

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

Injury No.: 00-168438

Employee: Charles E. Ketchum
Employer: Commercial Installation and Construction Company
Insurer: Missouri Printing Ind. Trust c/o Corporate Claims Management, Inc.
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: March 1, 2000
Place and County of Accident: St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge, as modified, is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge (ALJ) dated October 19, 2004, as modified. The award and decision of Administrative Law Judge Joseph E. Denigan is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable. The Commission modifies the award for fees and expenses to provide that employee shall be responsible for the expenses paid/payable for the deposition, testimony and reports of Dr. Garrett A. Hagen.

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

This matter is before the Commission on applications for review filed by both employee and the employer/insurer. The ALJ had found the matter compensable under the law and awarded a substantial amount of permanent partial disability. The ALJ had also limited the attorney fees.

Employee's attorney filed a review, on his own behalf, addressing the limiting of the fee and expenses.

The employer/insurer filed a review pleading that 1) the award of 597.5 weeks is contrary to law in that it should not exceed 400 weeks; 2) the award included ratings of individual scheduled injuries which are too high and not supported by the record; 3) the award for psychiatric disability is excessive considering the only psychiatric testimony; and 4) the "load" of 50% applied by the ALJ to the disabilities to the shoulders is excessive and unreasonable.

The ALJ awarded an amount of weeks of disability unanticipated by and irreconcilable with our statutory scheme. The ALJ awarded disability under section 287.190.1 RSMo and 287.190.3 RSMo in an amount exceeding 400 weeks. This is improper. *Schwartz v. Shamrock Dairy Queen*, 23 S.W.3d 768 (Mo. App. E.D. 2000).

Although we can not agree with the calculations employed by the ALJ in establishing disability we agree that the disability is more than substantial. Our review of the record leads us to find that the disabilities are not properly classified as permanent partial. Rather, we find the disability to be permanent in nature and total in degree under section 287.200 RSMo.

The award of the ALJ did not find employee to be permanently and totally disabled as no vocational evidence met his criteria of employability. We disagree.

The test for permanent and total disability is whether, in the ordinary course of business, any employer would reasonably be expected to hire claimant in his present physical condition. *Ransburg v. Great Plains Drilling*, 22 S.W.3d 726, 732 (Mo. App. W.D. 2000).

Employee underwent five separate surgical procedures involving his shoulders, three on the left and two on the right. Additional surgery was considered but thought not likely to succeed. He is left with significant restrictions. In evaluating a complicated medical case such as this one the Commission looks to expert opinion for guidance and it is in the sole discretion of the Commission to determine the weight to be given expert opinions. *Conley v. Treasurer of Missouri*, 999 S.W.2d 269, 271 (Mo. App. E.D. 1999), *Maxon v. Leggett & Platt*, 9 S.W.3d 725, 733 (Mo. App. S.D. 2000).

Employee testified that he has not worked since January 7, 2003. There was some discussion with his employer as to the possibility of employment if employee upgraded his skill level. No offer of alternative of potential employment was made. At that time, employer had no light duty job employee could perform.

Dr. Garrett A. Hagen testified that as of January 7, 2003, employee "has severe physical disabilities so that he is unable to work. Furthermore, because of the long duration of his disability it appears to be permanent in nature."

Dr. James Emanuel, one of the operating surgeons, in February 2003, placed employee's ability to work at a level lower than that recommended by a Functional Capacity Evaluation (FCE). The FCE demonstrated an ability to do medium level work. Dr. Emanuel thought employee only able to do light work. This with a 10-pound restriction for frequent lifting, pushing, pulling or carrying. The doctor recommended no climbing ladders, no repetitive overhead reaching or lifting and lifting to weight from shoulder height to above. Seven months later, employee was shown to have a re-tear of the rotator cuff on the right and the doctor would not "recommend any further attempt to fix it because it would probably fail again." Employee was continued on restrictions and medication for pain.

Mr. James England, a vocational specialist, testified that employee was a good potential placement candidate. He did not identify any jobs employee could do in his present condition. He testified employee could not go back to doing what he did and the employee's level of pain could interfere with even entry level jobs.

Dr. Raymond Cohen testified in three depositions. His testimony was consistent in that he found employee to be permanently and totally disabled as a result of his injury. Dr. Cohen agreed with the stringent restrictions placed on employee by other physicians. He also found there to be a continuing need for medication to address employee's pain.

