

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

Injury No.: 07-135912

Employee: Zola Marshall  
Employer: R. J. Reynolds Tobacco (Settled)  
Insurer: Ace American Insurance (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, and considered the whole record, we find that the award of the administrative law judge denying compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

**Discussion**

The administrative law judge concluded that employee did not sustain an accident or occupational disease arising out of and in the course of her employment, based on an (implied) finding that the testimony from employee's medical expert, Dr. Swaim, is not persuasive as to the issue of medical causation. In her brief, employee correctly notes that "[t]he commission may not substitute an administrative law judge's personal opinion on the question of medical causation of [an injury] for the uncontradicted testimony of a qualified medical expert in cases where [m]edical causation ... cannot be considered uncomplicated." *Carkeek v. Treasurer of Mo. - Custodian of the Second Injury Fund*, 352 S.W.3d 604, 609 (Mo. App. 2011)(citations omitted). But in asserting that the Commission has "no choice" in this matter but to reverse the administrative law judge's decision and adopt Dr. Swaim's uncontradicted causation opinion, employee ignores numerous Missouri cases making clear that "the Commission is free to accept or reject uncontradicted and unimpeached testimony." *Dunn v. Treasurer of Mo. As Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo. App. 2008)(citation omitted).

We acknowledge that the Second Injury Fund did not procure an expert medical causation opinion to contradict that of Dr. Swaim, but this circumstance does not result in an automatic finding in favor of the employee, because it was employee's burden to demonstrate, with persuasive medical evidence, that her claimed right knee injury was the result of an accident or occupational disease arising out of and in the course of her employment. See *Dunn*, 272 S.W.3d at 275, noting that "the [Second Injury Fund] does not have any obligation to present contrary or conflicting evidence." For the following reasons, we agree with the administrative law judge's determination that employee failed to meet her burden.

Employee: Zola Marshall

- 2 -

Employee is 5'11" in height and as of February 2007, she weighed 225 pounds. Her job duties, as reported to Dr. Swaim and recounted in her testimony, consisted of travelling to various locations where cigarettes were sold, checking and changing the arrangement of various cigarette displays, and installing promotional signs, posters, and banners. Employee drove 200 miles per week, servicing 8 to 10 locations per day. Employee normally spent about 30 minutes at each location. Employee's work involved occasional handling of signs weighing up to 50 pounds, but she estimated that most of the things she lifted at work weighed less than 25 pounds. Employee's duties required her to frequently stoop, squat, kneel, and climb stools and ladders, but employee did not specify the duration of such activities or explain what portion of a typical store visit involved such activities. Employee did testify that if she was doing a "reset" she could be on her hands and knees for up to 2 or 3 hours, but she did not specify how often this occurred.

Employee's treatment records from February 2007 make no reference to knee problems, although they note ongoing back problems, for which employee was in need of ongoing care. A note from Lee's Summit Family Care dated May 7, 2007, is the first treatment record referencing employee's right knee. The note records a history of pain and swelling for 2 weeks associated with walking. On May 15, 2007, employee complained of pain with sitting and reported she was on her feet a lot at work. On May 18, 2007, employee reported to the surgeon Dr. Go that she had been experiencing right knee pain off and on since mid-March 2007 after using a restroom with a low seat. At the hearing before the administrative law judge, employee testified that her right knee "just started hurting" in 2007. *Transcript*, page 31.

As noted above, Dr. Swaim is the only medical expert to testify in this matter regarding the issue of causation. Dr. Swaim's causation opinion, that repetitive weight bearing on the right knee in a flexed position is the likely cause of employee's joint pathology, is not inherently unpersuasive. But employee's descriptions of her job duties, as recounted in her testimony and as provided to Dr. Swaim and the treating physicians, are non-specific with regard to the frequency or duration of activities involving repetitive weight bearing with the right knee in a flexed position. Employee also provided the treating physicians with contradictory accounts regarding both the timing of the onset of her symptoms and the events and activities precipitating those symptoms.

