

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

Injury No.: 02-114014

Employee: Lynn Knox
Employer: Garden Ridge Management
Insurer: Sentry Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: July 15, 2002
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 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 dated May 11, 2005. The award and decision of Administrative Law Judge Edwin J. Kohner, issued May 11, 2005, 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.

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

Given at Jefferson City, State of Missouri, this 6th day of October 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Lynn Knox

Injury No.: 02-114014

Dependents: N/A
Employer: Garden Ridge Management
Additional Party: Second Injury Fund
Insurer: Sentry Insurance Company
Hearing Date: March 22, 2005

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: EJK

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 15, 2002
5. State location where accident occurred or occupational disease was contracted: St. Louis County, Missouri
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:
The claimant injured her right shoulder while reaching for merchandise, which fell on her.
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: Right shoulder
14. Nature and extent of any permanent disability: 30% Permanent partial disability to the right shoulder
15. Compensation paid to-date for temporary disability: \$274.32
16. Value necessary medical aid paid to date by employer/insurer? \$12,039.86

Employee: Lynn Knox Injury No.: 02-114014

17. Value necessary medical aid not furnished by employer/insurer? \$664.00
18. Employee's average weekly wages: \$309.72
19. Weekly compensation rate: \$206.48
20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:
69.6 weeks of permanent partial disability from Employer \$14,371.01
22. Second Injury Fund liability: Yes

14.7 weeks of permanent partial disability from Second Injury Fund \$ 3,035.26

TOTAL: \$17,406.27

23. Future requirements awarded: See additional Findings of Fact and Rulings of Law

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: Ray A. Gerritzen, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Lynn Knox	Injury No.:	02-114014
Dependents:	N/A	Before the	
Employer:	Garden Ridge Management	Division of Workers'	
Additional Party:	Second Injury Fund	Compensation	
Insurer:	Sentry Insurance Company	Department of Labor and Industrial	
Hearing Date:	March 22, 2005	Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	EJK

This workers' compensation case raises several issues arising out of a work related injury in which the claimant injured her right shoulder while reaching for merchandise, which fell on her. The issues for determination are (1) Liability for Past Medical Expenses, (2) Future medical care, (3) Permanent disability, and (4) Liability of the Second Injury Fund. The evidence compels an award for the claimant for future medical care and permanent partial disability benefits.

At the hearing, the claimant testified in person and offered a deposition of Robert Poetz, D.O., medical records from St. Anthony's Medical Center and Forbes McMullin, M.D. The defense offered depositions of David Fagan, M.D., and medical records from Tesson Heights Orthopedic medical records.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident occurred in Missouri.

SUMMARY OF FACTS

This forty year old claimant has a GED and was a medical assistant for a year-and-a-half, but worked as a stocker, packer, and warehouse worker for the last twenty years. She started working for this employer on September 5, 2001, as a stocker.

On July 15, 2002, while assisting a customer, a bar stool that the claimant was reaching for fell on her, injuring her right shoulder. She sought treatment that day at St. Anthony's Medical Center with complaints of right shoulder pain. She was diagnosed with a dislocation of the right shoulder. On July 19, 2002, she sought treatment with Dr. Fagan. She underwent an MRI of the right shoulder on September 30, 2002, which revealed an incomplete joint side tear of the distal supraspinatus tendon. She followed up with Dr. Fagan, who recommended surgery. On November 6, 2002, she underwent

an arthroscopy of the shoulder with debridement of the rotator cuff. She returned to work for this employer in a supervisory capacity, but eventually left in October 2003. The claimant never returned to work. The claimant testified that she is still having constant pain in the right shoulder and left knee. She cannot lift anything heavier than a gallon of orange juice or milk, no pushing, pulling, kneeling, squatting, can't sit for a long period of time and can't kneel. The claimant also testified that on July 19, 2004, Dr. Fagan told her that her shoulder would get worse as she got older, and she testified her shoulder is getting worse.

Dr. Fagan

On May 7, 2003, Dr. Fagan, a board certified orthopedic surgeon, examined the claimant and reported limited ranges of motion compared to the left shoulder, but found fairly good strength in her shoulder. X-rays demonstrated a very flat acromion, and Dr. Fagan opined that the claimant will always have problems with her shoulder. He opined that the claimant had a permanent partial disability rating of twelve percent. On July 19, 2004, he did a follow up evaluation and reported that the claimant still had a lot of discomfort. He again reported limited ranges of motion, including but not limited to both internal and external rotation. He reviewed a January 2004 MRI and opined that the claimant had mild acromioclavicular arthritis. He repeated his disability rating and opined that the claimant will remain symptomatic given the passing of two years from the surgery.

