

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

Injury No.: 09-021698

Employee: Alice Carrol McAnally  
Employer: Walmart (Settled)  
Insurer: Insurance Company of the State of Pennsylvania (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 December 28, 2012. The award and decision of Administrative Law Judge Emily Fowler, issued December 28, 2012, 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 7<sup>th</sup> day of August 2013.

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  
As to the Second Injury Fund Only**

Employee: Alice Carrol McAnally Injury No: 09-021698  
Employer: Walmart (Settled)  
Additional Party: Treasurer of the State of Missouri,  
Custodian of the Second Injury Fund  
Hearing Date: October 19, 2012 Checked by: ESF/cy

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: March 31, 2009
5. Location where accident occurred or occupational disease was contracted: Excelsior Springs, Clay County, Missouri
6. Was the above employee in the employ of the above employer at time of alleged accident or occupational disease? Yes
7. Did the employer receive proper notice? Yes
8. Did the accident or occupational disease arise out of and in the course of employment? Yes
9. Was the claim for compensation filed within time required by Law? Yes
10. Was the employer insured by the above insurer? Yes
11. Describe the work employee was doing and how the accident occurred or the occupational disease contracted: Employee was lifting a 25 pound ham out of a cooler with her right arm and felt a pop in her shoulder.
12. Did the accident or occupational disease cause death? No

13. Part(s) of body injured by accident or occupational disease: right shoulder
14. Nature and extent of any permanent disability: Permanent Total Disability
15. Compensation paid to-date for temporary disability: \$0
16. Value of necessary medical aid paid to date by employer? \$2,225.25
17. Value of necessary medical aid not furnished by employer? \$0
18. Employee's average weekly wages: \$350.00
19. Weekly compensation rate: \$233.33/\$233.33
20. Method of wages computation: By agreement

### **COMPENSATION PAYABLE**

21. Amount of Compensation payable from the Employer: N/A
22. Second Injury Fund Liability: None

Permanent total disability benefits from the Second Injury Fund, beginning on September 29, 2010. The Second Injury Fund is entitled to a full credit for 34 6/7 weeks. Thereafter, the Second Injury Fund is ordered to pay \$233.33 per week for Claimant's lifetime, pursuant to the Missouri Workers' Compensation Laws.

23. Future requirements awarded:

Said payments to begin September 29, 2010, 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 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Mark E. Kelly

**FINAL AWARD**  
**As to the Second Injury Fund Only**

Employee: Alice Carrol McAnally Injury No: 09-021698  
Employer: Walmart (Settled)  
Additional Party: Treasurer of the State of Missouri,  
Custodian of the Second Injury Fund  
Hearing Date: October 19, 2012 Checked by: ESF/cy

A hearing was held on October 19, 2012, before the Honorable Emily Fowler. Employee appeared in person and was represented by Mark E. Kelly and the Second Injury Fund was represented by Kim Fournier. 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, Walmart, was an employer operating under and subject to the provisions of Missouri Workers' Compensation Law on or about March 31, 2009, and was fully insured by Insurance Company of the State of PA;
- 2) that Alice Carrol McAnally was its employee and working subject to the law in Excelsior Springs, Clay County, Missouri;
- 3) that Employee notified the Employer of her injuries as required by law and her claim was filed within the time allowed by law;
- 4) that Employee's average weekly wage was \$350.00 resulting in a compensation rate of \$233.33 for temporary total disability and \$233.33 for permanent partial disability compensation;
- 5) that the Employer has paid temporary total disability compensation in the amount of \$0 and medical care costing \$2,225.25;

**ISSUES:**

The issues to be resolved by this hearing are as follows:

1. whether Employee sustained an accident arising out of and in the course and scope of her employment;

2. whether the Employee's prior disability was a hindrance or obstacle to her ability to maintain employment or to be employed should she become unemployed;
3. whether the Second Injury Fund is liable to the Employee for any disability

### **FINDINGS OF FACT**

Employee testified on her own behalf and presented the following exhibits, all of which were admitted into evidence without objection:

#### **Employee's Exhibits:**

- A. Stipulation for Compromise Settlement with Employer
- B. Deposition of P. Brent Koprivica, M.D.
- C. Medical Records of Northland Bone & Joint
- D. Medical Record of Bartlett Family Healthcare
- E. Medical Records of H. Andrew Pickett, M.D.
- F. Medical Records of Arnold L. Katz, M.D.
- G. Medical Records of Excelsior Springs Hospital
- H. Medical Records of St. Joseph East
- I. Medical Records of Kansas Medical Center-Department of Otolaryngology Head and Neck Surgery
- J. Medical Records of NEA Baptist
- K. Medical Records of NEA Clinic
- L. Medical Records of Liberty Hospital
- M. Deposition of Terry Cordray