Ultimately, Dr. Swaim's opinions are entitled to no more credence than the testimony from employee upon which said opinions necessarily rely. We find that employee is not a credible historian. We therefore find, after careful consideration, that Dr. Swaim's testimony is without adequate foundation, and we do not accept or adopt it. We conclude that employee's occupational exposure was not the prevailing factor in causing the resulting medical conditions and disability claimed herein.

Because employee's failure to prove that she sustained a compensable primary injury by occupational disease is fatally dispositive of her claim against the Second Injury Fund, we discern no need to consider the moot issues of notice, statute of limitations, or permanent total disability, and we hereby disclaim the administrative law judge's findings, analysis, and conclusions referable to each of those issues.

Employee: Zola Marshall

- 3 -

**Conclusion**

We affirm and adopt the award of the administrative law judge, as supplemented herein.

The award and decision of Administrative Law Judge Emily Fowler, issued August 1, 2013, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 28<sup>th</sup> day of March 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

**FINAL AWARD DENYING COMPENSATION  
as to Second Injury Fund Only**

Employee: Zola Marshall Injury No: 07-135912  
Dependents: N/A  
Employer: RJ Reynolds Tobacco (Settled)  
Additional Party: Treasurer of Missouri as Custodian of the Second Injury Fund  
Insurer: ACE American Insurance (Settled)  
Hearing Date: June 3, 2013  
Briefs Filed: July 8, 2013 Checked By: ESF/cy

**FINDINGS OF FACT AND RULINGS OF LAW**

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: May 23, 2007
5. State location where accident occurred or occupational disease was contracted: 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? No
8. Did accident or occupational disease arise out of and in the course of the employment? No
9. Was claim for compensation filed within time required by Law? No
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Working doing signage and promotional work at various retail outlets for cigarettes and noticed her right knee felt sprained and swelling
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 knee
14. Nature and extent of any permanent disability: none
15. Compensation paid to-date for temporary disability: 0
16. Value necessary medical aid paid to date by employer/insurer? Unknown
17. Value necessary medical aid not furnished by employer/insurer? Unknown
18. Employee's average weekly wages: \$564.15
19. Weekly compensation rate: \$376.10/\$376.10
20. Method wages computation: based on evidence at hearing
21. Amount of compensation payable: None
22. Second Injury Fund liability: None
23. Future requirements awarded: N/A

## FINDINGS OF FACT AND RULINGS OF LAW

Employee: Zola Marshall Injury No: 07-135912  
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On June 3, 2013, the parties appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The employee, Zola Marshall, appeared in person, and with counsel, Diane Baker. The Second Injury Fund appeared through Assistant Attorney General, Laura Van Fleet. There was no appearance on behalf of the Employer and Insurer as the claim between the Employer and the Employee has previously been settled.

### STIPULATIONS

The parties stipulated to the following:

1. That the Employer, R.J. Reynolds, was an employer operating under and subject to the provisions of Missouri Workers' Compensation Law, and was fully insured by ACE American Insurance;
2. That Zola Marshall was its employee and working subject to the law in Jackson County, Missouri;
3. That the Employer has paid temporary total disability compensation in the amount of \$0.00 and medical care costing \$0.00.

### ISSUES

The parties requested the Division to determine:

1. Whether or not Claimant suffered an occupational in the course and scope of employment;
2. The average weekly wage and applicable compensation rates;

3. Whether proper notice was given to the employer;
4. Whether the claim was filed in time;
5. The nature and extent of permanent disability;
6. Causation of her disability;
7. The liability of the Second Injury Fund.