Dr. Poetz

Dr. Poetz, a board certified family practice physician, examined the claimant in 2003 and provided conservative treatment of the claimant's shoulder injury in 2004. He testified that the right shoulder anterior dislocation occurs when the ball comes completely out of the socket and moves forward below the socket of the shoulder. See Dr. Poetz deposition, pages 8-9. In 2003, Dr. Poetz opined that the claimant had a forty percent permanent partial disability of her right shoulder from the 2002 accident and a forty percent preexisting permanent partial disability of her left knee. He also opined that she had a thirty percent preexisting permanent partial disability of her right elbow. He testified that the right shoulder disability combines with a right elbow disability, in the sense they are both part of the same limb and combine to make those disabilities exceed the simple sum. See Dr. Poetz deposition, page 4. In 2004, Dr. Poetz increased the disability from his 2003 report because of the continued increasing severity of pain and disability, clinically and historically. See Dr. Poetz deposition, pages 11-12.

In his June 27, 2003, report, Dr. Poetz recommended Cox II non-steroidal anti-inflammatory medications, which are prescription only drugs. He testified that she has a chronic problem that will require chronic pain management and long-term use of an anti-inflammatory pain reliever. Unless she has a surgical procedure, which successfully improves her range of motion, relieves her pain, and allows her to get better strength of the shoulder, she is likely to have pain for the rest of her life. See Dr. Poetz deposition, pages 30-31. He opined that the pain that her shoulder pain will not suddenly go away, and will require pain relief, unless she learns how to tolerate pain at a different level than she is now tolerating. He testified that when he last treated her she was taking prescription Cox II anti-inflammatory medication. See Dr. Poetz deposition, page 32. He testified she took Darvocet-100 and Mobic on two, three or four different occasions. See Dr. Poetz deposition, page 33. In his August 2003 report, Dr. Poetz also recommended warm, moist heat packs, range of motion exercises for the shoulder, knee and elbow, and avoid overhead reaching and lifting with the right shoulder and elbow, and avoid bending, stooping, squatting, and kneeling with the left knee. See Dr. Poetz deposition, page 13, and Deposition Exhibit B. Between August 2003 and December 2004, he examined the claimant on five occasions. See Dr. Poetz deposition, page 14, and Deposition Exhibit C. In his December 2004 report, he also recommended steroid injections, an MRI arthrogram, and additional surgery. See Dr. Poetz deposition, page 15, and Deposition Exhibit D-4.

Dr. Poetz testified the treatment he rendered, conservative care including non-steroidal anti-inflammatory medications, range of motion exercises, and hot packs, was reasonable and necessary for the work related shoulder injury. See Dr. Poetz deposition, pages 16-17. His total treatment bill was \$664.00. Dr. Poetz testified that his treatment charges were also reasonable and that the claimant will need treatment for the right shoulder for the rest of her life, because she has marked restriction of range of motion, scar tissue, and crepitus. See Dr. Poetz deposition, page 18. He testified that the scar tissue, crepitus, and degenerative changes in the joint is progressive and will worsen over time. He opined that the degenerative changes are from the trauma and that the joint will age at a faster rate than a healthy one. Dr. Poetz opined that the arthritic and degenerative changes that she has in the joint are related to the 2002 work related injury. See Dr. Poetz

deposition, pages 20-22.

Dr. Poetz testified that the claimant suffered less than a fifty percent tear of the rotator cuff. See Dr. Poetz deposition, page 24. The claimant had a debridement of the rotator cuff tear and of the glenoid labrum. See Dr. Poetz deposition, page 26. The January 23, 2004, MRI revealed a small amount of fluid in the shoulder joint, without evidence for a definite labral tear. See Dr. Poetz deposition, page 37. The MRI revealed right shoulder bursitis, which would require the medical treatment discussed above. See Dr. Poetz deposition, page 39. At Dr. Poetz last examination, the claimant had had significant range of motion problems with a twenty percent lack of external rotation and six inches lacking and reaching behind her back. See Dr. Poetz deposition, page 41. On December 16, 2004, Dr. Poetz opined that it is more probable than not that the claimant will require additional surgery in order to restore better range of motion, strength, and pain relief. See Dr. Poetz deposition, page 42.