Second Injury Fund presented the following exhibits, all of which were admitted into evidence without objection:

1. Deposition of Alice Carrol McAnally taken on August 30, 2011

## **MEDICAL EVIDENCE**

### ***Primary Injury***

Employee was initially seen by Dr. Dan Bartlett at the direction of her employer on April 1, 2009. Employee reported she was lifting a 25 pound box of meat the prior night when she heard a pop and felt immediate pain in her right shoulder. She reported no prior history of shoulder problems. Dr. Bartlett reported there was no warmth or erythema in the shoulder area but there was reduced range of motion, both passive and active. He also reported there was severe pain with attempted abduction, passive or active. He was concerned there was a rotator cuff tear and recommended a shoulder immobilizer with no use of her arm until cleared by an orthopedic surgeon. He provided work restrictions and prescribed Motrin 800 mg.

Employee saw her family physician, Dr. Andrew Pickett, on May 18, 2009, and he reported she was suffering severe pain to her right shoulder and it hurt her shoulder to move. Dr. Pickett performed a physical examination and noted her right shoulder was tender over the AC joint and over the long head of the biceps. His diagnosis was bicipital tendonitis to the right shoulder. He provided a trigger point injection of Lydocaine and Depomedrol. Employee continued to have pain in her shoulder and returned to Dr. Pickett on June 15, 2009. He reported her right shoulder pain had been hurting apparently down into her arm.

Employee subsequently saw by Dr. Arnold Katz on June 24, 2009, at Liberty Hospital. She was there for what he characterized as a follow up rheumatology clinic visit. His notes reflect he had seen Employee in January 2009. His records of the June 24, 2009, visit reflect she was off work because of a right shoulder injury which happened when she reached into a freezer unit to pull out a 20 pound ham and immediately heard a pop in her right shoulder. She had significant associated pain. He noted on physical examination that the abduction of her right shoulder was limited to 90° and was associated with significant pain. His diagnosis of the shoulder was adhesive capsulitis with injury happening at work. He also noted she was suffering osteoarthritis in her hands and spine as well as psoriatic arthritis which was stable. He gave her Methotrexate along with folic acid.

Due to an apparent dispute with the workers' compensation carrier, Employee did not receive additional treatment for her shoulder until she was seen by Dr. Eric Lingenfelter at Northland Bone & Joint on April 5, 2010. He noted she was seen for a re-evaluation regarding her shoulder. She reported that approximately a year prior she was getting into a shelf where there was a ham which weighed approximately 25 pounds. She stated that the location prevented her from using both hands and she had to reach in there with her right arm and she was lifting and pulling it out when she felt a pop. Employee reported she still suffered significant pain in her shoulder which caused her difficulty at night. Dr. Lingenfelter also noted she had been suffering from colon cancer and had received a colon resection. He reported x-rays showed osteoporosis and anterior lateral spur as well as some acromioclavicular joint degenerative changes. His diagnosis was right shoulder pain with suspicion of rotator cuff pathology and impingement syndrome. He reported a year of pain and no response to non-operative measure was an absolute indication for an MRI to evaluate the status of her rotator cuff. An MRI was subsequently performed on April 9, 2010, which showed degenerative changes of the glenoid fossa and a small partial tear of the articular surface of the supraspinatus tendon. It was also noted she had moderate severe degenerative joint

changes of the acromioclavicular joint.

Employee returned to Dr. Lingenfelter on August 4, 2010. She reported she was still suffering intermittent pain and informed Dr. Lingenfelter of her colon resection and five surgeries which was significant as to her consideration of surgical repair of the rotator cuff. Dr. Lingenfelter noted on physical examination she had pain over the acromioclavicular joint and positive Neer impingement test and Hawkins test. His assessment was right shoulder pain. He injected her shoulder and ordered her to follow up on a p.r.n. basis. He noted she was not working at this point and did not display anything to suggest that she needed surgery nor did she want to undergo the procedure.

### ***Pre-Existing Conditions***

Prior to this injury, Employee had a long history of other medical conditions. Employee treated at the Northeast Arkansas Clinic (NEA) in Jonesboro, Arkansas. In 2003 she was diagnosed with rheumatoid arthritis and was on Methotrexate. She reported she had morning stiffness with problems in her hands, knees, and feet. She also received Remaicaide infusions in 2003. She also suffered lower GI bleeding for which she received treatment in June 2003. Her medical history at that point reflected coronary artery disease, five strokes, COPD, and GERD. It was noted she had received a bilateral mastectomy but had no breast cancer. It was also noted by history that she had undergone an intracoronary artery stent in June 2002 at St. Joseph's East Hospital, Lexington, Kentucky and a heart catheterization in July 2002 at North Kansas City Hospital.

