

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

Injury No.: 08-124172

Employee: Walter Kramer
Employer: 50 Plus Pharmacy, Inc. (Settled)
Insurer: Pharmacists Mutual Insurance Co. (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled 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 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 the award and decision of the administrative law judge dated July 30, 2013. The award and decision of Administrative Law Judge Lawrence G. Rebman, issued July 30, 2013, 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 26th day of February 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD

Employee: Walter Kramer Injury No. 08-124172
Employer: 50 Plus Pharmacy, Inc. (Settled)
Insurer: Pharmacists Mutual Insurance Co. (Settled)
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Hearing Date: May 13, 2013 Checked by: LGR/lh

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: On or about April 17, 2008
5. State location where accident occurred or occupational disease was contracted: Independence, Jackson 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: While Employee was carrying totes up a flight of stairs at work, he suddenly and unexpectedly lost his balance and fell down the stairs injuring his right and left

shoulders.

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, Left Shoulder
14. Nature and extent of any permanent disability: 16% to each shoulder
15. Compensation paid to-date for temporary disability: \$1,650.08
16. Value necessary medical aid paid to date by employer/insurer? \$9,344.25
17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$240.00
19. Weekly compensation rate: \$160.00
20. Method wages computation: Stipulation of the parties

**COMPENSATION PAYABLE
FROM THE SECOND INJURY FUND:**

Employee shall receive weekly permanent total disability benefits at a rate of \$160.00 from August 14, 2008, less a credit of 75 weeks for which the employer paid permanent partial disability benefits at the rate of \$160.00.

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

The compensation awarded to the claimant shall be subject to a twenty-five percent (25%) lien in favor of Brianne Thomas, Attorney, for reasonable and necessary attorney's fees pursuant to §287.260.1.

FINDINGS OF FACT and RULINGS OF LAW

Employee: Walter Kramer Injury No. 08-124172
Employer: 50 Plus Pharmacy, Inc. (Settled)
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Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Hearing Date: May 13, 2013 Checked by: LGR/lh

At the hearing on May 13, 2013, the employee and Second Injury Fund stipulated to the following:

1. That on or about April 17, 2008, 50 Plus Pharmacy, Inc., was an Employer operating under the provisions of the Missouri workers' compensation law and that their liability under said law was fully insured by Pharmacists Mutual Insurance, Co.;
2. That on or about April 17, 2008, Walter Kramer was an employee of 50 Plus Pharmacy, Inc., and was working under the provisions of the Missouri workers' compensation law;
3. That the Employer had notice of the injury;
4. That the Claim for Compensation was filed within the time prescribed by law;
5. That the Claimant's average weekly wage was \$240.00 and the applicable compensation rate for permanent total disability is \$160.00;
6. That temporary total disability benefits have been paid by the Employer in the amount of \$1,650.08 for 11.57 weeks;
7. That medical aid has been furnished by the Employer in the amount of \$9,344.25;
8. That the Claim between the Employer and Employee was settled previously and that such stipulation was approved by the Hon. Lisa Meiners on May 22, 2012. The settlement between the Employee and the Employer provided that the Employer was to pay the Employee \$12,000.00 for permanent partial disability

representing 16% at the 232-week level referable to both shoulders.

ISSUES

The only issues to be determined by this hearing are:

1. whether the employee suffered an accident; and
2. whether the Second Injury Fund is liable to the Claimant for permanent total disability benefits under §287.220.1 RSMo (2012).

Claimant alleges that he is permanently and totally disabled as a result of the combination of the disability from his April 17, 2008 injury to his bilateral shoulders, as well as numerous pre-existing permanent disabilities he had at the time of his 2008 work injury. At the hearing, the Second Injury Fund contested liability.

The following exhibits were admitted into evidence on behalf of the Claimant subject to the objections made at the depositions of the witnesses:

- Exhibit A – Amended Claim for Compensation 08-124172
- Exhibit B – Employer’s Answer to Claim for Compensation
- Exhibit C – Second Injury Fund’s Answer to Claim for Compensation
- Exhibit D – Settlement Stipulation for Injury Number 08-124172
- Exhibit E – Withdrawn
- Exhibit F – Deposition of P. Brent Koprivica, M.D., with the following exhibits:
 - 1) Dr. Koprivica’s C.V.
 - 2) Dr. Koprivica’s Report of April 27, 2011
 - 3) Claimant’s Medical Records
 - 4) Chart Note from April 21, 2009
 - 5) Chart Note from June 16, 2009
- Exhibit G – Deposition of Terry Cordray, vocational expert, with the following exhibits:
 - 1) Mr. Cordray’s C.V.
 - 2) Mr. Cordray’s Report of July 20, 2011

The Fund offered the following exhibit, which was admitted into evidence:

- Exhibit 1 – Deposition of Walter Kramer

The Fund offered no other evidence, aside from its cross-examination of the Claimant.