He testified that he increased his rating from forty percent to forty-five percent from August 2003, to December 2004, because her condition deteriorated despite conservative treatment, including physical therapy, diathermy, and ultrasound in July and August 2004. She stopped the Mobic because of fluid retention. In July 2004, Dr. Poetz opined that she actually had increased symptomatology and decreased range of motion. She could only lift her shoulder one half of the way, and had popping, palpable crepitus, and was having impingement, with numbness and tingling into the hand and fingers on that side. See Dr. Poetz deposition, pages 43-44. She still had complaints of neck tightness from the right shoulder. She had decreased range of motion on abduction, adduction, and external rotation, along with increased weakness and increased elevation of the acromioclavicular joint. See Dr. Poetz deposition, page 46.

Preexisting Conditions

The claimant reported a right elbow fracture at age two but offered no medical records to document the elbow injury. The claimant testified that she did not remember the incident and that she did not follow up with a medical provider regarding that elbow injury after completing treatment.

The claimant underwent left knee arthroscopy and lateral meniscectomy in 1998. Nonetheless, she was able to perform her duties as a stocker and warehouse person leading up to July 15, 2002. With regard to the knee and elbow, as well as the right shoulder, Dr. Robert Poetz examined the claimant on two occasions at the request of the claimant's attorney. In his report of August 15, 2003, he noted a forty percent permanent partial disability to the right shoulder as a result of the July 15, 2002, injury. He noted a thirty percent permanent partial disability to the left knee and a thirty percent permanent partial disability to the right elbow. Then on December 16, 2004, Dr. Poetz increased his ratings on the right shoulder and left knee to 45% and 40%, respectively. When asked about the reason for his increased rating of the left knee in the December report, Dr. Poetz testified that it was due to a decrease in extension of the left knee compared to his earlier findings. See Dr. Poetz deposition, page 52. The claimant underwent another left knee surgery in January 2004 (subsequent to the work related injury) and had another left knee surgery in March 2005. She testified that her left knee had worsened since the July 15, 2002, right shoulder injury. The claimant testified that since leaving this employer in October 2003, she has been unsuccessful in finding another job.

LIABILITY FOR PAST MEDICAL EXPENSES

The statutory duty for the employer is to provide such medical, surgical, chiropractic, and hospital treatment ... as may be reasonably required after the injury. Section 287.140.1, RSMo 1994.

The intent of the statute is obvious. An employer is charged with the duty of providing the injured employee with medical care, but the employer is given control over the selection of a medical provider. It is only when the employer fails to do so that the employee is free to pick his own provider and assess those against his employer. However, the employer is held liable for medical treatment procured by the employee only when the employer has notice that the employee needs treatment, or a demand is made on the employer to furnish medical treatment, and the employer refuses or fails to provide the needed treatment. Blackwell v. Puritan-Bennett Corp., 901 S.W.2d 81, 85 (Mo.App. E.D. 1995).

The method of proving medical bills was set forth in Martin v. Mid-America Farmland, Inc., 769 S.W.2d 105 (Mo. banc 1989). In that case, the Missouri Supreme Court ordered that unpaid medical bills incurred by the claimant be paid by the employer where the claimant testified that her visits to the hospital and various doctors were the product of her fall and

that the bills she received were the result of those visits.

We believe that when such testimony accompanies the bills, which the employee identifies as being related to and are the product of her injury, and when the bills relate to the professional services rendered as shown by the medical records and evidence, a sufficient, factual basis exists for the Commission to award compensation. The employer, may, of course, challenge the reasonableness or fairness of these bills or may show that the medical expenses incurred were not related to the injury in question. *Id.* at 111, 112.

The claimant offered a billing statement from Dr. Poetz from his deposition, marked as deposition Exhibit E, showing charges of \$664.00, for eleven office visits from January 22, 2004, through August 17, 2004. The medical records are in evidence and Dr. Poetz testified about the medical services that he performed. He also testified that the services were reasonable and necessary and that the charges were reasonable. The difficulty is that the claimant's condition deteriorated significantly over the course of treatment. The defense argues in its brief that the charges for additional physical therapy should not be borne by the employer, because the claimant did not request additional treatment from the employer after Dr. Fagan released the claimant from care in May 2003. The claimant noted at the hearing that the claim for compensation, filed on October 22, 2002, contained a statement, "I am in dire need of immediate treatment." The defense responded and the claimant received medical and surgical care from Dr. Fagan. She did not testify whether she requested additional physical therapy from the employer in 2004, when she elected to obtain physical therapy and medication from a physician of her choice.