Although, Dr. Cohen admitted he would defer to a vocational expert as far as actual job placement is concerned. However, he found employee medically unable to compete in the open labor market. We agree with Dr. Cohen's determination. *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 884-885 (Mo. App. S.D. 2001).

Considering the entire record we find that no employer could reasonably be expected to hire employee with his inoperable right rotator cuff tear and severe restrictions. *Massey v. Missouri Butcher & Café Supply*, 890 S.W.2d 761, 763 (Mo. App. E.D. 1995). Employee is permanently and totally disabled.

Employer/insurer shall compensate employee for his disability in accord with section 287.200 RSMo. Payments shall be in the amount of \$578.48 per week beginning on January 7, 2003, and continuing for the life of employee as provided by statute.

Given at Jefferson City, State of Missouri, this 13th day of June 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: _____
John J. Hickey, Member

Secretary

AWARD

Employee:	Charles E. Ketchum	Injury No.: 00-168438
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	Commercial Installation and Construction Company	Department of Labor and Industrial Relations of Missouri
Additional Party:	N/A	Jefferson City, Missouri
Insurer:	Missouri Printing Ind. Trust c/o Corporate Claims Management, Inc.	
Hearing Date:	June 3, 2004	Checked by: JED:tr

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: March 1, 2000
5. State location where accident occurred or occupational disease was contracted: St. Louis County, Mo.
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 experienced pain and swelling as the result of manually lifting furniture on a daily basis.
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: both shoulders.
14. Nature and extent of any permanent disability: 85% PPD of the right shoulder and 66.66% PPD of the left shoulder plus a 50% loading factor; 15% PPD of the body for pain related depression; 10 weeks disfigurement.

15. Compensation paid to-date for temporary disability: \$13,458.10 (through January 3, 2003)

16. Value necessary medical aid paid to date by employer/insurer? \$49,997.90

Employee: Charles E. Ketchum Injury No.: 00-168438

17. Value necessary medical aid not furnished by employer/insurer? N/A

18. Employee's average weekly wages: Unknown

19. Weekly compensation rate: \$578.48/\$303.01

20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

527.55 weeks of permanent partial disability from Employer (loaded)	\$159,852.92
60 weeks PPD for pain related depression from Employer	18,180.60
10 weeks of disfigurement from Employer	3,030.10

22. Second Injury Fund liability: No

TOTAL: \$181,063.62

23. Future requirements awarded: Yes (see narrative Award).

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% (not to exceed \$5,000.00, plus expenses) of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Lawrence O. Willebrand

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Charles E. Ketchum

Injury No.: 00-168438

Dependents: N/A

Before the
Division of Workers'

Employer: Commercial Installation and
Construction Company

Additional Party: N/A

Compensation
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Insurer: Missouri Printing Ind. Trust c/o
Corporate Claims Management, Inc.

Checked by: JED:tr

This case involves alleged bilateral shoulder injuries resulting in serious permanent injury to Claimant with the reported accident date of March 1, 2000. Employer admits Claimant was an employee and that any liability is fully self-insured. The Second Injury Fund ("SIF") is a party to this claim. All parties are represented by counsel.

Issues for Trial

1. Notice;
2. Injury arising out of and in the course of employment;
3. Medical causation;
4. Nature and extent of unpaid temporary total disability;
5. Future medical expenses;
6. Nature and extent of permanent partials disability;
7. Liability of the SIF.

