Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No. 06-058601

Employee: James McClary

Employer: Schnucks Markets, Inc. (Settled)

Insurer: Self-Insured (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 November 25, 2015, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued November 25, 2015, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 1st day of April 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

Issued by DIVISION OF WORKERS' COMPENSATION

AWARD

Employee:	James McClary	Injury No.: 06-058601
Dependents:	N/A	Before the **Division of Workers' Compensation** Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Employer:	Schnucks Markets, Inc. (settled)	
Additional Party:	Second Injury Fund	
Insurer:	Self-Insured (settled)	
Hearing Date:	August 24, 2015	Checked by: JED

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? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: June 14, 2006 (stipulated)
5. State location where accident occurred or occupational disease was contracted: St. Louis County
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:
    Claimant sustained bilateral shoulder injury due to repetitive trauma.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: both shoulders
14. Nature and extent of any permanent disability: 22% of each shoulder
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? N/A

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

18. Employee's average weekly wages: N/A

19. Weekly compensation rate: $494.52/$385.08

19. Method wages computation: Stipulation.

COMPENSATION PAYABLE

20. Amount of compensation payable:

102.08 weeks PPD from Employer (settled)

21. Second Injury Fund liability: No

TOTAL: $ -0-

22. Future requirements awarded: None

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	James McClary	Injury No.: 05-140754
Dependents:	N/A	Before the **Division of Workers' Compensation** Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Employer:	Schnucks Markets, Inc. (settled)	
Additional Party:	Second Injury Fund	
Insurer:	Self-Insured (settled)	
Hearing Date:	August 24, 2015	Checked by: JED

This case involves two separate Claims for Compensation: 05-140754 (December 31, 2005) and 06-058601 (June 14, 2006). The testimony and exhibits in this record constitute the evidence in each Claim. Each Claim is disputed by the Second Injury Fund ("SIF"). Employer/Insurer previously settled its risk of liability. Separate Awards issue on each Claim. These cases may be referred to herein as the first and second cases, chronologically.

Claimant seeks PTD benefits against the SIF in the second Claim. Both parties are represented by counsel. The single issue for trial is the liability of the SIF.

FINDINGS OF FACT

1. Claimant, age 67, worked as a meat cutter his entire working life. He had worked for Employer since the mid 1990's.

2. In the first case, on or about December 31, 2005, claimant began treatment for bilateral carpal tunnel syndrome (CTS) due to repetitive trauma and underwent bilateral surgical releases with Dr. Henry Ollinger who placed him at maximum medical improvement (MMI) on October 23, 2006 without medical restrictions. Claimant settled this Claim for 17.5 percent PPD of each wrist.

3. In the second case, on or about June 14, 2006, Claimant began treatment for bilateral shoulder problems due to repetitive trauma and underwent bilateral surgeries with Dr. Herbert Haupt who placed Claimant at MMI on August 14, 2007 without medical restrictions. Claimant settled this Claim for 22 percent PPD of each shoulder. NOTE: The parties stipulated an MMI date of December 23, 2007 for this second case.

4. The record includes a May 1, 2007 cervical spine injury for which Claimant underwent multiple procedure surgery with Dr. Daniel Riew in 2009. (Group Exhibit A-7, p. 5.)

5. Employee testified that he had a cardiac incident in 1990 and treated at Saint Louis University Hospital. He stated those records were unavailable and did not identify a treating physician for that incident which Claimant's forensic expert characterizes as an angioplasty with stent implant. Employee worked another 17 years after that incident.

6. Employee identified his last day at work as Christmas 2007.

Opinion Evidence

7. Claimant offered the deposition of Dr. Robert Poetz who, in 2009, examined Claimant and reviewed medical records. Dr. Poetz diagnoses of the injuries in the first and second Claims herein parallel the medical records and the above-described settlements. He specifically rated the left wrist at 35 percent PPD and the right wrist at 40 percent PPD. He rated the shoulder injuries at 35 percent PPD each. He also diagnosed and rated a work-related repetitive motion cervical PPD of 50 percent.

8. Dr. Poetz also rated *pre-existing* disabilities of 5 percent of each shoulder, 25 percent of the cardiovascular system and 5 percent of the cervical spine. Dr. Poetz described Claimant's job as follows:

> His job is that of a meat cutter lifting meat products and boxes that weighed up to 100 pounds, unloading trucks, lifting 30 to 40 boxes a day frequently overhead, wrapping and packaging meats. […] Cold temperature work environment getting in and out of the freezer all day." (Exhibit A-11. p. 7.)