Dr. Poetz, a board certified family practice physician, testified that the services that he rendered were reasonable and necessary, but Dr. Fagan, a board certified orthopedic surgeon, testified that no further medical services (beyond over the counter pain relief medication) were indicated. Given the uncontested result that the claimant's condition worsened during the rendition of the medical services, Dr. Fagan's position appears to be more credible on this issue. Therefore, the claim for past medical services is denied.

FUTURE MEDICAL CARE

Awards may and often do include an allowance for the expense of reasonable future medical care and treatment. *Rana v. Landstar TLC*, 46 S.W.3d 614, 622 (Mo. App. W.D. 2001). Future medical care and treatment are provided for in Section 287.140.1, which states:

In addition to all other compensation, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

This statute has been interpreted to mean that a claimant is entitled to compensation for care and treatment "which gives comfort [relieves] even though restoration to soundness [cure] is beyond avail." *Id.* Of course, the appellant bears the burden to prove an entitlement to benefits for such care and treatment. *Id.* To prove an entitlement to workers' compensation benefits for future medical care and treatment, an employee must show something more than a possibility that he will need such medical care and treatment. *Id.* However, the claimant is not required to present evidence demonstrating with absolute certainty a need for future medical care and treatment. *Id.* Rather, it is sufficient for the claimant to show his/her need for additional medical care and treatment by a "reasonable probability." *Id.* "'Probable' means founded on reason and experience which inclines the mind to believe but leaves room for doubt." *Id.* "In determining whether this standard has been met, the court should resolve all doubt in favor of the employee." *Id.* "[A] claimant is not required to present evidence of specific medical treatment or procedures which will be necessary in the future in order to receive an award for future medical care." *Id.* Such a requirement could "put an impossible and unrealistic burden" upon the claimant. *Id.* The only requirement is that the finding of a need for future medical care and treatment be shown to be reasonably probable and be founded upon reason and experience. *Id.*

Dr. Poetz reviewed the January 23, 2004, MRI revealing a small amount of fluid in the shoulder joint, without evidence for a definite labral tear and bursitis, and testified that the condition should be treated by warm, moist packs, range of motion exercises, and Cox II anti-inflammatory medications. He opined that if the claimant had no response, then interarticular steroid injection should be used. If the claimant had no response to that procedure, he opined that the claimant would require an arthrogram and possible surgical intervention by arthroscope. See Dr. Poetz deposition, page 39. On December 16, 2004, Dr. Poetz opined that it is more probable than not that the claimant will require additional surgery in order to restore better range of motion, strength, and pain relief. See Dr. Poetz deposition, page 42. Dr. Fagan testified that the claimant has received instruction on warm, moist packs and range of motion exercises, and that the claimant is capable of performing that treatment herself without any supervision. He testified that surgery and injections were not indicated, because

of the duration of the condition. He opined that Cox II anti-inflammatory medications were not indicated due to the increased risk of heart disease and stroke.

Dr. Fagan's findings regarding surgery and injections appear to be more credible given his experience and training as an orthopedic surgeon. He also testified that the claimant received instruction in home exercises and warm moist packs to administer them by herself. Dr. Poetz, a board certified family practice physician, opined that the claimant will require prescription strength Cox II anti-inflammatory medications to relieve the pain in her shoulder. Dr. Fagan testified that Cox II anti-inflammatory medications were not indicated, but over the counter anti-inflammatory medication is indicated. See Dr. Fagan deposition, page 39. He testified that Cox II anti-inflammatory medication increased the risk of complications. See Dr. Fagan deposition, page 39. Dr. Poetz point that an anti-inflammatory medication could relieve the pain is well taken given the claimant's complaints of shoulder and knee pain. His position is not inconsistent with Dr. Fagan's findings that an over the counter anti-inflammatory medication could relieve the claimant's pain. See Dr. Fagan deposition, page 39. Since the two experts agree on this point, they are entitled to substantial weight.

The real question is whether the claimant's deteriorating joints in her knees and her right shoulder result from a progressive arthritic condition independent of the work related injury or whether the deterioration of the shoulder joint and resulting pain is a product of the work related injury. However, Dr. Poetz opined that the degeneration of the shoulder resulted from the work related injury, and Dr. Fagan testified that the claimant's "continued problems with movement and with pain ... could be" caused by the original injury. See Dr. Fagan deposition, page 39. While a lay approach would assume that the extensive knee deterioration after the accident was evidence of a severe progressive arthritic condition that caused degeneration in the shoulder also, the forensic evidence appears to not support such a finding.