The Employee, Zola Marshall, testified in person and offered the following exhibits, all of which were admitted into evidence without objection:

- A. Claim for Compensation
- B. Answer of SIF
- C. Settlement with Employer/Insurer
- D. RJ Reynolds Employee Incident Report
- E. Employee's W-2 for 2007 RJ Reynolds
- F. Certified records of Rustici Chiropractic
- G. Records of Lee's Summit Hospital
- H. Records of Lee's Summit Family Care
- I. Records of Dr. Zarr
- J. Records of St. Joseph Medical Center
- K. Records of Mayo Clinic as of Aug. 28, 2006
- L. Records of Mayo Clinic as of Aug. 13, 2010
- M. Certified records Laser Spine Institute
- N. Certified records Rockhill Orthopedic (Drs. Go and Dugan)
- O. Certified Records Liberty Hospital
- P. Certified Records Liberty Orthopedic
- Q. Settlement with Employer/insurer in Inj. #06-065456
- R. Deposition of Truett Swaim, MD
- S. Deposition Michael Dreiling, Vocational expert
- T. Original claim for compensation filed 10/20/09
- U. Report of Injury filed 11-2-09
- V. Wage Statement

The Second Injury Fund did not call any witnesses and offered the following exhibits, all of which were admitted into evidence without objection:

1. Rockhill Orthopedic Records
2. Award of case 06-065456
3. 2010 Deposition of Claimant
4. Lee's Summit Family Care Records

Claimant (Zola Marshall) is a 58 year old female. Ms. Marshall worked for RJ Reynolds (Employer) from 1988 to 2007 with a brief period of layoff around 1991. In 2006 she began

working full time as a retail representative. She was assigned 120 places to call on and was expected to visit approximately 11 per day. Each call required her to change out Point of Sale ads, check distribution of cigarettes, check displays, promotions and pricings. She visited grocery stores, convenience stores, and cigarette outlets.

#### Pre-Existing Low Back

Ms. Marshall reports that prior to July 18, 2006 she had problems with her cervical and lumbar spine. She was receiving treatment through the Mayo Clinic in Minnesota. She had an MRI dated May 10, 2004 which revealed severe degenerative changes involving multiple levels of the cervical spine with a broad-based disk bulge at C4-5 with some central canal stenosis. She had an MRI of the low back dated June 7, 2004 which showed disk bulging at L4-L5 and L5-S1. She had a clinical history of low back pain in both buttocks, worse on the right. After receiving epidural injections in Kansas City for her cervical and lumbar spine, Ms. Marshall elected to continue treatment at the Mayo Clinic. She missed work to attend her appointments in Minnesota. An April 11, 2006 note indicates that Ms. Marshall visited a Dr. Hurdle with a chief complaint of low back pain. She stated her pain had been well controlled until over the last several months which become more severe. She reports having a prescription for and taking Vicodin as needed for this pain. The Vicodin was prescribed by Dr. Sweeney, her primary care physician. He gave her a prescription for Vicodin and Ultram on March 27, 2006.

Ms. Marshall alleges that she injured her low back on July 18, 2006. She reports that she was at a cigarette retailer, standing on a stool to reach an overhead sign when she began to fall. She caught herself, but when snapping herself upright, had immediate pain in her low back. She drove herself home that evening and took a Vicodin for pain. Overnight, she reported to Lee's Summit Hospital Emergency room. She received medication and a steroid injection and was released to follow up with her primary care physician. The ER notes from that visit do not indicate that she had injured her back the day before, or indicate any mechanism of injury. The report does state that she "ran out of Vicodin yesterday" and that the pain is "similar to prior back pain" and "similar symptoms previously". She followed up at Lee's Summit Family Care the next day. The notes dated July 19, 2006 indicated back pain radiating down (r) leg, recurring since 2004. It further indicates that she had her Vicodin prescription refilled. She stated she was anxious to have another MRI since it had been over two years to see where she stood. There is no mention of work, or a new event as the source of the pain in this note either. Ms. Marshall testified that she didn't mention the cause of her pain at the ER because her pain was overwhelming and she just wanted treatment. She reported to her primary care physician later the same day that her pain was improved 50%, but she still didn't report any new injury or an incident at work.

Ms. Marshall received treatment from Dr. Zarr. On December 13, 2006 Dr. Zarr reported that Ms. Marshall had a 0% disability attributable to this injury. He opined that she had symptoms secondary to her July 2006 event, but that there was no permanent disability associated with the exacerbation.

