evidence, a medical expert’s opinion must be supported by facts and reasons proven by competent evidence that will give the opinion sufficient probative force to be substantial evidence. Silman v. Wm. Montgomery & Assoc., 891 S.W.2d 173, 176 (Mo.App. 1995), citing Pippin v. St. Joe Mineral Corp., 799 S.W.2d 898, 904 (Mo.App. 1990). Any weakness in the underpinnings of an expert opinion goes to the weight and value thereof. Hall v. Brady Investments, Inc., 684 S.W.2d 379 (Mo.App. 1984). Admission of a contrary matter weakens the value of expert opinion. DeLisle v. Cape Mutual Insurance, 675 S.W.2d 97 (Mo.App. 1984). It is reasonable to expect an expert to be fully informed about pre-

existing disabilities. Plaster v. Dayco Corp., 760 S.W.2d 911 (Mo.App. 1988). Bersett v. National Super Markets, Inc., 808 S.W.2d 34, 36 (Mo.App. 1991).

Dr. Volarich's admissions are fundamental to both causation opinion and PPD attribution. Dr. Volarich admitted that Dr. Emanuel relied on an incorrect patient history from Claimant who denied prior left shoulder "injury or complaints referable to the left shoulder." Dr. Volarich admitted that the 2007 left shoulder surgery was also intended to treat a longstanding disabling condition. Dr. Volarich also admitted the complaints and findings were chronic and disabling prior to June 2007. Moreover, Dr. Volarich made no attribution between the two cases of 2004 and 2007.

Separately, Dr. Volarich was not completely persuasive with regard to whether *bursitis* was pre-existing and whether a partial rotator cuff *tear* had healed; the operative report demonstrates otherwise. There is no credible evidence, post-arthroscopy, that a tear ever occurred and his statement is belied by the surgeon's description of rotator cuff strength as excellent. On the other hand, his opinion about swollen bursa and bursitis was colorable and not contradicted in the evidence. This is probably sufficient to predicate some additional PPD of the left shoulder.

However, the debridement type surgery, recognized procedure in degenerative cases, is not an independent basis for assessing PPD. Nothing in the statute says that a surgery mandates any amount of PPD. Back in 2004, another surgeon might have gone ahead and performed what Dr. Emanuel performed in 2007.<sup>1</sup> Indeed, it appears in the record that Claimant elected to defer further treatment of the left shoulder in 2005. Furthermore, Claimant's own expert admits, the same symptoms, diagnoses and permanent disability existed before this 2007 injury; he merely argued that the *bursitis* diagnosis was new (i.e., in addition to the impingement and AC joint arthritis).

EVIDENCE PREVENTING A FINDING OF  
PERMANENT TOTAL DISABILITY

Very noteworthy is not only did Claimant return to work after his onset date of June 13, 2007, but he tendered himself for heavy labor, concrete work. On that occasion, July 27, 2007 Claimant sustained what appears to be a supplanting low back injury. The facts in evidence are that Claimant has advanced degenerative disc disease at the levels of L4-5 and L5-S1. Even Claimant's vocational expert, Ms. Gonzales admitted Claimant's low back symptoms are sufficient to render Claimant unemployable. As stated above, the low back claim was not presented for a disability determination.

Claimant's expert evidence contains critical oversights of undisputed medical facts and undisputed work chronology and heavy duties. Neither of Claimant's experts integrate these facts into their opinions of permanent total disability. Both Dr. Volarich and Ms. Gonzales' opinions on permanent total disability ultimately lack credibility; each was professional enough to admit, on cross-examination, fact scenarios evident in the medical records and work history. It is reasonable to consider why the experts had not considered the fact scenarios presented on

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<sup>1</sup> Nothing in Dr. Emanuel's notes suggests either an emergent, or even urgent, circumstance surrounding the surgery.

cross-examination. Nevertheless, the admissions are fatal to Claimant's assertions of permanent total disability and anything more than limited left shoulder PPD. The left shoulder PPD is significantly less than that suggested by Dr. Volarich.