Based on the evidence as a whole, the claimant is awarded pain relief medication to be paid for by the employer and medically regulated by a medical provider selected by the employer. It is more appropriate for a medical provider to specify the strength, brand, and type of pain relief medication as long as the medication is required for the claimant's shoulder injury as opposed to unrelated conditions.

PERMANENT DISABILITY

Workers' compensation awards for permanent partial disability are authorized pursuant to section 287.190. "The reason for [an] award of permanent partial disability benefits is to compensate an injured party for lost earnings." Rana v. Landstar TLC, 46 S.W.3d 614, 626 (Mo. App. W.D. 2001). The amount of compensation to be awarded for a PPD is determined pursuant to the "SCHEDULE OF LOSSES" found in section 287.190.1. "Permanent partial disability" is defined in section 287.190.6 as being permanent in nature and partial in degree. Further, "[a]n actual loss of earnings is not an essential element of a claim for permanent partial disability." Id. A permanent partial disability can be awarded notwithstanding the fact the claimant returns to work, if the claimant's injury impairs his efficiency in the ordinary pursuits of life. Id. "[T]he Labor and Industrial Relations Commission has discretion as to the amount of the award and how it is to be calculated." Id. "It is the duty of the Commission to weigh that evidence as well as all the other testimony and reach its own conclusion as to the percentage of the disability suffered." Id. In a workers' compensation case in which an employee is seeking benefits for PPD, the employee has the burden of not only proving a work-related injury, but that the injury resulted in the disability claimed. Id.

In August 2003, Dr. Poetz examined the claimant and rated the claimant's permanent partial disability in her right shoulder at forty percent. On December 16, 2004, Dr. Poetz examined the claimant and increased his rating from forty percent to forty-five, because her condition deteriorated despite conservative treatment, including physical therapy, diathermy, and ultrasound in July and August 2004. He opined that she actually had increased symptomatology and decreased range of motion. She could only lift her shoulder one half of the way, and had popping, palpable crepitus, and was having impingement, with numbness and tingling into the hand and fingers on that side. See Dr. Poetz deposition, pages 43-44. She still had complaints of neck tightness from the right shoulder. She had decreased range of motion on abduction, adduction, and external rotation, along with increased weakness and increased elevation of the acromioclavicular joint. See Dr. Poetz deposition, pages 46.

On May 7, 2003, Dr. Fagan examined the claimant and reported limited ranges of motion compared to the

left shoulder, but found fairly good strength in her shoulder. X-rays demonstrated a very flat acromion, and Dr. Fagan opined that the claimant will always have problems with her shoulder. He opined that the claimant had a permanent partial disability rating of twelve percent. On July 19, 2004, he did a follow up evaluation and reported that the claimant still had a lot of discomfort. He again reported limited ranges of motion, including but not limited to both internal and external rotation. He reviewed a January 2004 MRI and opined that the claimant had mild acromioclavicular arthritis. He repeated his disability rating and opined that the claimant will remain symptomatic given the passing of two years from the surgery.

Since the claimant has not returned to work since she left this employment, one might speculate that the claimant is totally disabled. "Total disability" is defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. Section 287.020.7, RSMo 2000. The test for permanent total disability is whether, given the claimant's situation and condition, he or she is competent to compete in the open labor market. Sutton v. Masters Jackson Paving Co., 35 S.W.3d 879, 884 Mo.App. 2001). The question is whether an employer in the usual course of business would reasonably be expected to hire the claimant in the claimant's present physical condition, reasonably expecting the claimant to perform the work for which he or she is hired. Id. Although the claimant has not returned to employment in the open labor market, she testified that she is not totally disabled and did not offer any expert evidence to show permanent total disability.

The claimant has significant shoulder limitations and restrictions right shoulder with acromioclavicular arthritis. Based on the evidence, the claimant suffered a thirty percent permanent partial disability to her left shoulder from the accident.

SECOND INJURY FUND

To recover against the Second Injury Fund based upon two permanent partial disabilities, the claimant must prove the following:

1. The existence of a permanent partial disability preexisting the present injury of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed. Section 287.220.1, RSMo 1994; Leutzinger v. Treasurer, 895 S.W.2d 591, 593 (Mo.App. E.D. 1995).

2. The extent of the permanent partial disability existing before the compensable injury. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).

3. The extent of permanent partial disability resulting from the compensable injury. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).

4. The extent of the overall permanent disability resulting from a combination of the two permanent partial disabilities. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).