Ms. Marshall continues to have pain in her cervical and lumbar areas. She reports that she limits lifting to 20 pounds, and that her pain is exacerbated by housecleaning. She received surgery on her back through her husband's insurance. On January 26, 2011 she received a lumbar laminectomy.

### Knee

Ms. Marshall claims that she began having knee problems in 2007 while working for RJ Reynolds. Her knee felt unstable and began swelling and experiencing pain. She saw her personal doctor, Dr. Cabot Sweeney and got a prescription for hydrocodone. She saw Dr. Sweeney on May 7, 2007. She returned to Dr. Sweeney a week later and stated her pain was worse. She was referred to Dr. Go at Rockhill Orthopaedics on May 18, 2007 and reported to the specialist that she had knee pain since using a lower toilet that early spring. She had an MRI at that time and was eventually diagnosed as having a medial meniscus tear. She had arthroscopic surgery on May 29, 2007 with Dr. Go. She had a second opinion regarding her knee on February 22, 2008 with Dr. Dugan and had her knee injected and aspirated. On April 1, 2008 Dr. Dugan recommended conservative treatment instead of arthroscopy. On May 16, 2008 she saw Dr. Haas and Liberty Orthopedics regarding her knee and discussed a total knee arthroplasty. In June of 2008 she had the total knee arthroplasty. On August 11, 2008 she was released by Dr. Haas to follow up in one year. She had full extension, 120 degrees of flexion, and excellent range of motion and stability.

Ms. Marshall never reported to her employer, supervisor, or any co-worker that she was having work-related knee problems. Her boss did a ride-along evaluation of her and they discussed that she was having knee problems and he expressed his sympathy. She did not tell her supervisor she needed to use pain medication for her knee because she had already received bad evaluations and felt she was already in a bad light. She told RJ Reynolds she was going to have knee surgery. She was terminated in approximately June 2007. She pursued her treatment using her personal insurance. RJ Reynolds informed her she was terminated because she was no longer meeting expectations.

Ms. Marshall was unemployed for 10 months following her termination. She had arthroscopic surgery on her knee by Dr. Go in May 2007. She continued to have problems with her knee. She eventually got a job at the Lee's Summit School District in the cafeteria department. She felt she did not have enough pay as the wage was low and she only worked limited hours, so she quit that job. She got a part-time job at Acosta as a merchandiser. She left Acosta because she was not yet eligible for medical leave and she opted to have a total knee replacement in June 2008. Acosta told her she was eligible to reapply for her position, but she did not reapply. She stated that no doctor has placed any permanent restrictions on her for her knee.

Ms. Marshall's claim for compensation was received October 20, 2009.

Ms. Marshall settled her claim for her knee with the employer (Claimant's exhibit A). The stipulation signed by Ms. Marshall and her attorney states that the compensation rate for

temporary benefits is \$472.08 and \$376.55 for permanent partial disability. They did not state a percentage of disability but settled for \$4,820.00 as a strict compromise of a disputed claim to settle all issues including disability, medical, and TTD.

Ms. Marshall was evaluated by Dr. Truett Swaim at her own request. He offered ratings for her lumbar and right knee problems. His opinion was found to be not credible at the hearing on the lumbar work injury. (See SIF exhibit 2).

The first issue this Court will determine is whether the claimant sustained an accident or occupational disease arising out of and in the course of her employment. And further whether this accident was the cause of her knee injury. Ms. Marshall contends that the repetitive nature of her job caused her knee injury and relies on the testimony of Dr. Truett Swaim to support this position. However he appears to ignore the initial treatment record by Dr. Go on May 18, 2007. That treatment record by Dr. Go makes no reference to her job being the cause of her problems, but instead references that she had problems with her right knee since she used a lower toilet earlier in the spring of 2007. In fact, none of her treatment records reflect that she described her work as being a source of her pain or symptoms and the only mention in the treating records for her right knee are the 2007 reference to the use of the low toilet. She was also seen by her family care physician, Dr. Sweeney on May 8, 2008. In those records and others that followed there is no mention of her work activities in connection with her knee problems either as a cause or as an aggravation to any knee pain or discomfort she was suffering. On cross-examination of his report, Dr. Swaim admitted that while he disagreed that this was the cause of Ms. Marshall's problems, sitting on a toilet could cause a meniscus tear.

