

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

Injury No.: 01-091471

Employee: Bruce McNamara  
Employer: Board of Education of North Kansas City (Settled)  
Insurer: St. Paul Fire & Marine Insurance Company (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. We have reviewed the evidence, read the briefs, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission modifies the award and decision of the administrative law judge.

**Discussion**

In August 2001, employee was working as a bus monitor when an accident caused him to suffer a serious right shoulder injury that continues to produce debilitating pain despite four different surgeries, including a total shoulder replacement. Employee pursued claims against employer and the Second Injury Fund.

In his award, the administrative law judge found employee was permanently and totally disabled due to the work injury considered alone, but then, without explanation, awarded permanent partial disability benefits against employer and denied employee's claim against the Second Injury Fund. Employee filed an Application for Review with this Commission, arguing (among other things) that he is permanently and totally disabled owing to the effects of the work injury considered alone. Employer also filed an Application for Review, arguing (among other things) that employee is not permanently and totally disabled owing to the effects of the work injury considered alone.

While employee's appeal was pending here, we issued an Order Approving Stipulation for Compromise Settlement, which approved a settlement between employee and employer, in which employer agreed to pay employee a lump sum and waive any claim to the proceeds of employee's third-party action. In our Order, we dismissed employer's Application for Review, as well as employee's Application for Review so far as it relates to employee's claim against employer. Thereafter, employee filed a brief with this Commission arguing he is not permanently and totally disabled owing to the effects of the work injury considered alone, but instead due to a combination of the work injury and his preexisting conditions of ill, such that the Second Injury Fund is liable for permanent total disability benefits.

The only issues remaining before this Commission are (1) the nature and extent of permanent disability resulting from employee's work injury; and (2) employee's claim against the Second Injury Fund.

Employee: Bruce McNamara

- 2 -

After a careful review of the entire record, we agree with the administrative law judge's finding that the more credible evidence demonstrates that employee is permanently and totally disabled owing to the effects of the work injury considered alone. But for unknown reasons, the administrative law judge issued an award that was inconsistent with this finding. Consequently, we must modify the administrative law judge's award in order to make clear and unequivocal findings as to the nature and extent of permanent disability resulting from the work injury, and to resolve the issue whether the Second Injury Fund is liable for benefits. Section 287.220.1 RSMo creates the Second Injury Fund and provides, in relevant part, as follows:

If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, ... the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the "Second Injury Fund" ...

The treating surgeon (Dr. Satterlee), employee's evaluating doctor (Dr. Swaim), and the only vocational expert (Michael Dreiling) agree that if employee has to lie down during the day to relieve the pain in his right shoulder, he is permanently and totally disabled due to the effects of the work injury considered alone. We find this testimony credible. Employee testified that he lies down at least once or twice per day for right shoulder pain and attributed most of his current physical difficulties to his inability to use his dominant right extremity as a result of the work injury. We find this testimony from employee credible. We find that employee has to lie down during the day due to right shoulder pain attributable to the primary work injury.

When determining whether the Fund has any liability, the Commission must first determine the degree of disability from the last injury considered alone. Preexisting disabilities are irrelevant until this determination is made. If the last injury in and of itself rendered the claimant permanently and totally disabled, then the Fund has no liability and the employer is responsible for all compensation.

*Mihalevich Concrete Constr. v. Davidson*, 233 S.W.3d 747, 754 (Mo. App. 2007) (citations omitted).

In light of our foregoing findings, we conclude that the effects of the primary injury, considered alone and in isolation, render employee permanently and totally disabled. It follows that there can be no Second Injury Fund liability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007).

Employee: Bruce McNamara

- 3 -

Accordingly, employee's claim against the Second Injury Fund is denied.

**Conclusion**

We modify the award of the administrative law judge. Employee is permanently and totally disabled owing to the effects of the work injury considered alone and in isolation.

All other issues are moot.