Employee subsequently moved to Excelsior Springs, Missouri, and transferred her treatment to Dr. Andrew Pickett. Dr. Pickett's notes from September 2008, report she was suffering right back pain and gallstones. A patient information questionnaire was completed on October 14, 2008, in conjunction with Dr. Pickett's treatment. He noted she had a 100% loss of hearing in her right ear and suffered heart problems, GI problems, strokes, diabetes, depression and anxiety, arthritis and psoriasis.

Employee saw Dr. Pickett on January 27, 2009. He reported she was having difficulty hearing out of her left ear. Employee reported she had always been deaf in her right but felt her left was getting worse. His diagnosis was deafness to the left ear secondary to cerumen impaction.

Employee also underwent two prior low back surgeries in 1964 and 1971. These records were no longer available due to their age.

### ***Employee's Testimony***

Employee testified she was born on June 15, 1939. She attended high school and some college at Maple Woods Community College. Employee testified she began her working career in 1956 and worked for several different employers through 1977. In that year, she began working at her husband's automobile business as a bookkeeper and title clerk through 2006. At this shop, she worked on a part-time basis, keeping books and filling out forms for automobile titles. During this timeframe, she also worked for Excelsior Springs Medical Center from 1981 to 1986 as a secretary.

She also did some other part-time work from 1990 to 1996 for KC Auto Auction and Bill Woods Ford, completing forms for automobile titles. Employee returned to full-time employment in 2006, when she began working at a truck stop. In 2008, she began working for Wal-Mart, working 40 hours a week on a full-time basis.

Employee testified she injured her shoulder on March 31, 2009. While waiting on a customer, she reached in a cooler to pick up a ham and as she lifted it, felt a pain and heard a pop in her right shoulder. She finished slicing the ham and then reported the injury to her deli manager. Someone from Wal-Mart drove her to the hospital where she underwent a drug test. They did not schedule an appointment for her shoulder until the following day. She was placed in an immobilizer and put on light-duty. On light-duty, she was a greeter at the door but had difficulty performing this job. She had to move carts and pull four or five carts up to the front and had difficulty moving and tugging on the carts with one arm while the other was immobilized. Accordingly, she ended up taking leave. She ultimately saw Dr. Lingenfelter who injected her shoulder and discussed surgical options. Ultimately, Employee did not undergo surgery on her shoulder.

Prior to this injury, Employee had several significant medical conditions including a prior low back condition that resulted in two separate surgeries, rheumatoid arthritis that affected her hands, feet and ankle and a heart condition. Employee testified she had difficulty working with her rheumatoid arthritis. She took frequent breaks and co-workers would often help her when she was having a bad day. She called in sick because of the rheumatoid arthritis from time to time because of the pain. Employee testified she had difficulty with her low back because of the pain. She had difficulty standing for long periods of time and has to sit three or four times while cooking a meal. She is required to change her position from sitting to standing on a regular basis because of her low back pain. She has also been on and off pain pills since her surgery including taking high doses of ibuprofen. She has not had any subsequent injuries to her low back since 1971. Employee was diagnosed with coronary artery disease in 2002, and has had ongoing medications for her heart since that time. She has consistently seen a doctor every six months for her heart and has had two stints placed. Prior to 2009, her heart condition caused her to be fatigued.

Prior to 2009, Employee had a period of time in which her rheumatoid arthritis caused her significant pain. As a result, she applied for Social Security Disability in 1988, and began receiving those benefits. She received those benefits until 2001, at which time she became eligible for retirement benefits. During that period of disability, she received a right to work letter from Social Security Disability that allowed her to return to work part-time. However, Employee began working full-time at a truck stop in 2006. After moving back to Excelsior Springs in 2007, Employee applied for and received full-time work at Wal-Mart. She was able to perform that job until her shoulder injury in 2009.

As a result of her right shoulder injury, she has lost her range of motion and is not always able to lift her shoulder above her head. She has pain in her shoulder on a daily basis and she takes ibuprofen to alleviate that pain. She used hot packs to relieve the pain. Her shoulder affects her sleep and her ability to get dressed. She has difficulty fixing her hair and putting on make-up. Employee testified she chose not to undergo shoulder surgery because of some difficulties she had with a colon infection after her injury in 2009.

Between June and November 1999, Employee was diagnosed with colon polyps that were removed. This resulted in some infections and a requirement for a resection that ultimately led to seven surgeries during that time period. She had already been terminated from Wal-Mart.