9. Dr. Poetz render an ultimate opinion that Claimant was permanently and totally disabled "as a result of the combination of the December 1, 2005, June 14, 2006 and May 1, 2007 work-related injuries and his pre-existing conditions." (Exhibits A-7, p. 12; A-11, p. 13.) The 2007 case is not part of this proceeding.

10. Claimant offered the deposition of Timothy Lalk, licensed counselor, who examined Claimant, reviewed the medical records and prepared a narrative report. Mr. Lalk found Claimant unemployable in the open labor market based on the combination of disabilities, including the cervical spine . (Exhibits A-10 and A-12.)

11. Mr. Lalk noted that Claimant stated he had no medical condition that limited him prior to the subject work injuries herein. (Exhibit A-10, p. 14.)

12. Regarding the neck, Mr. Lalk's report articulates medical restrictions regarding the neck and he agreed that Dr. Polinsky's statement that Claimant "stop work" referred to butcher work, not all work. Mr. Lalk stated there are no jobs available that would accommodate Claimant's need to relieve disabling neck pain symptoms. (Exhibits A-10, p. 16-17; A-12, pp. 31-32, 37-38.)

13. Although unrebutted in the record, the exhibits contain some important admissions against interest and reliance on post-injury deterioration of Claimant's cervical spine.

RULINGS OF LAW

Liability of the SIF and Expert Testimony

SIF liability is premised on synergistic combination of the primary and pre-existing disabilities. Synergy is the concept in which the current PPD and the pre-existing PPD are found, in combination, to create a "substantially greater" disability, or an increased overall disability, and for which the employer should not be held liable. Section 287.220.1 RSMo (2000). The SIF is not responsible for subsequent deterioration, i.e. during the period 2012 and date of hearing. Lawrence v. Joplin R-VIII School Dist., 834 S.W.2d 789 (Mo.App. 1992).

A claimant must prove all the essential elements of his claim. Fischer v. Archdiocese of St. Louis, 793 S.W.2d 195, 198 (Mo.App. 1990). Dolen v. Bandera's Cafe, 800 S.W.2d 163, 164 (Mo.App. 1990). Dunn v. Treasurer, 272 S.W.3d 267, 272 (Mo.App. 2008). Regarding SIF benefits requirements under Section 287.220.1 RSMo (2000), the Supreme court held in 2013 that there must be at least one pre-existing permanent partial disability (PPD) that meets the statutory threshold in order to trigger SIF liability and, further, the threshold requirement does not apply to the last (or primary) injury. Treasurer v. Witte, 414 S.W.3d 455, 467 (Mo. banc 2013).

In addition, it has been held that in the determination of SIF liability "the level of permanent disability associated with an injury cannot be determined until it reaches the point of maximum medical improvement." A finding of when "no further progress may be attained" is essential in ascertaining when permanency occurs and, thus, when payment can be calculated. Hoven v. Treasurer, 414 S.W.3d 676, 678 (Mo.App. 2013), *citing* Cardwell v. Treasurer, 249 S.W.3d 902, 910 (Mo.App. 2008).

The SIF is liable for permanent total disability benefits when that disability is the result of a combination between the primary injury and the prior disabilities. The fact finder need not rely exclusively on expert testimony but may consider the whole record and any reasonable inferences that may be made from the evidentiary record. Carkeek v. Treasurer, 352 S.W.3d 604, 608 (Mo.App. 2011).

* * *

Regarding expert testimony, medical causation opinion which is not within the common knowledge or experience of lay understanding, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause. McGrath v. Satellite Sprinkler's Sys., 877 S.W.2d 704, 708 (Mo. App. 1994). As with all proofs in complex medical evidence, a medical expert's opinion must be supported by facts and reasons proven by competent evidence that will give the opinion sufficient probative force to be substantial evidence. Silman v. Wm. Montgomery & Assoc., 891 S.W.2d 173, 176 (Mo.App. 1995), *citing* Pippin v. St. Joe Mineral Corp., 799 S.W.2d 898, 904 (Mo.App. 1990). Any weakness in the underpinnings of an expert opinion goes to the weight and value thereof. Hall v. Brady Investments, Inc., 684 S.W.2d 379 (Mo.App. 1984). Admission of a contrary matter weakens the value of expert opinion. DeLisle v. Cape Mutual Insurance, 675 S.W.2d 97

(Mo.App. 1984). It is reasonable to expect an expert to be fully informed about pre-existing disabilities. Plaster v. Dayco Corp., 760 S.W.2d 911 (Mo.App. 1988). See also Bersett v. National Super Markets, Inc., 808 S.W.2d 34, 36 (Mo.App. 1991).