The award and decision of Administrative Law Judge Mark S. Siedlik, issued August 22, 2011, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

Given at Jefferson City, State of Missouri, this 31<sup>st</sup> day of May 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
James Avery, Member

\_\_\_\_\_  
Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

## FINAL AWARD

Employee: Bruce McNamara Injury No.: 01-091471  
Dependents: N/A  
Employer: BD of ED of North Kansas City  
Insurer: St. Paul Fire & Marine Insurance Company  
Additional Party: Missouri Treasurer as Custodian of the Second Injury Fund  
Hearing Date: April 5, 2011 Checked by: MSS/cy

## FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the alleged 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 alleged accident or onset of occupational disease: August 20, 2001.
5. State location where alleged accident occurred or occupational disease was contracted: Kansas City, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did alleged 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? Yes.
11. Describe work employee was doing and how alleged accident occurred or occupational disease contracted: Claimant was in a motor vehicle accident.
12. Did accident or occupational disease cause death? No Date of death? N/A

13. Part(s) of body injured by accident or occupational disease: Right shoulder.
14. Nature and extent of any permanent disability? 50% permanent partial disability of the right shoulder.
15. Compensation paid to-date for temporary disability: \$15,764.14
16. Value necessary medical aid paid to date by employer/insurer? \$113,454.25
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$301.50
19. Weekly compensation rate: \$201.01
20. Method wage computation: Agreement

### **COMPENSATION PAYABLE**

21. Amount of compensable payable: \$23,317.16 (50 x right shoulder from employer/insurer), however, employer/insurer entitled to a credit of \$27,717.91, leaving a credit due of \$4,400.75 due from Claimant.

The compensation awarded herein shall be subject to a lien in the amount of 25% to attorney Henri Watson.

## **FINDINGS OF FACT and RULINGS OF LAW**

Employee: Bruce McNamara Injury No.: 01-091471  
Dependents: N/A  
Employer: BD of ED of North Kansas City  
Insurer: St. Paul Fire & Marine Insurance Company  
Additional Party: Missouri Treasurer as Custodian of the Second Injury Fund  
Hearing Date: April 5, 2011 Checked by: MSS/cy

This case comes on for hearing before Administrative Law Judge Siedlik in Kansas City, Missouri on April 5, 2011. The Claimant in this matter, Mr. Bruce McNamara, was present with his counsel, Mr. Henri Watson. The Employer and Insurer were represented by their counsel, Mr. Mike Wilson. The Second Injury Fund was represented by their counsel, Ms. Kimberly Fournier.

This claim involves injuries on or about the 20<sup>th</sup> of August 2001 while the Claimant was in the employ of the Board of Education of Kansas City, North Kansas City School District, and sustained injuries by accident arising out of and in the course and scope of employment in Jackson County, Missouri. At the time of the injuries, the parties were subject to the Missouri workers' compensation law and the Employer's liability was insured by St. Paul Fire & Marine. The Employer had notice of an injury and a claim was timely filed.

The average weekly wage has been agreed to be \$301.50 per week and the compensation rate agreed to be \$201.01. Weekly benefits totaling \$15,764.14 have been paid, representing 78 3/7ths weeks of benefits. Medical expenses in the amount of \$113,454.25 have been paid.

### **ISSUES**

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

- 1) The liability for past medical expenses;
- 2) The need for future medical care;
- 3) The nature and extent of permanent disability;
- 4) The liability of the Second Injury Fund;
- 5) Whether the Division has authority to determine the credit due the Employer based on third-party litigation and settlement under §287.150.

The evidence at trial consisted of the testimony of the Claimant and his wife in person, together with expert deposition testimony and other documentary evidence comprising of Claimant's Exhibits A through R and Employer/Insurer's Exhibits 1 through 34. The Second Injury Fund offered no evidence at this proceeding.

The Claimant testified that at the time of trial, he was 71 years old and on August 20, 2001, at the age of 60 years old, was working as a bus aide for North Kansas City School District. The Claimant had worked as a bus aide since December of 1999 and in that capacity helped handicapped students on and off the bus, generally assisted with the students being transported.

On or about August 20, 2001, the Claimant, while in the employ of North Kansas City School District and riding in a school bus, was involved in a motor vehicle accident. The Claimant, as a result of this accident, was thrown head first over the metal barrier at the front of the seat and down into the stairwell of the bus. Claimant was taken by ambulance to the hospital and diagnosed with a blunt chest trauma and multiple rib fractures, right scapular fracture, scalp laceration and left forearm laceration.