Employee testified she does not do much during a typical day. She has someone from family services that comes and does her housework for her five days a week. She is unable to plant and do yard work and can no longer quilt. She is able to mow on her riding mower which is the extent of her yard work. She attempted to apply for jobs following her injury in 2009, but was not hired for any of those jobs she applied for. She had three interviews for a position at Liberty Hospital but ultimately did not receive an offer.

Employee settled her claim with her Employer for 15% of the right shoulder at the 232 week level.

### **EXPERT TESTIMONY**

#### ***P. Brent Koprivica, M.D.***

Dr. Koprivica evaluated Employee on February 14, 2011, for an independent medical evaluation. Dr. Koprivica reviewed all the medical records, took a history from Employee, and performed a physical examination. Dr. Koprivica evaluated Employee's March 31, 2009, injury to her right shoulder and reported she had several significant pre-existing disabilities. These disabilities included a hearing loss, a history of arthritic involvement, particularly involving both hands, osteoarthritis involving multiple joints as well as inflammatory arthritic involvement associated with rheumatoid arthritis, two prior surgeries performed at the L4-5 level, and a cardiovascular impairment. Dr. Koprivica testified while he was performing an evaluation, he attempted to identify a pre-injury level of disability, particularly things that have a vocational impact or hindrance or obstacle to employment. He specifically excluded any development of a new disability subsequent to the work injury.

After performing his independent medical evaluation, Dr. Koprivica concluded Employee's work injury of March 31, 2009, was the direct, proximate, and prevailing factor in her development of disabling right shoulder impairment based on partial rotator cuff tear, injury to the acromioclavicular joint with development of impingement and secondary adhesive capsulitis. He reported the structural problem in Employee's shoulder was to a level of significance to deem surgery appropriate. However, the clinical decision to not perform surgery relates in part to her multiple other impairments that predated her March 31, 2009, injury. He felt the decision not to do surgery was reasonable as she was at risk for developing an infection. As a result of her March 31, 2009, injury, Dr. Koprivica felt she had suffered a 25% permanent partial disability of the right upper extremity at the level of the shoulder. He restricted her from repetitive or sustained activities above shoulder girdle level on the right and avoid repetitive pushing or pulling tasks for the right upper extremity. He also felt she should avoid repetitive reaching with her right upper extremity and limit her lifting to 10 pounds for below chest level activities with the right arm. After evaluating her injury attributable to the March 31, 2009, accident, he did not feel that injury was totaling disabling when considered in isolation, in and of itself. However, he felt she had several significant conditions which rendered her permanently and totally disabled when combined with her March 31, 2009, injury.

Dr. Koprivica felt Employee's back injury was a hindrance or obstacle to her employment as it limited her ability to perform detailed tasks while working at an auto company she owned with her husband. She had difficulty bending and twisting as was required to clean the car. She was in a self-employment situation that allowed her to self-accommodate but she could not do those types of tasks. She also had difficulty because of her heart condition but because she was self-employed, she was able to rest when needed and try not to over-exert herself. That way she could avoid the chest pains and shortness of breath. She also had difficulty because of the rheumatoid arthritis which impacted several joints in her hands as well as her feet. Employee was unable to perform any type of job that was hand intensive or required repetitive grasping or pinching or a lot of force on a repetitive basis. Dr. Koprivica felt she would be unable to perform a job doing assembly work because of the problems with her hands. She also had complete deafness in her right ear and a hearing deficit in her left ear that affected her ability to hear. She has difficulty hearing normal speech as a result of the hearing loss.

Dr. Koprivica believed Employee had suffered from hearing loss issues which was an industrial disability. He noted Employee lost her hearing in her right ear while in the third grade. As a result, she is totally deaf in the right ear but had also suffered hearing loss in the left ear for which she had been prescribed a hearing aid. Because of her hearing loss, Employee was hindered in her actual work, while interacting with co-workers or customers. Dr. Koprivica noted Employee's co-workers often needed to tap her on the shoulder to get her attention and speak louder so she could hear them. As a result of her bilateral hearing loss, he felt her hearing loss impacted her work, interactions with co-workers and was a hindrance and obstacle to employment.

Dr. Koprivica reviewed an audiogram performed on January 12, 2011, which confirmed the total hearing loss on the right. As a result of the total hearing loss on the right, he assigned 40 weeks of disability predating March 31, 2009. As a result of the hearing loss evidenced in the audiogram of the left ear, he felt there was an additional 2.1 weeks of disability.