The claimant bears the burden of proving that she sustained an accident or occupational disease. The medical records reflect that when she initially reported to a treating physician for her knee symptoms, she reported that the symptoms were related to an incident on a toilet. She never discussed with any of her treating physicians that she hurt her knee while working. And further she never even mentioned that her work aggravated or bothered her knee while she was working. She did not report the injury to her employer for two and a half years after she began receiving treatment, despite being terminated. She had no job to protect by concealing that information.

The next issue to be determined is the claimant's rate of pay. The claimant testified that she was terminated from employment on May 23, 2007. The claimant produced both her W-2 for 2007 (Exhibit E) and a pay record from April to June of 2006 showing gross wages of \$1,128.30 for eighty hours work (two weeks) (Exhibit V). The claimant explained that her W-2 included her accrued vacation pay of \$1,200 to \$1,300.00. The claimant also testified that she had not received any pay increase in her work from 2006 until her termination on May 23, 2007. The claimant testified at her deposition that at the time of her termination on May 23, 2007, she was making "\$32,000 something" per year (SIF Exhibit 3, pp. 51-52). The settlement with the Employer/insurer in this case (Exhibit C) lists a compensation rate of \$472.08/376.55. In reviewing her rate of pay it appears she made \$564.15 per week based upon her W-2. Therefore this Court determines that her average weekly wage is \$564.15 making her compensation rate \$376.10 for permanent partial as well and permanent total disability benefits.

The next issue to be determined is whether the claimant provided her employer with proper notice as well as whether she filed her claim within the statute of limitations. V.A.M.S. 287.127 and 287.420 direct that the employee must provide notice to his/her employer within 30 days of diagnosis of the occupational disease/repetitive injury. If the claimant does not provide written notice to the employer of the injury within the 30 days after diagnosis, or that the employer had actual knowledge of the injury, then the burden rests on the claimant to prove that no prejudice occurred due to their failure to give notice. *Soos v. Mallinckrodt Chemical Co.* 19 S.W.3d 683 (Mo.App. E.D., 2000). When the notice requirements of section 287.420 are not met, then no proceedings for compensation may proceed.

Ms. Marshall held the burden of proving the employer was not prejudiced by her failure to notify them of her injury. No such evidence was presented. Because the employer was never told that Ms. Marshall's knee problems and treatment were in any way related to her employment, they did not timely file a report of injury or direct or oversee medical treatment. Ms. Marshall used her own insurance to begin receiving treatment on her knee with her personal physician Dr. Sweeney in May 2007. She had her first surgery on her knee in May 2007 and had a total knee replacement in June 2008. All of these surgeries were pursued using her private insurance and were not submitted to her employer for payment at the time she received treatment. She never asked her employer to see a doctor. She was terminated in approximately June of 2007, and even though she no longer had a job to protect, she still did not report her injury to her employer. She made no assertion to any doctor or representative of her employer that her knee problems were work related, until she filed her claim for compensation in October 2009. Ms. Marshall had a workers' compensation injury in 2006, and had exposure to the logistics of the claim filing process from that injury. It is also interesting to note that while she was in the process of being treated for her knee with Dr. Sweeney and Dr. Go she had a deposition for her earlier back injury under workers' compensation but still never reported the knee as a work related injury or discussed it as work related with anyone from the employer.