The Claimant was taken off work and treatment was begun primarily with Dr. Newland. The most serious injury appeared to be to the right shoulder, which initially was provided conservative treatment. Dr. Newland later diagnosed Claimant with a comminuted fracture of the scapula, intra-articular at the glenohumeral joint with multiple comminuted articular surface at the cephalad 50% of the joint. Dr. Newland at that point recommended limited range of motion exercises of the arm. The Claimant was eventually referred to Dr. Craig Satterlee for management of the shoulder injuries. Dr. Satterlee, after a period of therapy, noted no improvement and performed surgery on the Claimant's right shoulder on May 9, 2002. The purpose of the surgery on May 9, 2002 was the form of a right suprascapular nerve release. This provided insufficient healing and on September 4, 2002, Dr. Satterlee performed a second surgery to the right shoulder involving a rotator cuff repair. The Claimant returned to light-duty work in October of 2002 where he performed light-duty office work for the school district until the beginning of January 2003 when light duty was discontinued. Dr. Satterlee released the Claimant in January of 2003, noting that the Claimant had quite a serious injury to the right shoulder and ordered a permanent restriction of no lifting more than 40 pounds below the horizontal and Claimant was released from further care. Claimant testified after his release, Employer offered him a different job working 20 hours per week, which the Claimant declined out of concern for his shoulder.

The Claimant spent over 30 years working for the railroad prior to taking a job at North Kansas City Hospital. Claimant spent a significant portion of 30 years as a yard master for the railroad working odd shifts, which the Claimant testified chronically disturbed his sleep. Claimant testified this lack of normalized sleep caused him to feel sleep deprived, brought stress into his life, which he fought to manage with medication. Claimant suffered both from hypertension and COPD while working for the railroad. The Claimant further testified he developed Raynaud's Syndrome, which was aggravated by cold weather and caused his hands and fingers to go numb. During a portion of the Claimant's work history for the railroad, he worked as a switchman, which required climbing up and down ladders, which Claimant found

difficult. Claimant further testified he had difficulty with standing and difficulty with walking. At some point the Claimant moved to a more sedentary job of yard master, which was a largely indoor job, but also required Claimant to climb five stories of stairs to reach his work station.

The Claimant testified to right knee pain from 1970 through the 1980's and later developed left knee pain to the point wherein the Claimant retired in 1995 from the railroad. Claimant testified that climbing stairs caused a great degree of difficulty for both knees. The Claimant admitted being a lifetime smoker of as much as five packs of cigarettes per day, which caused him to develop COPD. The Claimant further testified to a fall at home in May of 2000 injuring his left shoulder and a resulting MRI scan, which revealed a partial tear to the left rotator cuff. This testimony is significant in as much as the Claimant, three years after this work-related accident in 2001, had surgery to repair that left shoulder rotator cuff tear, that surgery taking place in December 2004.

After the work-related accident in 2001, the Claimant's medical conditions continued to deteriorate to the point that in October 2003, Dr. Satterlee performed a third surgical procedure to the Claimant's right shoulder involving a right total shoulder replacement with a distal clavicle excision. Later in August of 2004, the Claimant suffered injury to the left shoulder which had been diagnosed prior to the 2001 work accident of having a rotator cuff tear, which had never been repaired. It was after a home accident in August of 2004 that Dr. Satterlee performed surgery on the left shoulder on December 8, 2004 of repairing the left rotator cuff tear.

Claimant, in 2009, had a right knee replacement, which was a reasonable consequence of earlier right knee surgeries in 1970 and 1987.

The Claimant has, for a good portion of his lifetime, been a race car enthusiast and before 2001, enjoyed racing his vintage 1961 race car. Claimant purchased his car in 1998 and prior to the Claimant's 2001 injury, he was able to race throughout the country. The Claimant testified he was physically capable of loading his race car onto a trailer and towing it hundreds of miles to participate in these races. The Claimant testified he was able to pass a physical for the racing license before 2001 and was able to perform skilled driving tests before 2001. Claimant, after the 2001 injury, was unable to race his car. The Claimant testified he did drive his car in September of 2005 to Wisconsin for a controlled track drive in hopes of selling his car. The Claimant testified he was able to get his car out of the trailer and drove his car 400 miles to its destination. The Claimant, being unable to sell the car at that race, reloaded the car and drove it back 400 miles to Kansas City. The Claimant testified he sold his race car in 2007. After the 2001 injury, the Claimant had more than one occurrence of pulling tarps for the purpose of covering and uncovering his race car, which aggravated his shoulder and back conditions. The Claimant further testified that in 2005, he was hospitalized for heart failure and has had ongoing difficulties with his low back, which became a hindrance and need for treatment after 2005, and in 2007 and 2009 had undergone injections for a herniated disk in the low back.

The Claimant was seen by a number of physicians as well as a vocational expert, Mr. Michael Dreiling, to evaluate the Claimant's conditions of ill and answer questions about the employability of Claimant.