FINDINGS OF FACT AND CONCLUSION OF LAW

Claimant was present at the hearing and his testimony was credible. It is noted that Mr. Kramer testified that he could not remember exact dates or his specific problems at the time of the hearing. He testified on more than one occasion he has trouble remembering things and he gets confused. He said he has trouble with his balance and that he gets dizzy. He testified he would agree with the medical records.

Mr. Kramer is 83 years old at the time of the hearing, having been born on February 15, 1930. He graduated high school in 1948, but completed no further academic or vocational training. He served in the military from 1951 to 1953 as quarter master supply sergeant in Korea. After the service he went to work in the grocery business. He worked for a number of grocery stores in various capacities. He performed duties as a cashier, sacker and stocker. While working in his grocery business, he did not work with computers. Mr. Kramer retired from the grocery business at age 62. He returned to his father's farm, farming and selling produce. He performed the farming activities until approximately 1997. Mr. Kramer's vocational history indicates that he did not have any experience working in an office, answering phones, working on a computer or typing.

In 1997, the Claimant began working for 50 Plus Pharmacy. He worked Monday through Friday, 10:00 am through 6:00 pm, earning \$8.00 an hour. The Claimant delivered prescriptions to customers' homes, including nursing homes and individual homes in Independence. He did not have to lift more than five pounds when delivering prescriptions to a person's home. He regularly lifted totes weighing twenty pounds when making deliveries to nursing homes. Making deliveries required climbing up stairs, carrying prescriptions, as well as getting into, and out of, the delivery vehicle. While at the store, the Mr. Kramer's job duties included sweeping the floor, stocking shelves and emptying trash bins.

Mr. Kramer's right hand has significant problems dating back to 2003. On November 2, 2005, he underwent a cervical reconstruction and disk fusion due to angular kyphosis of his cervical spine which caused his cervical spine to slope forward and results in the claimant's head permanently bending forward as if looking down.

In 2006, Mr. Kramer was injured when he fell on ice while delivering prescriptions for the Employer. He received a CT scan to check for head injuries. The doctors discovered Claimant had normal pressure hydrocephalus or fluid on the brain, which was not a result of the fall. After the fall on the ice, Claimant changed his work hours to part time of four hours a day. His duties changed to only deliveries and no heavy lifting. Claimant did not claim any permanent work injuries from the fall.

From 2005 until the accident in 2008, the Claimant continued to work for 50 Plus Pharmacy despite his pre-existing hand and neck condition which caused his head to permanently tilt down and his hands to be numb and his pre-existing hydrocephalus which caused the Claimant to experience balance problems and dizziness.

The Claimant's Primary Injury

On April 17, 2008, while working at 50 Plus Pharmacy, the Claimant was carrying three totes up a flight of stairs. According to the Claimant, each tote weighed approximately 20 pounds. He held one tote under his arm, and stacked the other two totes in his hands. As he climbed, the Claimant lost his balance because he was overloaded and fell backwards down the stairs to the floor. In his deposition, Claimant denied that he fell because he was dizzy. As a result of the fall, Mr. Kramer injured both shoulders and hit his head. He was taken by ambulance to Centerpoint Medical Center. The Claimant timely reported his shoulder injuries to his employer. Based on the testimony of the Claimant, both at the hearing and in his deposition, I find that the Claimant sustained an accident while in the course and scope of his employment at 50 Plus Pharmacy.

After falling down the stairs, the Claimant obtained treatment that day at Centerpoint Medical Center. X-rays revealed a right scapula fracture. The next day, the Claimant saw Dr. Wayne Letizia, his personal physician. Dr. Letizia referred the Claimant to Dr. Gregory Hummel, an orthopedic specialist. The Claimant visited Dr. Hummel on April 24, 2008. During the visit, Dr. Hummel discovered that the Claimant injured his left scapula as well. At Dr. Hummel's direction, the Claimant underwent x-rays that day, which revealed a non-displaced fracture of the left scapula. Dr. Hummel treated the Claimant from April 24, 2008 to August 14, 2008. Though Dr. Hummel referred him to Select Physical Therapy for attempted rehabilitation, the Claimant testified that therapy did not help his condition. Dr. Hummel eventually released the Claimant to return to work on August 14, 2008, despite ongoing range of motion deficits in both shoulders.