Employee also suffered from arthritic involvement involving both hands, as well as degenerative osteoarthritis and inflammatory arthritic involvement associated with rheumatoid arthritis. As a result of the arthritis, she was restricted from repetitive hand use, especially repetitive pinching or repetitive grasping types of activities. Dr. Koprivica felt Employee had suffered a 15% permanent partial disability of the right hand at the level of the wrist, as well as 15% permanent partial disability of the left hand at the level of the wrist.

Employee also suffered from a prior back injury which resulted in two prior lumbar surgeries. Her initial injury was a right sided L4-5 disk herniation with right lumbar radiculopathy for which she underwent a hemilaminectomy and discectomy on the right at L4-5 by Dr. Keith Whittaker. Approximately seven years later, she had a recurrent disk herniation which required a revision of the L4-5 discectomy on the right. As a result of her low back injuries, she self-limited and had to take breaks because of her back pain. She could not tolerate sustained or awkward postures as required when she was performing detailing tasks while working on cars. She was also limited in what she could lift and carry as a result of her back injury. She was capable of lifting up to 50 pounds on a one-time basis, but to repetitively lift or carry, she was limited to less than 20 pounds.

Based upon her lumbar condition, Dr. Koprivica felt she was restricted generally to light physical demand level activity. He restricted her from frequent or constant bending at the waist, pushing, pulling or twisting and recommended she avoid sustained or awkward postures of the lumbar spine. As a result of her prior lumbar condition, he believed she had suffered a 25% permanent partial disability to the body as a whole.

Employee also suffered from cardiovascular disease which was diagnosed in 2002. She had unstable angina which required a heart catheterization and one stent. On April 26, 2006, she had a stent placed in the left marginal artery as a result of recurring anginal symptoms. As a result of her Class 2 cardiovascular impairment, he felt she had suffered a 15% permanent partial disability to the body as a whole. He restricted her from work activities that required medium or heavier metabolic demand, especially with environmental extremes. Dr. Koprivica acknowledged Employee had a heart catheterization in June 2010. He testified the coronary disease was already impacting her as an industrial disability prior to 2009. However, in his opinions he specifically excluded the new cardiac event in his overall assessment of the severity of the disability that predated her work injury.

Dr. Koprivica was asked whether a percentage of disability with regards to her coronary artery disease was accurate as he did not see her until February 2011. Dr. Koprivica felt it was possible if testing was done before and after to compare that it might change his opinion. However, he did not think it was probable and his judgment is based on what he felt was probable. Dr. Koprivica testified that although a doctor did not place specific restrictions on Employee for her prior conditions that did not mean she did not have any restrictions or limitations.

Dr. Koprivica felt when one combined the multiple severe pre-existing industrial disabilities with the additional disability attributable to the March 31, 2009, injury, it was his opinion there was a significant synergism with enhancement of the disabilities above the simple arithmetic sum of the separate disabilities. This combination, in his opinion, rendered Employee permanently and totally disabled. He felt the permanent total disability was a result of the combination of the March 31, 2009, injuries with her pre-existing disabilities.

***Vocational Evidence - Terry L. Cordray, M.S., CRC, CCM, ABVE***

Terry Cordray performed a vocational evaluation for Employee on June 1, 2011. As part of his examination, he conducted a vocational interview as well as vocational testing. He reported at the time of the evaluation, Employee had not taken any pain medication as she knew she would be participating in a vocational evaluation. He also noted she had difficulty hearing during the interview and testing and observed her standing and limping throughout the interview and testing. Mr. Cordray reviewed the medical records as well as the limitations and restrictions provided throughout those records. He also took an educational background from Employee and noted for vocational rehabilitation purposes, she was to be considered a high school graduate. Although she had taken real estate classes approximately 30 years prior, they were no longer relevant. Likewise, the training she received at a community college in 1990 was not marketable. She only attended for one semester and earned below average grades. Mr. Cordray felt the 12 hours of college credits were not marketable by themselves. Mr. Cordray felt Employee's age was significant in that she was 73 years old now, 71 at the time he evaluated her and vocational experts agree that individuals

over 55 have an extremely difficult time adjusting to new work processes and procedures. In addition, she has to compete with younger individuals for a job.

Mr. Cordray noted prior to the primary injury, Employee had a period of time in which she received social security disability beginning in the late 1980's because of the arthritis to her hands. The arthritis in her hands prevented her from doing full-time work in such jobs as general clerical and secretarial in which she would be required to do frequent keyboarding.

Mr. Cordray also took a work background from Employee. From 1996 until 2006, she worked for her husband performing part-time work as a title clerk. In 2006, she returned to full-time work at Flash Market Truck Stop, taking payments and making change. She also was required to restock the beer cooler, requiring her to lift and carry over 20 pounds and occasionally cook. Employee then relocated to Excelsior Springs where she began working at Walmart on November 4, 2008, until the time she was no longer able to work due to her work injury there. Mr. Cordray reported Employee was required to broil and deep fry entrées and side dishes. She was also required to stock coolers and put food items in containers. She would lift and carry hams weighing 25 pounds as well as boxes of frozen chickens weighing 50 pounds.