## MEDICAL EVIDENCE

The Claimant's primary treating physician for his shoulder injury was Dr. Satterlee. Dr. Satterlee, as part of his treatment of the Claimant, performed a right suprascapular nerve release on May 9, 2002. Thereafter, on September 2002, Dr. Satterlee performed a subacromial decompression and rotator cuff repair. Ultimately on October 15, 2003, Dr. Satterlee performed a right shoulder replacement and after follow-up care and physical therapy, the Claimant was returned to work on July 22, 2004. Dr. Satterlee, under questioning, testified that at the time of the Claimant's release on July 22, 2004, the Claimant was not in need of a subscapularis tendon repair. It was Dr. Satterlee's opinion that if that procedure was necessary, he would not have released the Claimant from care. Dr. Satterlee was of the opinion at the conclusion of Claimant's treatment and release, the Claimant had a disability of 50% of the shoulder and assigned restrictions of no lifting over ten pounds of the horizontal plane. Dr. Satterlee was of the opinion the Claimant could perform sedentary work. Dr. Satterlee was of the opinion the shoulder replacement done on the Claimant should last 15 to 20 years and the Claimant would be in need of future medical treatment, including medications, anti-inflammatories and physical therapy.

The Claimant was also examined by Dr. Truett Swaim on behalf of the Employee and his testimony is in evidence. Dr. Swaim provided permanent partial disability ratings for several of the Claimant's orthopedic conditions. Dr. Swaim believed the Claimant had an MRI prior to this work-related accident, a left rotator cuff abnormality which post-accident was surgically repaired. Dr. Swaim opined Claimant had a preexisting condition of 8 to 10% permanent partial disability to the left shoulder based on that MRI. Dr. Swaim was also made aware of the Claimant's bilateral knee problems predating his employment with the North Kansas City School District. Dr. Swaim was of the opinion that the surgically repaired right knee of the Claimant had a 50% permanent partial disability and the Claimant's left knee he found a 40% permanent partial disability. Dr. Swaim believed the Claimant's bilateral knee pain impacted the Claimant's ability to perform work with the railroad requiring the Claimant to change jobs and ultimately leave the railroad employment entirely. Dr. Swaim's opinions dealt with the orthopedic conditions of the Claimant and did not provide ratings for the Claimant's claim of COPD, his cardiac abnormalities or his Raynaud's Syndrome. Dr. Swaim did not evaluate the Claimant's post-accident progression of the underlying cardiac disability nor the Claimant's herniated disk in the low back, which developed after Dr. Swaim's last exam. In addition, Dr. Swaim had formed his opinions before the Claimant underwent a right knee replacement in December 2009. Dr. Swaim was of the opinion that the Claimant would require future medical treatment, including follow-up X-rays on a yearly basis and medication for pain to the Claimant's right shoulder.

Dr. Swaim testified that the Claimant is totally and permanently disabled because of his age, educational background and, as a result of the limits and functional restrictions related to his right shoulder alone, did not believe that it would be reasonable to consider him employable for gainful employment in the job market. Dr. Swaim placed restrictions on the Claimant and specifically noted that the Claimant needs to lie down or recline in a recliner to control discomfort.

Dr. McMillan examined the Claimant at the request of the Employer and Insurer and his testimony is in evidence. Dr. McMillan was provided medical records, reports and depositions and his examination of the Claimant. Dr. McMillan reviewed all of the Claimant's conditions of ill and was asked his opinions as to the degrees of disability and employability of the Claimant. Dr. McMillan was not provided by the Claimant any history of a September 5 race incident and was unaware of the Claimant injuring his shoulder. Dr. McMillan referenced in his report and relied upon the Claimant's history of that injury and any complaints of pain as the Claimant had relayed them to Dr. Satterlee and Dr. Swaim. Dr. McMillan noted the Claimant did relate ongoing difficulty and increased pain with bending, kneeling, stooping and going up and down stairs. The Claimant conceded that he continues to attend car races where he climbs stairs to sit in bleachers and, based on his history taken during the exam, Dr. McMillan determined the Claimant could sit "pretty much indefinitely." (McMillan deposition at page 14.) Dr. McMillan noted the Claimant's limited ability to stand was based on the right knee, which was replaced post-accident at North Kansas City Hospital and is unrelated to any work-related accident at the North Kansas City School District. Dr. McMillan was of the opinion the Claimant's congestive heart failure would cause fatigue and malaise and the Claimant's chronic smoking would cause shortness of breath, fatigue and difficulty with exertion in extremely hot or cold climates. Dr. McMillan's examination of the Claimant's upper extremities do not reveal any pain, numbness or parasthesia in the extremities, although Dr. McMillan noted minor weakness in the right shoulder but no other weakness in the extremities and no loss of grip strength. Dr. McMillan noted the lengthy list of medications the Claimant was taking at the time of his examination and noted that none of the medications the Claimant reported taking were for pain relief, and further noted that the TENS unit that was prescribed for pain was not recommended until after September 2005, when the Claimant again injured his shoulder.