Dr. P. Brent Koprivica offered his expert testimony by deposition. All objections in the deposition are overruled. He evaluated the Claimant on April 27, 2011, and found that the Claimant's fall down the stairs in April of 2008 was the prevailing factor in causing his shoulder injuries. Based on his physical examination of the Claimant, Dr. Koprivica opined that the Claimant's shoulders were severely dysfunctional. The Claimant has decreased strength and range of motion in his shoulders. Since the Claimant fell down the stairs on April 17, 2008, his bilateral shoulders have been painful and weak with loss of range of motion. Physical therapy did not improve his pain or range of motion. Claimant is unable to repeatedly reach, push, or pull or perform any overhead lifting. The Claimant testified that he cannot lift more than 20 pounds, nor can he perform basic household activities, such as changing light bulbs, mowing his grass, or reaching in overhead cabinets. In fact, once the Claimant returned to work after his shoulder

injuries, he stated that he did not have to perform many of his old job duties, including sweeping and stocking shelves due to the difficulty completing those tasks. Dr. Koprivica apportioned a 20% permanent partial disability rating to the Claimant's left shoulder, and a 25% permanent partial disability rating to his right shoulder. Dr. Koprivica restricted the Claimant from repetitive reaching, pushing or pulling activities. Dr. Koprivica testified that in isolation Mr. Kramer's April 17, 2008 shoulder injuries were not industrially disabling. I find Dr. Koprivica's opinions to be credible.

Ultimately, the Claimant settled both of his shoulder injury claims against the Employer for 16% permanent partial disability to each shoulder. Based upon the evidence Claimant has a 16% permanent partial disability to both shoulders at the 232-week level. He reached maximum medical improvement on August 14, 2008.

The evidence in this case is not clear on when claimant stopped working. It was either after he was released from Dr. Hummel for his shoulder injuries or after he had the surgery in 2009 for his hydrocephalus. The Claimant was unsure. The evidence indicates that Claimant returned to work after being released and continued to work part-time but was limited to only delivering prescriptions. He stated that he could only sweep for a short time because his shoulder gave out. Mr. Kramer appears to have worked until he had subsequent shunt surgery in January, 2009 by his personal physician, Dr. Velez.

Following the shunt surgery Dr. Velez attempted to get Claimant back to work stating on April 21, 2009 that: "I do think that if there is any possibility that he could work for at least four hours that would be a good compromise. I urged him to speak with human resources where he works and see if there is any about the possibility of that he could be accommodated to that." On June 16, 2009, Dr. Velez stated that he gave Mr. Kramer a note because he was interested in returning to work "...half time with no stay of his limitation." Claimant did not return to work for 50 Plus Pharmacy because he walked too slowly, felt like he wanted to fall over and felt too dizzy.

The Claimant's Pre-Existing Injuries

The evidence shows that the Claimant had a significant medical history pre-dating his shoulder injuries in 2008.

The medical records and the Claimant's testimony indicate that he started experiencing problems with his neck in 2003. Initially, the Claimant's hands were painful and often went numb. He started having trouble grasping objects, especially in his right hand. Because of his neck injury, the Claimant had trouble sleeping. The Claimant's neck condition caused his head to start to permanently tilt downward. Even today, the Claimant has the permanent appearance of

looking downward. By 2005, the Claimant's severe neck condition required surgical intervention. On November 2, 2005, he underwent a cervical decompression and fusion. The Claimant testified that the surgery did not alleviate the pain and numbness in his hands. The Claimant testified that his neck condition affected his ability to work. After his neck surgery, the Claimant returned to 50 Plus Pharmacy on a part-time basis working only 4 hours per day. He testified that the radicular symptoms in his hands hindered his ability to grasp, lift, and carry prescriptions and interfered with his using his hands or arms during his work shift. Furthermore, the surgery did not correct the downward position of his head and neck.