5. The disability caused by the combination of the two permanent partial disabilities is greater than that which would have resulted from the pre-existing disability plus the disability from the last injury, considered alone. Searcy v. McDonnell Douglas Aircraft, 894 S.W.2d 173, 177 (Mo.App. E.D. 1995).

6. In cases arising after August 27, 1993, the extent of both the preexisting permanent partial disability and the subsequent compensable injury must equal a minimum of fifty weeks of disability to "a body as a whole" or fifteen percent of a major extremity unless they combine to result in total and permanent disability. Section 287.220.1, RSMo 1994; Leutzinger, supra.

To analyze the impact of the 1993 amendment to the law, the courts have focused on the purposes and policies furthered by the statute:

The proper focus of the inquiry as to the nature of the prior disability is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition. That potential is what gives rise to prospective employers' incentive to discriminate. Thus, if the Second Injury Fund is to serve its acknowledged purpose, "previous disability" should be interpreted to mean a previously existing condition that a cautious employer could reasonably perceive as having the potential to combine with a work related injury so as to produce a greater degree of disability than would occur in the absence of such condition. A condition satisfying this standard would, in the absence of a

Second Injury Fund, constitute a hindrance or obstacle to employment or reemployment if the employee became unemployed. Wuebbeling v. West County Drywall, 898 S.W.2d 615, 620 (Mo.App. E.D. 1995).

Section 287.220.1 contains four distinct steps in calculating the compensation due an employee, and from what source, in cases involving permanent disability: (1) The employer's liability is considered in isolation - "the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability;" (2) Next, the degree or percentage of the employee's disability attributable to all injuries existing at the time of the accident is considered; (3) The degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the combined disability; and (4) The balance becomes the responsibility of the Second Injury Fund. Nance v. Treasurer of Missouri, 85 S.W.3d 767, 772 (Mo.App. W.D. 2002).

The claimant has significant shoulder limitations and restrictions to her right shoulder with acromioclavicular arthritis. Based on the evidence, the claimant suffered a thirty percent permanent partial disability to her left shoulder from the 2002 accident. Although the claimant has not returned to employment in the open labor market since leaving this employer a year after the accident, she testified that she is not totally disabled and did not offer any expert evidence to show permanent total disability.

With respect to preexisting disabilities, the claimant reported a right elbow fracture at age two but offered no medical records to document the elbow injury. The claimant testified that she did not remember the incident and that she did not follow up with a medical provider regarding that elbow injury after completing treatment. She testified that her right elbow ached off and on and that she could not extend her elbow completely. Dr. Poetz opined that the claimant lacked full extension in her right elbow by twenty percent.

The claimant underwent a left knee arthroscopy and lateral meniscectomy in 1998. Nonetheless, she was able to perform her duties as a stocker and warehouse person leading up to July 15, 2002. Dr. Poetz examined the claimant on two occasions. In his report of August 15, 2003, he found a thirty percent permanent partial disability to the left knee and a thirty percent permanent partial disability to the right elbow. On December 16, 2004, Dr. Poetz increased his ratings on the left knee to forty percent. When asked about the reason for his increased rating of the left knee in the December report, Dr. Poetz testified that it was due to a decrease in extension of the left knee compared to his earlier findings. See Dr. Poetz deposition, page 52. The claimant underwent another left knee surgery in January 2004 (subsequent to the work related injury) and had another left knee surgery in March 2005. She testified that her left knee had worsened since the July 15, 2002, right shoulder injury. The evidence is sufficient to support a finding that the claimant had a preexisting permanent partial disability of thirty percent of her left knee before the 2002 accident. The Second Injury Fund bears no liability for the claimant's subsequent deterioration after the 2002 accident. Lawrence v. Joplin R-VIII School Dist., 834 S.W.2d 789, 793 (Mo.App. S.D. 1992). The evidence supports a finding that the claimant's elbow fracture was not sufficiently disabling before the 2002 accident to meet the threshold requirements set forth above.

Dr. Poetz testified that the combination of claimant's "present and prior disabilities results in a total which exceeds the simple sum by ten to fifteen percent." See Dr. Poetz deposition, page 12. Dr. Poetz finding is not contradicted. Based on the evidence, the combination of the two disabilities exceeded the simple sum of the two permanent partial disabilities by twelve and one half percent. Both of these disabilities appear to be sufficiently disabling as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the claimant becomes unemployed. Therefore, the claimant is awarded an additional 14.7 weeks of permanent partial disability benefits from the Second Injury Fund.

Date: _____

Made by: _____

EDWIN J. KOHNER
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest

Director
Division of Workers' Compensation