The Claimant contends as part of this case that a subsequent tear of the subscapularis tendon in the right shoulder, which occurred in September of 2005, is related to the North Kansas City School accident in 2001. Dr. McMillan, as did Dr. Satterlee, believed activities engaged in by the Claimant with his race car in September of 2005 were responsible for the tearing of the subscapularis tendon. Dr. McMillan believed the best source of information concerning the mechanism of injury and onset of symptoms was the Claimant's description of this injury to Dr. Swaim. Consequently, Dr. McMillan opined that, but for the activities of the race car in the late summer of 2005, the Claimant would not have torn his rotator cuff and would not have required subsequent rotator cuff (subscapularis tendon) repair. Dr. McMillan concluded the Claimant had, from a result of his work-related injury, a disability of 45% at the right shoulder. Dr. McMillan concluded that the Claimant was capable of functioning at the sedentary physical demand level and, in addition, believed there are a number of light-duty jobs the Claimant would be quite capable of performing. Dr. McMillan ultimately opined the Claimant could compete in the open labor market and specifically determined that the August 20, 2001 North Kansas City School District injury to the right shoulder did not render the Claimant unable to compete in the open labor market. Dr. McMillan concluded the Claimant's decision not to return to work would be the result of the combination of his post-retirement age, his other medical problems and his physical impairments beyond those related to his right shoulder. Dr. McMillan believed the Claimant's decision not to return to the competitive labor market was a result of post-accident

progression of a variety of medical conditions unrelated to his vocational injury of August 20, 2001.

The Claimant was examined by Dr. P. Brent Koprivica on behalf of the Employer and his testimony is in evidence. Dr. Koprivica examined the Claimant on November 14, 2005. At that examination, the Claimant had experienced an injury at a race event in Wisconsin in September of 2005, but did not disclose this injury to Dr. Koprivica at the time of his exam. Dr. Koprivica opined after examining the Claimant that, when viewed in isolation, the Claimant's injury to his right shoulder in 2001 was not totally disabling and opined that the work-related injury of August 20, 2001 in isolation resulted in a permanent partial disability of 30% of the whole body. Dr. Koprivica noted that Claimant had significant disabilities that preexisted his August 20, 2001 North Kansas City injury and noted a right knee injury waterskiing in the 1970's, which was injured but treated conservatively, ultimately requiring surgery in 1987. Dr. Koprivica noted Claimant had mentioned the bilateral knee problems while working for the railroad prior to his employment with the North Kansas City School District. Specifically, Dr. Koprivica noted the Claimant had mentioned the need to change positions and switch to a more sedentary position as a yard master. Dr. Koprivica noted in the Claimant's accommodated position as a yard master, he was required to climb approximately five stories of steps to access his position in the tower and noted that climbing these steps caused the Claimant's knees to become symptomatic and painful. Dr. Koprivica noted the Claimant's objective complaints to his knees while performing job duties as a switchman and as an accommodated position as a yard master were consistent with the structural problems Claimant had in both knees prior to the North Kansas City School District work injury. Dr. Koprivica believed the Claimant should be restricted to primarily seated activities with the ability to take postural breaks and that he should avoid squatting, crawling, kneeling or climbing. Dr. Koprivica ultimately opined the Claimant had a preexisting permanent partial disability to the right knee of 35% and 25% of the left knee. Dr. Koprivica found that Claimant had a preexisting condition involving Raynaud's Syndrome which results in abnormal vascular constriction of the upper extremities when exposed to cold. The Claimant had testified and relayed to the doctors who examined him the inability to function for the railroad in extremely cold weather because of the pain and difficulties it would cause with his upper extremities. Dr. Koprivica, after examining the Claimant and reviewing his medical treatment, opined the Claimant's Raynaud's Syndrome caused a 5% preexisting permanent partial disability to the whole body which predated the Claimant's North Kansas City School District injury. Dr. Koprivica further opined the Claimant further had preexisting cardiac problems prior to his work at the North Kansas City School District and after reviewing medical records and taking into account the Claimant's history and complaints, was of the opinion the Claimant had a preexisting permanent partial disability of 15% of the body which predated his North Kansas City School District injury.