According to Dr. Koprivica, the Claimant's neck condition is associated with severe bilateral upper extremity cervical radiculopathies. The condition limits the Claimant's motor function and weakens his extremities—especially his right hand. Dr. Koprivica opined that the Claimant is unable to do any repetitive pinching, grasping, or forceful activities with the upper extremities. Dr. Koprivica opined that the neck condition limited Mr. Kramer's ability to safely operate a motor vehicle. Based on the limitations, the Claimant's subjective complaints, and the objective medical findings, Dr. Koprivica assigned a 35% permanent partial disability to the body as a whole that pre-existed the April 17, 2008 work injury.

In addition to his pre-existing neck condition, the Claimant also suffers from a condition called normal pressure hydrocephalus. The Claimant first learned of his condition while obtaining treatment for a fall on the ice. On November 30, 2006, the Claimant slipped on ice while delivering prescriptions to a customer, causing him to fall and strike his head. He suffered a concussion and facial laceration. A CT scan showed that the Claimant suffered from normal pressure hydrocephalus, a condition characterized by extra fluid buildup in the brain. The Claimant's condition progressed to the point that he underwent surgery in January of 2009, during which the surgeon placed a right occipital ventriculoperitoneal shunt. The shunt allows the Claimant's brain fluid buildup to drain properly. The Claimant suffered, and continues to suffer, from dizziness and loss of balance. He testified that this condition made it difficult for him to walk and affected his memory prior to April 17, 2008. The Claimant testified these symptoms interfered with his ability to work, to sleep, and to perform his activities of daily living. He testified he had to walk very slowly and he had to "go slow" at work.

The medical reports in this matter revealed the existence of normal pressure hydrocephalus in November of 2006. Dr. Koprivica confirmed that the Claimant suffered from the effects of normal pressure hydrocephalus even before his work-related accident in April of 2008, despite the fact that the surgery to alleviate the brain fluid build-up took place after the work injury. Dr. Koprivica testified that the January 2009 surgery would have reversed some of the progressing deficits due to the normal pressure hydrocephalus that occurred between April 2008 and January 2009. Specifically, Dr. Koprivica opined that Mr. Kramer's condition following the surgery was reflective of his disability prior to April 2008. Dr. Koprivica attributed a 15% permanent partial disability to the body as a whole for the Claimant's pre-

existing normal pressure hydrocephalus.

The Claimant's pre-existing medical conditions affected his ability to work at 50 Plus Pharmacy. The Claimant testified that his right hand bothered him and became weak starting in 2003. As a result, he had trouble grabbing and lifting totes for deliveries. His hands are weak and painful today. At the hearing, Mr. Kramer's right hand was significantly atrophied and he could not straighten his right hand. The Claimant's neck injury also made it difficult to sleep. Ultimately, following his neck surgery in November of 2005, the Claimant never worked full-time again.

In addition, due to the normal pressure hydrocephalus, the Claimant had trouble walking between delivery sites and the delivery truck. Accordingly, Dr. Koprivica restricted the Claimant from prolonged standing or walking.

Vocational expert Terry Cordray offered his expert testimony by deposition. All objections in the deposition are overruled. Mr. Cordray opined that the Claimant's pre-existing injuries posed an obstacle or hindrance to his employment. Even before the accident in April of 2008, the Claimant had been reduced to part-time work. The deficits caused by his neck injury, according to Mr. Cordray, posed a significant hindrance or obstacle to the Claimant's employment. Because the Claimant is unable to use his right hand, he cannot perform sedentary jobs for which he would otherwise qualify. As Mr. Cordray testified, unskilled sedentary jobs require frequent, repeated hand use. The Claimant's neck condition precludes him from frequently or repeatedly using his hands, especially his right hand. That he is right-hand dominant exacerbates the problem. Because of the Claimant's dizziness and lack of stability, he only qualifies for jobs which do not require prolonged standing. Though the Claimant's primary injury—his shoulder injuries—contributed to his overall disabling condition, Mr. Cordray opined that it did not, in isolation, render the Claimant permanently and totally disabled. As a result, Mr. Cordray testified that the Claimant's shoulder injuries in April of 2008 combined with his pre-existing injuries render him permanently and totally disabled. He reasoned that the Claimant cannot lift or reach overhead, grasp objects with his hands, or stand for long periods of time; can only perform sedentary demand jobs; has no education other than a high school diploma obtained in 1948; and has no transferable job skills. Mr. Cordray testified, "It's not realistic to expect that he could perform a job."