FINDINGS OF FACT

Dispositive Evidence

1. Claimant, age 56, graduated from O'Fallon Technical High School having studied auto mechanics. Nevertheless, Claimant did not use these skills in formal employment. Claimant testified he restored approximately 200 cars in his lifetime.
2. Claimant commenced working for Employer on June 25, 1984 as a laborer. He lifted and moved heavy desks, conference tables, and file cabinets, while loading and unloading trucks.
3. Commencing early in the year of 2000 when lifting heavy furniture both shoulders became very painful and his arms began to swell. The next day he was referred to the work center then work hardening on September 13, 2000.
4. Claimant was referred by Employer to Dr. Haupt who treated him from August 18, 2000 through June 28, 2001.
5. On April 19, 2000, Dr. Haupt performed open surgery on his *right* shoulder for a torn rotator and a biceps tendon tear. On November 6, 2000, Dr. Haupt performed open surgery on the *left* shoulder for a torn rotator cuff with resection for a full thickness tear. On January 2, 2001, Dr. Haupt performed a second open surgery on the *left* shoulder for a massive recurrent tear with attempted revision.
6. Claimant was referred to Dr. James Emanuel whose surgical practice is focused on the shoulder. Dr. Emanuel treated him from March 18, 2002 through February 13, 2003. On May 22, 2002 Dr. Emanuel performed the third *left* shoulder open surgery with decompression and the removal of loose pieces of bone and a distal clavicle resection. The left shoulder repair had been re-torn.
7. Claimant was released for light duty in January, 2003, but was restricted to the use of one arm and no driving. Claimant felt stress and depression during this period.
8. On September 18, 2002, Dr. James Emanuel performed the second surgery on the *right* shoulder including debridement of the joint, rotator cuff repair for a massive tear and a distal clavicle resection for a re-tear of the rotator cuff, fraying and the absence of the biceps tendon.
9. On April 22, 2004, Dr. Emanuel recommended a possible muscle transfer or a shoulder replacement but opined that there would not be much hope for success.

10. Charles Ketchum also sought treatment at his own expense at the Pain Management Center by Dr. Manish Suthar, on July 3, 2003 (Exhibit M). Dr. Suthar diagnosed depression and prescribed pain medication, pain patches, a TENS Unit, changed his sleeping medication. Claimant incurred charges at the pain clinic in the sum of \$1,600.00 which the claimant paid himself.
11. Dr. Emanuel, the second surgeon, opined a 40% PPD of the upper extremity as it related to the right shoulder and 15% PPD of the left shoulder.
12. Dr. Cohen found 80% of the right shoulder and 75% of the left shoulder; he believed Claimant was permanently and totally disabled.
13. Dr. Wayne Stillings, a psychiatrist, found a permanent partial psychiatric disability of three to four percent.
14. Dr. Emanuel stated in his deposition he recommended a possible muscle or tendon transfer or a shoulder replacement and the patient should be consulted by a specialist in such procedures. Employer did not provide such a referral but no specialist was identified by Dr. Emmanuel.
15. Additionally, the claimant sought treatment for pain commencing July 3, 2003 with Dr. Suthar.
16. Claimant attained maximum medical improvement on January 3, 2003.
17. Charles Ketchum has not worked since January 31, 2003.
18. Mrs. Judy Petit testified that he had been a good worker and they had discussed with the claimant the possibility of using a computer in the future.
19. Claimant has an accomplished hobby of restoring automobiles. Claimant gave unimpeached and unrebutted testimony of having restored over 200 cars.
20. Mr. James England a rehabilitation counselor testified by deposition on behalf of the employer and evaluated the employee on June 27, 2003, which was before Dr. Emanuel made his recommendations on April 22, 2000, and before he was treated by Dr. Suthar at Pain Management.
21. Mr. England believed Claimant was very pleasant and cooperative and stated that Claimant could perform in retail and security positions. Mr. England testified that constant pain *per se* was not an obstacle to employment but, rather, determining the *level* of that constant pain was dispositive (p. 43).
22. Dr. Garrett Hagan and Dr. Raymond F. Cohen found Claimant unemployable but neither commented on Claimant's unusual accomplishments in restoring cars, his high verbal ability demonstrated at trial, and his ability to sit, stand, bend and ambulate freely.
23. Claimant still drives a car and can do laundry chores.

RULINGS OF LAW

Permanent Disability

Claimant sustained two scheduled losses under Section 287.190.1, RSMo (2000), for bilateral shoulder injuries. In addition, Claimant sustained one unscheduled loss (or BAW) for psychiatric disability under Section 287.190.3 RSMo (2000), and disfigurement from multiple surgical scars of the arms under Section 287.190.4 RSMo (2000). Some of these injuries warrant an appropriate loading factor for multiplicity. Eagle v. City of St. James 669 S.W.2d 36 (Mo.App. 1988).

Note is made of the apparent omission of any credible report by Employer to the Division of the prospect of gainful employability. See Sections 287.146 et seq. RSMo (2000). This omission is difficult to understand. Claimant's lack of employment over the past year and severe bilateral shoulder injuries place re-employment starkly in issue absent a return to work. Claimant's demonstrated accomplishment in the area of automobile mechanics and restoration are tantamount to transferable skills. Possession of transferable skills facilitates vocational rehabilitation and, therefore, re-employment. Claimant apparently entertained automobile service writer work on his own but has not followed up with sufficient applications.