Dr. Koprivica was made aware of the Claimant's injury in May of 2000 to the left shoulder, which predated the North Kansas City School District injury. Dr. Koprivica was made aware of an MRI that was performed which diagnosed a rotator cuff tear that was not treated at that time and, after the North Kansas City School District accident, the Claimant aggravated his left shoulder to the point where it was surgically repaired in December of 2004. Dr. Koprivica was of the opinion the Claimant's preexisting disability to the left shoulder was 15% predating

the North Kansas City School District injury and increased that opinion to 30% of the left shoulder, taking into account the post-accident surgery.

### VOCATIONAL EVIDENCE

Claimant was examined by Mr. Michael Dreiling, a vocational expert on behalf of the Employee. Mr. Dreiling, in reviewing the history of the accident, the preexisting conditions, the treatment rendered to date and the opinions and restrictions of the doctors which were provided to him in advance, did agree with the restrictions placed on the Claimant and opined that those restrictions would allow him to work in a sedentary to light-demand job. Mr. Dreiling indicated that prior to 2001, the Claimant was able to perform the full range of sedentary jobs. Mr. Dreiling agreed the Claimant was able to perform the functions of his sedentary job at the railroad prior to 2001 and further agreed the restrictions on the use of his upper extremities did not occur until after the 2001 work injury. Based on Mr. Dreiling's review of the voluminous medical records, restrictions placed by the physicians and the testimony of the physicians to which he was provided, Mr. Dreiling opined from a vocational standpoint the Claimant was unemployable in the open labor market based on the limitations and restrictions from the 2001 work injury alone. Mr. Dreiling discussed the fact that Dr. Swaim imposed limitation on the Claimant, which included the opportunity to recline or lie down during the day in order to support the right arm and the discomfort in the right arm. Based on that report from Dr. Swaim, Mr. Dreiling opined the medical need to lie down would preclude the Claimant from being able to obtain or maintain employment. Mr. Dreiling further opined the Claimant had prior physical problems, but was unaware of any restrictions on the Claimant before 2001 and had been presented no evidence that any of these prior conditions of ill caused the Claimant to have difficulty meeting the work criteria of his employment before 2001. Mr. Dreiling was ultimately of the opinion, as set forth above, that the Claimant, while having prior physical conditions of ill, was rendered permanently and totally disabled in his opinion as a result of the 2001 work injury considered alone and in isolation.

The Claimant, as part of his case, had requested future medical care for the treatment of the right shoulder injury from the North Kansas City School District. The Claimant carrying the burden of proof of proving entitlement to benefits for future medical expenses must present evidence of a medical causal relationship between the condition and the compensable injury if the employer is to be held responsible for future medical treatment. Bowers v. Island Dairy Company, 132 SW 3<sup>rd</sup>, 260 (Mo.App.) 2004. Dr. Swaim and Dr. Satterlee in their testimony believed the Claimant's shoulder replacement surgery and the prosthetic device implanted should last 15 years. Dr. Swaim testified the subscapularis tendon repair necessitated by the 2005 race car event changed the inner workings of the shoulder joint. Specifically, Dr. Swaim believed that the surgical repair would increase the wear on the artificial components in the Claimant's shoulder joint. A most credible reading of the evidence based on the opinions of Dr. Swaim and Satterlee is that the subscapularis tendon repair was not causally connected to the North Kansas City School accident. In light of the believable testimony by both mentioned doctors, the subscapularis tear and resulting surgery, having changed the pathology in the Claimant's right shoulder, leads me to conclude that the Claimant has not met his burden of proof of proving that future medical needs to the right shoulder are causally connected to the North Kansas City

School District accident. To that end, the Claimant, having sought medical reimbursement for that treatment of the subscapularis tendon repair, I find is not the responsibility of the Employer and Insurer in this matter. The evidence, as confirmed by Dr. Satterlee's testimony, confirmed that Medicare had paid his surgical fee for that procedure and the balance was taken off as an adjustment to medical care and the Claimant was not responsible for any of those charges.

### **Subrogation Issues**

In Addition to filing a workers' compensation claim in this matter, the Claimant and his wife, Katheryn McNamara, filed suit in Clay County, Missouri against the alleged and negligent driver who caused the motor vehicle accident arising from the Claimant's work-related injury. Section 287.150 RSMo provides a right of subrogation "whenever recovery against the third person is effected by the employee or his dependents." The statute specifically provides that the employer and insurer shall be surrogated to the right of the claimant, as well as the claimant's dependents. Because the Claimant's wife is conclusively presumed to be a dependent pursuant to §287.140, subrogation to recovery is extended to the Claimant's wife, Ms. Katheryn McNamara.