Because of the Claimant's pre-existing injuries, as well as the shoulder injuries he sustained on April 17, 2008, the Claimant is permanently and totally disabled. I find Mr. Cordray's opinions to be credible, thorough and well-reasoned. The Claimant's evidence proves that his previous head and neck injuries posed a hindrance or obstacle to his employment before he fell down the stairs in 2008. When combined with the effects of his primary injury of April 17, 2008, the synergistic effects of all of the disabling conditions render the Claimant permanently and totally disabled. Under the legal standards discussed below, the Claimant has

presented sufficient evidence proving that the combined effect of his pre-existing injuries and primary injury have rendered him permanently and totally disabled.

RULINGS OF LAW

This Claim presents the following issues:

1. Did the Claimant sustain injuries arising out of a work-related accident on April 17, 2008?
2. Is the Second Injury Fund liable to the Claimant for permanent total disability benefits?

1. The Claimant sustained injuries arising out of a work-related accident on April 17, 2008.

Claimant bears the burden of proof on all essential elements of his Workers' Compensation case. *Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute*, 793 S.W.2d 195 (E.D. 1990) overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). The fact finder is charged with passing on the credibility of all witnesses and may disbelieve testimony. *Id.* at 199.

The Claimant must prove that he sustained an accident arising out of his employment caused his shoulder injuries. Under the Workers' Compensation Law, an accident is an unexpected traumatic event occurring during a single work shift, identifiable by time and place of occurrence, and producing at the time objective symptoms of an injury caused by the event. §287.020.3(1) RSMo. Furthermore, the Claimant will establish causation—that his injuries arose out of employment—only if (a) the work accident is the prevailing factor in causing his injuries and (b) the accident is not caused by a hazard or risk unrelated to his employment. § 287.020.3(2) RSMo; *Pile v. Lake Regional Health System*, 321 S.W.3d 463, 466-67 (Mo. App. S.D. 2010), *reh'g and/or transfer denied*, (Sept. 22, 2010) and *transfer denied*, (Oct. 26, 2010).

The Second Injury Fund has no burden in producing any evidence; rather the Claimant must establish permanent total disability by introducing evidence. *Teresa Carkeek v. Second Injury Fund*, 352 S.W. 3d 604 (Mo App W.D. 2001) citing *Clarks Harts Auto Repair*, 274 S.W. 3d 612, 616 (Mo. App. 2009)

Michael v. Treasurer of Mo., echoed a similar statement saying “The SIF however has no obligation to present conflicting or contrary evidence on the claim for permanent total disability benefits . . . rather claimant must prove the nature and extent of any disability by a reasonable

degree of certainty.” 334 S.W. 3d 654, 662 (Mo. App. S.D. 2011) citing *Dunn v. Treasurer of Mo.*, 272 S.W. 3d 267, 275 (Mo. App. E.D. 2008) and *Elrod v. Treasurer of Mo.*, 138 S.W. 3d 714, 717 (Mo. Banc 2004). Under the *Michael’s* case rationale, the Administrative Law Judge is free to determine that they were not persuaded by the evidence presented by the claimant.

Work accident and prevailing factor causing injury.

Section 287.020.3(2) defines whether an injury arises out of and in the course of employment where it states:

(2) An injury shall be deemed to arise out of and in the course of the employment only if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and

(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

Determining whether a particular accident is the prevailing factor in causing the employee’s injuries is inherently factual. *Leake v. City of Fulton*, 316 S.W.3d 528, 532 (Mo. App. W.D. 2010). The prevailing factor in causing an injury is defined as the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. § 287.020.3(1); *Johnson v. Indiana Western Exp., Inc.*, 281 S.W.3d 885, 889-90 (Mo. App. S.D. 2009). It must be reasonably apparent from the circumstances that the accident is the prevailing factor in causing the injury. §287.020.3(2)(a) RSMo.

The Claimant injured his shoulders when he fell down a flight of stairs while carrying prescriptions. Dr. Koprivica testified that, to a reasonable degree of medical certainty, the Claimant’s injuries were caused by the work accident of April 17, 2008. Similarly, the Claimant testified that he fell down the stairs during a work shift, while performing his ordinary work duties. Claimant’s April 17, 2008, work accident was the prevailing factor in causing his injuries.

To prove that his work accident did arise out of and in the course of his employment, the Claimant must establish that his injury resulted from a risk or hazard peculiar to his employment. The Second Injury Fund argues that Claimant’s fall was due to his dizziness and therefore, an idiopathic condition and not due to a work condition. The deposition of Mr. Kramer was introduced into evidence by the Second Injury Fund. In that deposition, Mr. Kramer denies that he fell because he was dizzy.