In her deposition she described her work duties and how she was required to bend down and kneel down to check her distribution. She described how she would be on her hands and knees or one knee looking for the product. She explained there was a lot of bending and stooping and kneeling on both knees. And she did this repeatedly throughout the day. (SIF Exhibit 2, page 25-27.) She stated that when a supervisor Mylan Haden asked about her apparent knee pain she was afraid of losing her job so she did not say anything. (SIF Exhibit 2 page 29-30). She reiterated this information in her live testimony at hearing. She may well have known that her work was causing her problems but she deliberately refused to say anything to her employer. She went through treatment and two surgeries before ever giving notice to her employer and then it was in the form of a claim. All the medical care and decisions were made by her alone and not her employer. By not giving any notice to her employer and in fact concealing it from them, even after she was fired, she deliberately evaded the requirements of workers' compensation. She should not then be rewarded by allowing a claim against the second injury fund simply because her employer, following the statutory requirements filed a report of injury in response to her claim. A claim filed over two years and a half beyond her diagnosis and well after all her medical treatment had been completed. This is the very definition of prejudice.

For the Second Injury Fund to have any liability, there must be a compensable claim under section 287. Section 287.220. As Ms. Marshall's claim did not meet the statutory requirements of Notice and was not filed within the two year statute of limitations, the Second Injury Fund has no liability, regardless of the cause or extent of any disability.

Because Ms. Marshall did not give written notice of her injury within 30 days, and there was no good cause for her omission, the employer did not have the opportunity to file a report of injury. As such, the two year statute of limitation from the injury should apply. Ms. Marshall did not file her claim until October 2009, well over two years from the diagnosis of her knee problem in May 2007. Section 287.430.

The next issue to be determined is whether claimant is permanently and totally disabled. Ms. Marshall is not permanently and totally disabled. After her alleged injury to her right knee, she obtained two more jobs. She reports that she could continue to work part-time in a job similar to the job she held at Lee's Summit School district in the cafeteria as a lunch worker. Ms. Marshall testified that she could physically do the work. This is a job that she applied for and obtained on the open labor market after her primary injury. She left the job because of the low pay, not because of her physical ability to do the work. Her ability to do this job available on the open labor market is substantial evidence that she is employable on the open labor market.

Furthermore, Ms. Marshall left her merchandising job that she was doing part-time to obtain surgery and was told that she could re-apply for her position, but because she had not been employed long enough to receive FMLA benefits, reapplication would be necessary. Ms. Marshall never reapplied, though she was never turned down by Acosta for re-employment.

Ms. Marshall has no permanent restrictions for her right knee. She was discharged by Dr. Haas for her right knee on August 11, 2008 and was not given any permanent restriction at that time. The doctor noted that she had excellent range of motion and stability. She returned to Dr. Haas in October 2008 for pain. The doctor noted that an x-ray revealed excellent alignment of the prosthesis and no evidence of loosening and recommended a surgical stocking for swelling, but felt that her pain was not concerning and that she would improve. No further treatment is documented.

Further evidence of Ms. Marshall's employability is the very small disability she suffered from her alleged 2007 injury to her right knee. She settled this claim with the employer for \$4,820.00 dollars to include TTD and medical benefits. While Ms. Marshall contends that her actual disability should be based on Dr. Swaim's rating, and not her stipulation with the employer, I find that she is bound to her stipulation regarding the extent of her disability pursuant to *Conley*. *Conley v. Treasurer of Missouri* 999 S.W.2d 269 (Mo.App. E.D.,1999). A claimant is bound to their stipulations because to do otherwise would be to permit them to re-litigate a claim. Ms. Marshall was represented by counsel in this settlement. Both she and her attorney signed the stipulation and presented it to the Administrative Law Judge for approval. Despite Ms. Marshall's attempt to rely on Dr. Swaim and Michael Dreiling that she is permanently and totally disabled, I find that those opinions are not conclusive in that they rely on Dr. Swaim's

50% disability rating to the right knee and are not consistent with Ms. Marshall's work history subsequent to termination from the employer. Furthermore, Ms. Marshall's own testimony shows that she is capable of employment on the open labor market.

For the reasons stated above I find the Second Injury fund is not liable for any disability in this matter.

Made by: \_\_\_\_\_  
Emily Fowler  
*Administrative Law Judge*  
*Division of Workers' Compensation*