Based upon Employee's work background, he felt her primary occupations throughout her life had been a title clerk and a cashier. However, he did not feel she had obtained any skills in the past 15 years that were transferable as title clerk or a cashier. Therefore, he believed she was an unskilled worker for sedentary and lighter types of occupations. Mr. Cordray also performed vocational testing and opined she was in the average range in spelling and math and of average intelligence. However, given her age of 71 years, it was not realistic to expect vocational rehabilitation.

Mr. Cordray felt Employee's work restrictions from her primary injury were significant in keeping her from doing jobs such as a deli cook which required her to reach overhead and do a lot of repetitive reaching activities with her dominant right hand while performing jobs such as cooking. Mr. Cordray felt Employee could not perform any jobs which required normal hearing. She could not interact in public in any type of sales jobs. Additionally, she could not work as a cashier because of the interaction as well as the constant requirement to use her hands. Other unskilled sedentary jobs such as assembly jobs and data recording are all jobs that would require constant use and repetitive use of her hands which she would be unable to perform. Mr. Cordray felt the restrictions on Employee's back and cardiovascular impairment would place her in a sedentary or light category and all of those jobs she would be unable to do because of her hands, hearing and right shoulder. Mr. Cordray felt Employee was permanently and totally disabled in the open labor market and that total disability resulted in a combination of her right shoulder injury with her prior medical conditions.

Mr. Cordray testified beginning in 2007, Employee worked for an employer in which she was not hired by a family member. Mr. Cordray testified Employee worked at a truck stop in 2006, before working at Wal-Mart for seven months before her injury. Mr. Cordray testified that while on paper, she might not have appeared employable prior to 2009; she was able to obtain a job at Wal-Mart and work successfully for seven months until the time of her injury in 2009. Mr. Cordray testified her prior job at the truck stop in 2006, was "pretty much" within the lifting restrictions

assigned by Dr. Koprivica. He felt she might have had some difficulty in communicating with customers but it certainly would not be impossible.

After performing the evaluation, reviewing the medical records and performing vocational testing, Mr. Cordray opined Employee had a vocational profile of an older individual with a high school education and had the physical ability to perform the work of a title clerk and a deli clerk. However, subsequent to her injuries, she can no longer perform her previous jobs. Based upon the review of the medical records in consideration with Employee's educational background and skill level, Mr. Cordray believed she was totally disabled. He felt this total disability was a result of a combination of her March 31, 2009, injury combined with her pre-existing conditions. Mr. Cordray concluded it was not realistic to expect an employer, in the normal course of business hiring individuals to perform work as it is customarily performed, would reasonably be expected to hire a 71 year old woman with only a high school education, no marketable skills, a current history of right shoulder injury, with prior limitations to her hands and low back, as well as deafness in one ear. Therefore, he believed Employee was totally disabled.

## **RULINGS:**

### ***Accident***

The Second Injury Fund has challenged whether Employee suffered an accident in the course and scope of her employment.

The courts have held that when a condition is beyond the understanding of a lay person, expert testimony is required. "For an injury to be compensable the evidence must establish a causal connection between the accident and the injury. The testimony of a claimant or other lay witness can constitute substantial evidence of the nature, cause and extent of the disability when the facts fall within the realm of lay understanding...An injury may be of such a nature (however) that expert opinion is essential to show that it was caused by the accident to which it is ascribed." (Citations omitted). Griggs v. A. B. Chance Company, 503 S.W.2d 697, 704 (Mo.App. 1974). The courts have further noted that, "medical causation not within common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause." Selby v. Trans World Airlines, Inc., 831 S.W.2d 221, 222 (Mo.App. 1992).

The Second Injury Fund insinuated in Dr. Koprivica's deposition the Employee potentially injured her shoulder while picking up her disabled husband on a regular basis. However, there is no evidence to support this insinuation.

Employee testified she injured her right shoulder while lifting a ham out of the cooler. She immediately reported the injury to her Employer and was taken directly to a health facility for a drug test by her Employer. All the medical records contemporaneous to the accident, report the same mechanism of injury. The medical records from Employee's family physician were also put into evidence. Although Employee saw her primary care physician, Dr. Pickett, on multiple occasions prior to the injury, there was no evidence Employee ever reported pain in her right shoulder prior to the March 31, 2009, injury. All the medical evidence is consistent with the mechanism of injury as Employee reported it on March 31, 2009. Dr. Koprivica and Dr.