Work is not the prevailing factor in causing an injury if it merely happened to occur at work. *Miller v. Missouri Highway and Transp. Com'n*, 287 S.W.3d 671, 674 (Mo. banc 2009). The injury must be due to some condition of employment. *Id.* If the risk involved is one to which the worker would have been exposed equally in normal non-employment life, the hazard or risk is unrelated to the worker's employment. *Id.* For an injury to be deemed to arise out of and in the course of the employment, the claimant employee must show a causal connection between the injury at issue and the employee's work activity. *Pope v. Gateway to the West Harley Davidson*, ED98108; WL 5207529 (MO App E.D. Oct. 23, 2012)

There is no dispute Mr. Kramer broke his clavicle bones as a result of a fall. The question is whether the fall was the result of a work injury. His testimony and the records in this case established that his normal job duties included carrying totes of prescriptions up stairs at 50 Plus Pharmacy. On April 17, 2008, when the Claimant ascended a flight of stairs carrying 3 large totes filled with prescriptions, he was performing an ordinary duty of his job. Mr. Kramer testified that he was overloaded while performing his duties. The facts as related by Mr. Kramer are more compelling than those at issue in the *Pope v. Gateway Harley Davidson*. When the Claimant fell, he was performing a duty peculiar to his employment as a deliveryman. Furthermore, he was carrying bulky totes up stairs which increased his risk of falling and to which he would not have been equally exposed in everyday life.

Therefore, the Claimant's evidence established that work was the prevailing factor in causing his accident and resulting injuries.

2. The Second Injury Fund liability

This Court must also determine whether the Second Injury Fund is liable to the Employee for any disability, either permanent partial or permanent total disability. In this case the Employee has alleged that he is permanently and totally disabled.

Mr. Kramer is entitled to permanent total disability benefits from the Fund if he can prove that:

- (1) he is permanently disabled as a result of his work-related accident;
- (2) he has a permanent disability predating the compensable work-related injury; and
- (3) the combined effect of his primary and pre-existing injuries results in permanent and total disability.

Michael v. Treasurer, 334 S.W.3d 654, 662-64 (Mo. App. 2011).

Permanent Disability

An employer is liable for permanent total disability compensation under §287.220 RSMo

1994 only where it is found that the primary accident alone caused the employee to be permanently and totally disabled. *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 276 (Mo. App. 1996); *Feldman v. Sterling Properties*, 910 S.W.2d 808 (Mo. App. 1995); *Moorehead v. Lismark Distributing Company*, 884 S.W.2d 416, 419 (Mo. App. 1994); *Kern v. General Installation*, 740 S.W.2d 691, 692 (Mo. App. 1987).

Compensation cases in which there has been a previous disability are to be determined under §287.220.1 RSMo (1994). In partial disability cases, the Employer is liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. In total disability cases, the Employer is liable only for the disability resulting from the last injury considered alone and of itself. The Employer's liability for permanent partial disability compensation is determined under §287.190; *Stewart v. Johnson*, 398 S.W.2d 850 (Mo. App. 1996).

Based upon a review of the medical records including the opinions of the medical and vocational experts, Mr. Kramer was not rendered permanently and totally disabled due to his last accident alone. Dr. Koprivica's report lists physical limitations including the Claimant's inability to: lift or reach overhead, grasp objects with his hands, or stand for long periods of time. The Claimant cannot reach overhead because of his weakened shoulders. The Claimant's neck injury is characterized by radiculopathies, which prevents him from grasping objects with his hands. Claimant cannot stand or walk for long periods of time because of dizziness and balance issues—symptoms caused by his normal pressure hydrocephalus. Though the Claimant's primary injury—his shoulder injuries—contributed to his overall disabling condition, vocational expert Mr. Terry Cordray opined that they did not, in isolation, permanently and totally disable the Claimant.

At the hearing, the parties stipulated that, as a result of falling down the stairs on April 17, 2008, the Claimant sustained a 16% permanent partial disability to both shoulders. The only expert medical evidence is the testimony of Dr. Koprivica that established Claimant's fall resulted in a permanent disability to both shoulders. And, as discussed above, the Claimant's accident was related to his work. Thus, the Claimant's work-related accident in April of 2008 caused a 16% permanent disability to both shoulders. I find that the Claimant has permanent disability as a result of his work-related accident of April 17, 2008.