Claimant has virtually no dynamic strength in either arm or in combination. Claimant has no useful arm movement overhead. His hand task ability is intact and his musculature is adequate. The treating surgeon imposed lifting restrictions that preclude any employment other than physically light work. In addition the surgeon's restrictions swallow the relatively low PPD percentage ratings assigned to Claimant's upper extremities.

Claimant is, nevertheless, fully ambulatory and demonstrated strong verbal skills at trial. Moreover, expert

evidence suggested Claimant was a well-adjusted individual. These facts coupled with his skill set in the highly marketable automobile service industry prevent a finding of permanent total disability. In addition, Claimant seems highly motivated. Vocational rehabilitation is certainly contemplated by the statute in cases such as this. Id.

Dr. Cohen stated Claimant was permanently and totally disabled. However, Dr. Cohen admitted he was neither qualified as a vocational expert nor did he purport to test Claimant in that regard. Nevertheless, he initially commented that Claimant would benefit from retraining and subsequently withdrew this opinion despite an unchanged physical examination. This type of loose testimony cannot be said to be the basis of convincing opinion evidence. It seems pretensive. 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).

Although in issue, the pleading and proof of SIF liability failed. Neither Dr. Cohen nor Dr. Hagen articulated pre-existing PPD that may be said to be either sufficient in degree or synergistic in effect. Section 298.220.1 RSMo (2000). Separately, Dr. Hagen's testimony was rambling and lacked probative value on the issues for trial, i.e. causation and permanent disability. His many equivocations and non-responsive answers were unrehabilitated on cross-examination. Neither of these proffered experts commented on Claimant's skill set yet stated Claimant was unemployable.

Conclusion

Accordingly, on the basis of the substantial and competent evidence contained within the whole record, Claimant sustained an eighty-five percent PDD (197.2 weeks) of the right shoulder, sixty-six and two-thirds percent PPD (154.5) of the left shoulder and a loading factor of fifty percent is applied for multiplicity of these injuries, and additional fifteen percent PPD (60 weeks) of the body referable to pain related depression. Claimant also sustained ten weeks disfigurement for surgical scars and right biceps disfigurement. Although Claimant has reached maximum medical improvement, medical expenses remain open for pain management issues. The SIF claim is denied because no significant pre-existing PPD was proven. The other issues are moot.

* * *

The Division has responsibility to approve all attorney fees. Section 287.260 RSMo (2000). Claimant's attorney seeks twenty-five percent of the award. The fees are capped for two reasons. First, the medical evidence of upper extremity disability is overwhelming and self-evident. Second, Claimant's attorney left undeveloped several issues at trial and incurred unnecessary expenses. See Cervantes v. Ryan, 799 S.W.2d 111, 115 (Mo.App. 1990). The following must be noted.

Claimant's attorney did not seek disfigurement for multiple surgical scars and biceps deformity. Claimant's attorney did not develop vocational evidence. This is difficult to understand given the unusual skill set of Claimant which this court finds as a basis to prevent a finding of permanent total disability. Claimant's attorney offered no vocational expert. Dr. Cohen admitted he lacked vocational qualification and the period of unemployment to date is clear. The deposition of Dr. Hagen appears to have been unnecessary since it lacked probative causation testimony or specific permanent disability evidence. At least, assuming, *arguendo*, the narrative report was believed necessary to explain the medical records, deposition time and expense could have been avoided under the *sixty-day rule* expedient. It is not fair to ask clients to pay expenses not related to recovery. Claimant's attorney took Dr. Cohen's deposition three times which is irregular practice and unexplained in the record. Claimant's attorney's brief was poorly written and lacked analysis of how cited cases related to Claimant's physical disabilities or vocational disabilities. The brief did not address the issue of SIF liability or future medical expenses.

Accordingly, given the straightforward issues on employability, the skill required and the skill utilized, and the overwhelming evidence of serious injury, a twenty-five percent fee is awarded but not to exceed \$5,000.00, plus expenses but Claimant shall not be responsible for any expenses paid/payable for Dr. Hagen's deposition.

Date: _____

Made by: _____

Joseph E. Denigan
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Gary J. Estenson
Acting Director
Division of Workers' Compensation