Lingenfelter felt her shoulder injury was causally related to her March 31, 2009, accident. There is no evidence to the contrary.

Accordingly, I find Employee proved that an accident occurred while in the course and scope of her employment,

### ***Nature and Extent of Claimant's Disability***

Employee has asserted a claim for permanent and total disability benefits from the Second Injury Fund.

Section 287.020.7, RSMo, provides, "The term "total disability" as used in this chapter shall mean inability to return to any employment and not merely inability to return to the employment in which the employee' was engaged at the time of the accident." The phrase "inability to return to any employment" has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment." Kowaiski v. M-G Metals and Sales, Inc., 631 S.W.2d 919, 922 (Mo.App. 1982). The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. Sullivan v. Masters Jackson Paving Co., 35 S.W.3d 879, 884 (Mo.App. 2001), overruled in part on other grounds by Hampton, 121 S.W.3d at 225; Reiner v. Treasurer of the State of Mo., 837 S.W.2d 363, 367 (Mo.App. 1992), overruled in part on other grounds by Hampton, 121 S.W.3d at 229; and Lawrence v. Joplin R-VIII School Dist., 834 S.W.2d 789, 792 (Mo.App. 1992). The key question is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person's present physical condition, reasonably expecting the employee to perform the work for which he or she is hired. Brown v. Treasurer of Missouri, 795 S.W.2d 479, 483 (Mo.App. 1990); Reiner at 367; and Kowalski at 922. See also Thornton v. Hass Bakery, 858 S.W.2d 831, 834 (Mo.App. 1993).

Section 287.220, RSMo, creates the Second Injury Fund and sets forth when and in what amounts compensation shall be paid from the fund in "[a]ll cases of permanent disability where there has been previous disability." In deciding whether the fund has any liability, the first determination is the degree of disability from the last injury considered alone. Landman v. Ice Cream Specialties, Inc., 107 S.W.3d 240, 248 (Mo.banc 2003), overruled in part on other grounds by Hampton, 121 S.W. 3d at 224 (Mo banc 2003); Hughey v. Chrysler Corp., 34 S.W.3d 845, 847 (Mo.App. 2000). Accordingly, pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined. If the last injury in and of itself renders the employee permanently and totally disabled, then the fund has no liability and the employer is responsible for the entire amount of compensation. Id. at 248.

The first issue to be determined is whether the Employee suffered any disability and if so, the nature and extent of Employee's disability. Subsequent to that, 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 she is permanently

and totally disabled. There is no credible evidence that the Employee was rendered permanently and totally disabled as a result of the injury caused by her March 31, 2009 accident considered

alone and without regard to her alleged preexisting 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 Employee was not rendered permanently and totally disabled due to her last accident alone. As previously stated, the Employer in this case is only liable for permanent partial disability payments for 15% percent to the right upper extremity at the 232 week level, which has previously been determined pursuant to the stipulation and settlement agreement between the Employer and Employee. This Court finds this determination of disability to be reasonable.

Since I have determined that Employee's March 31, 2009 accident resulted only in permanent partial disability and that that disability did not cause the Employee to be permanently and totally disabled in and of itself, the next issue is the Second Injury Fund's liability. In order to establish Second Injury Fund liability for permanent total disability benefits, the Employee must prove the following: number one, that he has permanent disability resulting from a compensable work-related injury. See §287.220.1 RSMo (1994). Two; that he has permanent disability predating the compensable work-related injury, which is "of such seriousness as to constitute a hindrance or obstacle to employment or to obtain reemployment if the employee becomes unemployable." §287.220.1 RSMo (1994); Messex v. Sach's 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, 895 S.W.2d 591 (Mo.App. 1995); and Wuebbeling v. West County Drywall, 898 S.W.2d 615 (Mo.App. 1995). And, number three, that the combined effect of the disability resulting from the work-related injury and the disability that is attributable to all conditions existing at the time the last injury was sustained results in permanent total disability. Boring v. Treasurer, 947 S.W.2d 483 (Mo.App. 1997); Reiner v. Treasurer, 837 S.W.2d 363 (Mo.App. 1992); Frazier v. Treasurer, 869 S.W.2d 152 (Mo.App. 1994). See Miller v. State Treasurer, 978 S.W.2d 808 (Mo.App. 1998), where the Court held Claimant's fibromyalgia from last injury, combined with preexisting aneurysm, was sufficient to establish permanent total disability against the Second Injury Fund.

The first requirement has already been met, and a determination of percentage of that disability has been made pursuant to the settlement stipulation entered into between Employee and the employer.