Pre-existing Disability

The Claimant must establish that a measurable disability existed at the time of his last injury. *Gassen v. Lienbengood*, 134 S.W.3d 75, 80 (Mo. App. 2004). To qualify as disabilities, the Claimant's pre-existing injuries must have been of such seriousness as to constitute a hindrance or obstacle to employment or re-employment. §287.220.1 RSMo; *Messex v. Sachs Electric Co.*, 989 S.W.2d 206 (Mo. App. 1997); *Garibay v. Treasurer*, 964 S.W.2d 474 (Mo.

App. 1998); *Rose v. Treasurer*, 899 S.W.2d 563 (Mo. App. 1995); *Leutzinger v. Treasurer*, 837 S.W.2d 615 (Mo. App. 1995). Where an injury limits an employee's ability to perform work, a disability may exist even if the employee manages to work through an injury. *Feltrop v. Eskens Drywall and Insulation*, 957 S.W.2d 408, 409 (Mo. App. 1997) (*overruled in part on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003)).

The Claimant's pre-existing medical history is significant. Before his work-related accident, Mr. Kramer suffered from permanent disabilities to his neck, hands and brain.

The Claimant testified that he started experiencing problems with his neck in 2003. In 2003, the Claimant's hands were painful and often went numb. He started having trouble grasping objects, especially in his right hand. It made carrying totes at work more difficult. Dr. Koprivica's subjective and objective findings, as well as the medical records, confirm the Claimant's testimony regarding his neck injury. Because of his neck injury, the Claimant had trouble sleeping. By 2005, the Claimant's severe neck conditions required surgical intervention. On November 2, 2005, he underwent a cervical decompression and fusion. The Claimant testified that the surgery did not alleviate the pain and numbness in his hands. The Claimant's neck condition causes him to permanently look down.

Though his neck injury limited his ability to perform work duties, the Claimant continued to work. After undergoing neck surgery in 2005, Mr. Kramer returned to work on a part-time basis. He continued delivering prescriptions and performing the same job functions such as sweeping and taking out the trash.

According to Dr. Koprivica, the Claimant's neck condition is associated with severe bilateral upper extremity cervical radiculopathies. The condition limits the Claimant's motor function and weakens his extremities—especially his right hand. Dr. Koprivica opined that the Claimant is unable to do any repetitive pinching, grasping, or forceful activities with the upper extremities. Based on the limitations, the Claimant's subjective complaints, and the objective medical findings, Dr. Koprivica assigned a 35% permanent partial disability to the body as a whole. Vocational expert Terry Cordray testified that the Claimant's neck injury posed a hindrance and obstacle to employment before his work-related accident in 2008.

Mr. Kramer, Dr. Koprivica, and Mr. Cordray testified that the Claimant's neck injury posed a hindrance to his employment. The Claimant said he could only work part-time following the neck surgery; Dr. Koprivica placed significant limitations on the Claimant's ability to work; and Mr. Cordray testified that the Claimant's inability to use his hands significantly restricts his labor market. Under the facts of this case, as established by the evidence presented, the Claimant's neck injury constituted a hindrance and obstacle to his employment, and thus qualifies as a pre-existing disability.

Similarly, the Claimant's normal pressure hydrocephalus meets the statutory definition of pre-existing disability. Prior to 2008, the Claimant testified that he suffered, and continues to suffer, from dizziness and loss of balance. These symptoms made walking to and from the delivery truck and around his workplace difficult. Bouts of dizziness and instability also contributed to his need to "go slow" at work. Dr. Koprivica limited the Claimant to performing sedentary jobs because he is unable to stand or walk for long periods of time. Mr. Cordray testified that the Claimant's normal pressure hydrocephalus posed a hindrance and obstacle to his employment.

While the Claimant did not undergo surgery for the normal pressure hydrocephalus until 2009, objective medical testing revealed its existence in 2006. According to his testimony and the objective medical findings, the Claimant worked with this condition for nearly two years before sustaining work-related shoulder injuries in April of 2008. Thus, Mr. Cordray and the Claimant testified that the condition posed a hindrance and obstacle to his employment prior to 2008. The Claimant proved that his normal pressure hydrocephalus was a pre-existing disability.