PPD Pre-Existing both Cases

The pre-existing shoulder and neck PPD amount are found to be consistent with the 5 percent rating assigned to each. The cardiovascular condition is found to have resulted in 10 percent PPD when analyzed in light of Claimant's remarkable work record after 1990 and his parallel admissions to his vocational expert, Mr. Lalk.

First Case

The first case contemplates a primary injury of bilateral CTS injury which PPD must be evaluated against the above-described alleged pre-existing disabilities, at least one of which must meet the statutory threshold. The record supports a finding of permanency for the primary injury of 17.5 percent PPD of each wrist due to CTS. Regarding alleged pre-existing disabilities, only the alleged cardiovascular condition is colorable since neither Claimant's expert testimony, nor the balance of the record, supports a finding that the shoulder and neck PPD meet the statutory threshold. See Subsection 287.220.1. Dr. Poetz rated the alleged cardiovascular at 25 percent PPD based on the angioplasty and stent implant incident.

Dr. Poetz also described Claimant's heavy duties at work, including cold temperature shocks, i.e. "… in and out of the freezer all day." While Claimant testified he received assistance from his co-workers, that assistance did not occur until after these two reported injuries. Claimant worked another 17 years after the cardiac event. Dr. Poetz did not reconcile this long post-incident work history and heavy duties with his rating. Again, the treatment records are not among the medical exhibits. Claimant also told his vocational expert that he had no problems after the cardiac incident. The evidence demonstrates Claimant sustained a 10 percent PPD as a result of the alleged cardiac incident which does not meet the statutory threshold of 12.5 percent. This precludes a finding of SIF liability in the first case.

Second Case

The second case contemplates a primary injury of bilateral shoulder injury which PPD must be balanced against the above alleged pre-existing disabilities *plus* the primary PPD found in the first case involving CTS which has a 2005 injury date. The record supports a finding of permanency for the primary injury of 22 percent PPD of each shoulder due to repetitive trauma. The above analysis holds here regarding the below-threshold cervical and shoulder PPD findings of pre-existing PPD and the cardiovascular PPD found above at 10 percent.

The analysis of the SIF liability due to combination with CTS is more complex. As stated above in Hoven, the PPD from an injury cannot be determined until an employee attains MMI. Here, the record reflects Dr. Ollinger released Claimant on October 23, 2006. This is almost 10 months after the report of injury resulting in CTS (first case). It is also 4½ months after the

reported date of injury in the second case. Under the holding by the court in Hoven, since PPD cannot be determined until MMI has occurred, no PPD may be said to have existed prior to the MMI date. Here, the MMI date in the first case, is later than the reported injury date of June 14, 2006 in the second case which precludes a finding that the PPD resulting from the CTS injury cannot be said to have been a pre-existing disability for purposes of SIF liability calculation. Accordingly, no PPD liability may be found against the SIF.

* * *

Another issue presents in this second case with the allegation of permanent total disability (PTD) resulting from the combination of the shoulder PPD and the other allegations of PPD. As per the statute, PPD thresholds do not apply in cases where PTD is alleged. Thus, *arguendo*, PTD may be said to have resulted after the second case because the thresholds do not apply to the pre-existing shoulder, cervical and cardiac PPD amounts found above. However, this argument fails because of the holding in Lawrence and Frazier, *supra*. These two cases hold that the SIF is not liable for subsequent deterioration of an employee's pre-existing condition. Stated differently, the SIF is not liable for any progression of a pre-existing condition that was not worsened by the last injury, or primary injury.

Here, Dr. Poetz testified that Claimant sustained 5 percent PPD prior to both the first and second cases and, in addition, sustained a cervical spine injury on May 1, 2007. This injury post-dates that of the shoulder injury; cervical surgery was performed in 2009 resulting in severe limitations. Dr. Poetz rated these severe limitations at 50 percent PPD. Mr. Lalk relied on these cervical limitations in articulating his opinion that Claimant was unemployable in the open labor market. [It should be noted that the MMI date of the primary shoulder injury postdates the May 1, 2007 cervical injury and cannot be said to be a pre-existing PPD item relative the PTD allegation of a 2007 injury Claim, or "third case" herein.] This record compels a finding that the PTD allegation must fail.

Conclusion

Accordingly, in the second case, identified by Injury Number 06-058601, on the basis of the substantial competent evidence contained within the whole record, Claimant is found to have failed to sustain his burden of proof. Claim denied

Date: _____ Made by: _____

JOSEPH E. DENIGAN
Administrative Law Judge