The purpose of this statute is to protect the employer liable to pay any compensation benefits and to prevent a double recovery by the employee or their dependents. Farmer-Cummings v. Future Foam Incorporated, 44 SW 3<sup>rd</sup>, 830 (Mo.App.) Western District 2001. The cases construing §287.150 have cast the employee's obligation as one of constructive trustee. It is also the law that if the employee initiates such an action to recover against a liable tortfeasor, he does so in a trust capacity, as the trustee of an expressed trust, and as such trustee, the employee is bound to protect the subrogation rights of the employer and insurer. Schumacher v. Leslie, 232 SW 2<sup>nd</sup>, 913 (Mo.App.) 1950. The evidence indicates that the Claimant and the third party liability carrier formed their agreement and subsequent consortium claim to Ms. McNamara without taking into account the Employer and Insurer interest, nor were they a party to the release. The evidence in the record establishes that the releases containing the waiver of right of subrogation were signed the day before the Employer and Insurer were contacted for purposes of determining the amount of benefits they had been paid to ultimately apply the Ruediger formula and determine reimbursement.

The Claimant ultimately settled their third-party tortfeasor case for \$100,000.00. Of that net recovery, Claimant's attorney was paid a fee of \$40,000.00 and reimbursed case expenses of \$4,564.00. The Employer and Insurer had paid in excess of \$122,000.00 in benefits on behalf of the Claimant (Employer's Exhibit 29). In applying the Ruediger formula, this matter would have resulted in the remaining net settlement proceeds of \$55,436.00 being reimbursed to the Employer and Insurer. Ruediger v. Kalmeyer Brothers Service, 501 SW 2<sup>nd</sup>, 56 (Mo.banc) 1973. The Employer and Insurer alleges and I conclude that the Claimant, by apportioning a consortium claim to the wife of the Claimant, sought to deprive the Employer and Insurer of the statutory subrogation interest. In the sworn testimony of Katheryn McNamara, she admitted that "the goal" of signing her release was to reduce the amount of money to be recovered by the Employer and Insurer.

Accordingly, I find that pursuant to §287.150 and the case law which interprets its' application, leads me to conclude that the total amount paid by the Employer and Insurer in this case totaling over \$122,000.00 and the third party tortfeasor settlement in the amount of \$100,000.00 paid to Bruce and Katheryn McNamara should be included in its entirety in the application of the Ruediger formula. Such application would have resulted in a remaining net settlement of \$55,436.00 being paid to the Employer and Insurer. The Employer and Insurer subrogation interest on the \$50,000.00 received by the Claimant has been paid to the Employer and Insurer. The amount paid to the Employer and Insurer based on the Claimant's described portion of the settlement was \$27,718.09. Reducing that from the Ruediger share of \$55,436.00 results in a balance of \$27,717.91 in favor of the Employer and Insurer for the unpaid balance on the \$50,000.00 paid to Katheryn McNamara. This difference of \$27,717.91 is a balance owed to the Employer and Insurer and serves as a credit for any permanent partial disability benefits made part of this award.

### FINDINGS

I find from the voluminous (eight volumes of medical records and evidence), and testimony in this case, that the Claimant has met his burden of proof to establish compensable injury under the Workers' Compensation Act. The Claimant, as part of his contention for compensation, believes that he is permanently and totally disabled and has offered proof in that regard. The test for permanent total disability is a workers' ability to compete in the open labor market. ABB Power T&D Company v. Kempkernl (Mo.App.) WD 2007. The critical question is whether in the ordinary course of business, any employer would reasonably expect to hire the injured worker given his present physical condition. Under the Missouri Workers' Compensation Act, total disability is defined as the inability to return to any employment. Messex v. Sachs Electric Company, 989 SW 2<sup>nd</sup>, 206 (Mo.App.) ED 1999. The words "inability to return to any employment" means the employee is unable to perform the usual duties of the employment under consideration and the manner that such duties are customarily performed by the average person engaged in such employment. Kowalski v. M-G Metals and Sale, 632 SW 2<sup>nd</sup>, 919 (Mo.App.) SD 1982. The primary determination for permanent total disability is whether the employee is able to compete in the open labor market. A determination of permanent total disability focuses on the ability or inability of the employee to perform usual duties of various employments in the manner that such duties are customarily performed by the average person engaged in such employment. Gordon v. Tri-State Motor Transit, 908 SW 2<sup>nd</sup>, 849 (Mo.App.) SD 1995. There are many factors that may be considered in this assessment, including the Claimant's physical and mental condition, age, education, job experience and skills in order to determine whether the Claimant is permanently and totally disabled. I find based on the substantial and credible evidence in this matter, that the Claimant's inability to compete in the open labor market render him permanently and totally disabled as based on the residuals of the 2001 work injury considered alone and in isolation. The testimony of the Claimant and his wife both were adamant in their assertion that the bus accident in 2001 was the cause of the Claimant's current inability to access the open labor market. They both agree that considering the physical problems before 2001, the Claimant was able to work full-time, without restrictions and was able to participate and led an extremely active lifestyle, which included racing vintage race cars and playing racquetball as well as taking care of his home and