Permanently and totally disabled

Under the Workers' Compensation Act, the main test for permanent total disability claims is whether the claimant is able to compete in the open labor market. *Underwood v. High Road Industries, LLC*, 369 S.W.3d 59, 66 (Mo. App. 2012); *Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 635 (Mo. App. 2007). As such, "total disability" is defined as "the inability to return to any reasonable or normal employment." *Underwood*, 369 S.W.3d at 66 (citing *Lewis v. Kansas Univ. Med. Ctr.*, 356 S.W.3d 796, 800 (Mo. App. 2011)); §287.020(7) RSMo.

The critical question, given the Claimant's present physical condition, is whether any employer could reasonably be expected to hire him and whether he could reasonably be expected to successfully perform the work. *Underwood*, 369 S.W.3d at 66 (internal quotations omitted); *Highley v. Von Weise Gear*, 247 S.W.3d 52, 55 (Mo. App. 2008); *Michael*, 334 S.W.3d at 663; *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 275 (Mo. App. 1996). The Claimant need not be completely inactive or inert to meet this statutory definition. He must, however, be unable to compete in the open labor market. *See Reese v. Gary & Roger Link, Inc.*, 5 S.W.3d 522 (Mo. App. 1999); *Carlson v. Plant Farm*, 952 S.W.2d 369, 373 (Mo. App. 1997); *Fletcher v. Second Injury Fund*, 922 S.W.2d 402 (Mo. App. 1996); *Searcy v. McDonnell Douglas Aircraft*, 894 S.W.2d 173 (Mo. App. 1995); *Reinver v. Treasurer*, 837 S.W.2d 363 (Mo. App. 1992); *Brown v. Treasurer*, 795 S.W.2d 478 (Mo. App. 1990).

The courts of this state have held that, in making permanent total disability determinations, a number of factors may be considered, including a claimant's: physical and mental condition, age, education, job experience, and skills. *See e.g., Tiller v. 166 Auto Auction*,

941 S.W.2d 863 (Mo. App. 1997); *Olds v. Treasurer*, 864 S.W.2d 406 (Mo. App. 1993); *Brown v. Treasurer*, 795 S.W.2d 439 (Mo. App. 1990); *Patchin v. National Supermarkets Inc.*, 738 S.W.2d 166 (Mo. App. 1987); *Laturno v. Carnahan*, 640 S.W.2d 470 (Mo. App. 1982); *Vogel v. Hall Implement Co.*, 551 S.W.2d 922 (Mo. App. 1977).

Prior to becoming employed at 50 Plus Pharmacy, the Claimant had a vocational history of working in grocery stores. He performed duties as a cashier, sacker, and stocker. He was also self-employed as a farmer raising produce for a short period of time. He had no experience working in an office, answering phones, working on a computer, or typing. Mr. Kramer does not have skills that would transfer to sedentary duty.

Dr. Koprivica issued restrictions for Claimant of no lifting over 20 lbs, no overhead lifting, no repetitive pushing or pulling and no climbing. Dr. Koprivica testified he felt Claimant could not sustain full-time employment.

Mr. Cordray cited the Claimant's age, lack of education, training, or transferable job experience, and physical limitations in concluding that the Claimant is unable to compete in the open labor market. Mr. Cordray's testimony is uncontroverted where he states: "it's not realistic to expect that he could perform a job." According to Mr. Cordray, the combined effect of the Claimant's primary and pre-existing injuries permanently and totally disabled him.

Based upon the evidence in this case, I find that the Claimant's primary and pre-existing disabilities combined to render him permanently disabled. I further find that the Claimant's permanent and total disability resulted from the synergistic effect of his combined injuries, not from any single injury. The Claimant was unsure whether he stopped working after he was released from Dr. Hummel for his shoulder injuries or after he had the surgery in 2009 for his hydrocephalus. However, the timing is irrelevant. The Claimant established that he could not go back to work performing the duties he had previously performed due to the combined effects of his primary and pre-existing disabilities.

I find that the Claimant's primary and pre-existing disabilities have combined to render him permanently and totally disabled.

Employee shall receive weekly permanent total disability benefits at a rate of \$160.00 from August 14, 2008, less a credit of 75 weeks for which the employer paid permanent partial disability benefits at the rate of \$160.00.

The Claimant's attorney, Brianne Thomas, has requested a fee equal to 25% of all amounts awarded for disability. I find that such request is fair and reasonable and order a lien to attach to this award for sums due and owing at present and for sums accruing in the future.

Issued by DIVISION OF WORKERS' COMPENSATION
Employee: Walter Kramer

Injury No. 08-124172

Made by: _____
Lawrence G. Rebman
Administrative Law Judge
Division of Workers' Compensation