The next issue to be determined by this Court is whether the Employee's prior disability was a hindrance or obstacle to her ability to maintain employment or to be employed should she become unemployed. Employee testified she had difficulty hearing her co-workers and customers because of her complete hearing loss in her right ear coupled with the hearing loss in her left ear. She also

had difficulty bending, twisting and stooping because of her low back. Additionally, she had difficulty using her hands repetitively because of the arthritis. In reviewing the medical records, the reports from Dr. Koprivica and Employee's testimony, this Court finds that Employee's prior disabilities do, in fact, cause a hindrance or obstacle to employment or to Employee's ability to obtain reemployment if she became unemployed.

After performing a medical examination and reviewing all of the medical records, Dr. Koprivica opined Employee suffered from numerous pre-existing conditions including osteoarthritis, arthritis that affected both hands, two prior lumbar surgeries, coronary artery disease and hearing loss. Employee testified to the numerous ways in which she was limited because of these injuries. Dr. Koprivica felt when one combined the multiple severe pre-existing industrial disabilities with the additional disability attributable to the March 31, 2009, injury, it was his opinion there was a significant synergism with enhancement of the disabilities above the simple arithmetic sum of the separate disabilities. This combination, in his opinion, rendered Employee permanently and totally disabled. He felt the permanent total disability was a result of the combination of the March 31, 2009, injuries with her pre-existing disabilities.

Mr. Cordray was the only vocational expert to evaluate Employee. Based upon his review of the medical records in consideration with Employee's educational background and skill level, Mr. Cordray believed she was totally disabled. He felt this total disability was a result of a combination of her March 31, 2009, injury combined with her pre-existing conditions. Mr. Cordray concluded it was not realistic to expect an employer, in the normal course of business hiring individuals to perform work as it is customarily performed, would reasonably be expected to hire a 71 year old woman with only a high school education, no marketable skills, a current history of right shoulder injury, with prior limitations to her hands and low back, as well as deafness in one ear. Therefore, he believed Employee was totally disabled.

While the Second Injury Fund makes the argument Employee was unemployable in the open labor market prior to her March 31, 2009, injury, the fact remains she held two full-time jobs in 2006, and 2008. This included working at a truck stop as a cashier. She waited on customers, taking payment and making change. She also stocked the beer cooler requiring her to lift and carry over 20 pounds and occasionally cooked. She performed this job for three months before moving to Excelsior Springs. In November 2008, Employee was hired by Wal-Mart to work in the deli. She was required to boil and deep fry entrees and side dishes. She stocked coolers and put food items in containers. She was required to lift and carry items such as hams weighing 25 pounds and boxes of frozen chicken weighing up to 50 pounds. Employee demonstrated the ability to perform this job from November 4, 2008, until her injury on March 31, 2009, and then continue to perform light-duty work until she was unable to do so because of her right shoulder. There is no evidence Employee was unable to perform her job at the truck stop because of her physical injuries. Likewise, there is no evidence Employee was unable to perform the essential tasks while working at Wal-Mart. Although Employee's restrictions were significant and impacted her ability to perform jobs, the fact is she was able to obtain and maintain employment until the time of her termination in July 2009, and was employed in the open labor market.

I find the testimony of Dr. Koprivica and Terry Cordray to be credible.

The Second Injury Fund argues Employee was totally disabled prior to her last accident.

Although Mr. Cordray commented that it would be difficult to place Employee, considering her vocational profile prior to her last accident, he noted that she was in fact able to obtain two different full time employments on her own. This Court finds that she was working full time at jobs obtained in the open labor market. There was no indication that she obtained these jobs through family or friends. Further, although there was some minor self accommodation of sitting occasionally when she needed a break, bathroom breaks as she needed them and occasional requests for help from her co employees, there was no formal significant accommodation from either employer. Employee was working full time for seven months prior to her last accident. She was not permanently and totally disabled prior to her last accident.

Based upon the evidence presented, I find that Employee is permanently and totally disabled. I find that no employer could reasonably be expected to hire Employee in her current condition, particularly when one considers the chronic pain Employee experiences, and her significant medical restrictions. I further find that the total disability is a result of a combination of her pre-existing disabilities and her right shoulder disability she suffered on March 31, 2009. This fact is substantiated by the testimony of all experts involved. Evidence to the contrary is non-existent.

The evidence establishes that Employee reached maximum medical improvement on September 29, 2010. The Second Injury Fund is entitled to a credit for 34 6/7 weeks and, thereafter is directed to pay Employee the sum of \$233.33 per week for permanent total disability commencing on May 31, 2011, and continuing for the remainder of Employee's life pursuant to Missouri Workers' Compensation laws.

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