FAILURE TO MAKE ATTRIBUTION/  
FAILURE TO MAKE STATUTORY REDUCTION DUE TO  
PRE-EXISTING DISEASE OR NATURAL PROCESS OF AGING

Neither the law nor medical causation methods exclude prior injuries from being addressed in a comprehensive attribution model. Claimant must establish by a preponderance of credible evidence that any permanent disability herein was the result of the subject accident/exposure and not that of another. See Plaster v. Dayco, 760 S.W.2d 911, 913 (Mo.App. 1988). Bersett v. National Super Markets, Inc., 808 S.W.2d 34, 36 (Mo.App. 1991). Separately, the reform bill expressly requires a deduction of any PPD that is determined to be pre-existing or due to the natural aging process. Section 287.190.6(3) RSMo (2005). Conventional analysis requires finding the overall disability and subtracting pre-existing PPD, and subsequent PPD (not applicable here), in order to determine the *current PPD* attributable to the reported injury.

Dr. Volarich's comparative testimony on his clinical examinations of Claimant in 2006 and 2008 wherein he affirms Claimant's curtailed range of motion was "almost twice as bad," in 2008 is difficult to reconcile with Dr. Emanuel's final post-surgical follow-up wherein he finds full range of motion on December 21, 2007. No attempt is made to include this in the foundation of the opinion. The opinion, therefore, is difficult to reconcile with the post-surgical finding and patient release. Indeed, the expert seems to suggest a worsening situation (but is silent regarding a treatment recommendation).

Dr. Volarich also stated the reported injury is the prevailing factor in the progression of his impingement condition and the surgery. The above discussed admissions diminish the probative value of his assertion of "progression."

Also, Claimant's operative report is devoid of any finding suggesting acute injury or signs of healed tissue from prior traumatic injury. Normally, an operative report simply is not probative of an attribution issue because of the variety of findings, i.e., acute or degenerative or asymptomatic scar tissue. However, the operative report at hand is so clearly a record of exclusively degenerative changes that it has probative value in demonstrating the absence of significantly new pathology. Here, the addition of bursitis of the previously diagnosed and compensated degenerative/arthritis shoulder is minimal. Dr. Volarich admitted the similarity of pre-existing symptoms and pre-existing disabling quality and, on the other hand, records a finding on range of motion that seems difficult to reconcile with the surgeon's "full" range of motion finding discussed above.

### Permanent Disability

Claimant's evidence of left shoulder PPD is flawed in several respects. As outlined, these defects undercut other aspects of the experts' opinions. Claimant was released by Dr. Emanuel approximately five months after surgery. He has not treated subsequently or sought treatment for

the left shoulder. In 2008, Claimant told Dr. Volarich that he was unable to work with his arms outstretched. This history is curious since Claimant was performing concrete work six weeks after the reported injury herein when he injured his back on July 27, 2007, after which date he has not returned to work. This raises a question about what work period he had, post-surgery, upon which to make this self-assessment, his representation of same to his expert, and the expert's dubious reliance thereon. Separately, it is noteworthy that rather than take a conventional history from Claimant in 2008, Dr. Volarich reviewed the 2006 report with Claimant the contents of which Claimant reportedly characterized as continuing and unabated.

It is fairly stated that Dr. Volarich's 2008 findings are largely stale as of this hearing date. Almost three years elapsed since his physical examination on October 15, 2008. Also, the cumulative total of PPD weeks is excessive by any measure; again, the ratings cannot be reconciled with Claimant's work record or his left shoulder surgery record. Many of the secondary PPD items are simply insufficiently documented rendering the ratings speculative.

The record compels a finding that Claimant sustained an overall 25 percent PPD of the left shoulder of which fifteen points was sustained/compensated in 2000/2006 and 10 points of which is related to the reported injury which was successfully treated by Dr. Emanuel. Dr. Emanuel's treatment record is un rebutted and reveals only an ongoing degenerative condition and the absence of any traumatic injury. Arthroscopic surgeries employing the debridement techniques used by Dr. Emanuel are simply routine.

Liability of the SIF

The significance of PPD assignments is predicated by the statutory thresholds for injuries to the extremities and injuries to the body as a whole. Section 287.220.1 RSMo (2000). Here, Claimant's primary injury to the left shoulder does not meet threshold. Accordingly, the claim against the SIF is moot.

Conclusion

Accordingly, on the basis of the substantial competent evidence contained within n the whole record, Claimant is found to have sustained a 10 percent PPD of the left shoulder as a result of the reported injury. No SIF liability is found.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

JOSEPH E. DENIGAN  
*Administrative Law Judge*