lawn maintenance. Since 2001, the Claimant and wife agree that his right arm is essentially useless, that he is in tremendous pain and is required to lie down numerous times per day in order to diminish the pain he endures. This testimony is supported by credible medical and vocational opinions. The opinions of Dr. Swaim, the Claimant's chosen rating physician, testified that the Claimant is permanently and totally disabled because of his age, educational background and, as a result of the limits and the functional restrictions related to his right shoulder alone, I do not believe that it would be reasonable to consider him for gainful employment in the job market. Dr. Swaim placed restrictions on the Claimant and specifically noted the Claimant needs to lie down or be in a recliner to control discomfort. Dr. Satterlee, the treating physician, opined the Claimant had chronic pain that requires daily ongoing pain medication and a TENS unit. Dr. Satterlee did indicate that it was reasonable that the Claimant be afforded the opportunity to lie down when his shoulder was hurting.

Dr. Koprivica, the Employer's rating physician, opined the Claimant's permanent total disability was a result of combining his 2001 work injury with his preexisting disabilities, but also agreed that if the Claimant had to unpredictably recline during the day due to shoulder pain, that act itself is totally disabling.

Dr. McMillan, who evaluated the Claimant at the request of the Employer and Insurer, do not believe the Claimant to be permanently and totally disabled and that the Claimant was capable of performing sedentary work. Dr. McMillan went on to note that the Claimant's choice not to return to work was a result of his retirement age and other medical problems, rather than from his primary injury.

When there are opinions of medical experts that are conflicting, the fact-finding body determines whose opinion is most credible. The fact finder may reject all or part of an expert's testimony. Bennett v. Columbia Healthcare, 134 SW 3<sup>rd</sup>, 84 (Mo.App.) WD 2004. The testimony of the Claimant and his wife were believable in their assertion that his shoulder injury alone in 2001 has caused the Claimant's current inability to function, and this testimony is consistent with the opinion of Dr. Swaim.

The only vocational expert engaged to render an opinion in this case, Mr. Dreiling, did agree that the restrictions placed on the Claimant would allow him to work in a sedentary to light-demand job. Mr. Dreiling indicated that prior to 2001, the Claimant was able to perform a full range of sedentary jobs. Mr. Dreiling agreed the Claimant was able to adequately perform the functions of his sedentary job at the railroad prior to 2001. Mr. Dreiling further agreed the restrictions on the use of his upper extremities did not occur until after the 2001 work injury. Ultimately, Mr. Dreiling opined Mr. McNamara was unemployable on the open labor market based on the limitations and restrictions from the 2001 injury alone. Mr. Dreiling pointed out the limitation imposed by Dr. Swaim, which included the opportunity to recline or lie down during the day in order to support the right arm and relieve the discomfort and pain, forms the basis of at least part of his opinion. Mr. Dreiling had noted that the Claimant had prior physical problems, but was unaware of any restrictions on the Claimant before 2001 and had been presented no evidence that any of those prior conditions caused the Claimant to have difficulty meeting the work criteria of his jobs prior to 2001.

I find ultimately that Claimant had, from his work-related injury in 2001, a permanent partial disability of 50% to the right shoulder and is entitled to 116 weeks of compensation at the rate of \$201.01. That compensation totals \$23,317.16 and when applied to the credit due the Employer and Insurer as set forth above in the amount of \$27,717.91, leaves a credit in favor of the Employer and Insurer in the amount of \$4,400.75. I find the Second Injury Fund is relieved of any liability in this matter.

Made by: \_\_\_\_\_

Mark S. Siedlik  
*Administrative Law Judge*  
*Division of Workers' Compensation*