

**FINAL AWARD DENYING COMPENSATION**  
(Affirming Award of Administrative Law Judge  
by Separate Decision)

Injury No.: 05-141672

Employee: Donna Moorman  
Employer: Boehringer Ingelheim Corporation (Settled)  
Insurer: Liberty Mutual Insurance Company (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. We have reviewed the evidence, read the parties' briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we affirm the order of the administrative law judge by separate decision. The decision of Administrative Law Judge Robert B. Miner, issued February 3, 2010, is attached solely for reference and is not incorporated by this decision.

**Preliminaries**

The issues stipulated at the hearing were: (1) accident; (2) occupational disease; (3) notice; (4) whether the alleged accident or occupational disease arose out of and in the course of employment; (5) medical causation; (6) liability for future medical treatment; (7) nature and extent of permanent partial disability; (8) liability for permanent total disability; and (9) the liability, if any, of the Second Injury Fund.

The administrative law judge applied the 2005 amendments to the Missouri Workers' Compensation Law to employee's claim, and found the following: (1) employee failed to sustain her burden of proving she sustained a left shoulder injury arising out of and in the course of her employment for employer; and (2) employee failed to sustain her burden to prove that her work for employer was the prevailing factor in causing her left shoulder condition and disability. Given these findings, the administrative law judge denied employee's claims against the employer and the Second Injury Fund and determined that all other issues are moot.

Employee submitted a timely Application for Review with the Commission alleging the administrative law judge erred: (1) in retroactively applying the 2005 amendments to the Missouri Workers' Compensation Law; (2) in finding employee failed to meet her burden of proving she sustained a left shoulder injury prior to August 28, 2005; (3) in finding Dr. Parmet credible over Dr. Prostic; and (4) in not finding employer's Report of Injury credible on the issue of notice.

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On July 29, 2010, the Commission issued its Order Approving Stipulation For Compromise Settlement approving the settlement of this claim as between the employee and employer/insurer.

For the reasons set forth in this award and decision, the Commission affirms the award of the administrative law judge by separate decision.

### **Findings of Fact**

#### Accident or occupational disease

Employee began working for employer as a bottle washer in 1982. In 1986, employee transferred to employer's packaging and labeling department. Employee's job duties required her to swivel her body from left to right to pick up bottles and place them in boxes. Employee then loaded the boxes onto a pallet, jacked up the pallet, and pulled the pallet out using a pallet jack. Employee handled between 10,000 and 20,000 bottles per day. Employee performed the same job in labeling for 19 years. In the early 2000s, employee sought treatment for shoulder pain. Employee saw Dr. Smith who gave her cortisone shots.

Employee's claim for compensation alleges employee sustained an injury on August 16, 2005, by repetitive reaching and pulling of product, causing cumulative wear and tear on her left shoulder. At her deposition of September 19, 2007, employee testified that her shoulder claim should actually be for August 1, 2005. Employee's deposition testimony conflicts with her hearing testimony, in which she testified that she hurt her *back* on August 1, 2005.

At the hearing, employee testified that her shoulders began to hurt more and more doing her job as time went on. Employee could not remember which shoulder began to cause her problems first. Employee did not report her alleged left shoulder injury to anyone at work. Employee didn't know when a doctor first suggested to her that her left shoulder condition might have been caused by her work. Employee had difficulty sleeping on her left shoulder both prior to and after August 2005.

Given employee's history of seeking treatment for her left shoulder condition prior to August 2005, her contradictory deposition testimony as to when her left shoulder injury manifested itself, and employee's general lack of recollection at the hearing, we find employee's testimony unreliable as to the timing and circumstances of the alleged August 16, 2005, injury and resulting left shoulder condition.

#### Medical causation

On October 25, 2005, employee first sought treatment for her left shoulder condition with her personal physician, Dr. Ahmad. Dr. Ahmad's notes contain no mention of employee's repetitive work duties. The clinical history set forth in the report issued in connection with the October 29, 2005, MRI of the left shoulder states: "Reason for exam LT shoulder pain x 6 yrs, no known injury." The radiologist's impression was: "1. No rotator cuff tear seen. 2. Degenerative changes of the acromioclavicular joint with evidence suggesting impingement syndrome."

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Dr. Parmet provided an independent medical evaluation on behalf of the employer. Dr. Parmet diagnosed degenerative changes of the left shoulder and rotator cuff attributable to employee's genetic background, surgical menopause, and generalized osteoarthritis. Dr. Parmet did not find evidence of a work-related injury by accident or occupational disease. Dr. Parmet noted that he found arthritis in both shoulder joints and osteoarthritic changes in employee's hands, all attributable to aging. Dr. Parmet opined that the work didn't cause employee's condition but merely made her aware of it. Ultimately, Dr. Parmet opined that employee's work for employer was not the substantial contributing factor or a prevailing factor in her left shoulder condition.

Dr. Koprivica provided an independent medical evaluation on behalf of employee. Dr. Koprivica believed that employee's upper extremity use in activities at work represented an exposure to risk that was unique to her employment, and that the general population is not exposed to that type of risk. Dr. Koprivica opined that employee's work activities were a substantial factor in her left shoulder injuries and condition.

Dr. Prostic provided an independent medical evaluation on behalf of employee. Dr. Prostic opined that employee's work duties of reaching and pulling materials and doing warehouse type loading and unloading of containers were a substantial factor in causing injury to employee's left shoulder.

We find Dr. Parmet more credible than Drs. Prostic and Koprivica. We are convinced that employee's left shoulder condition was the result of non-work-related factors, such as her generalized osteoarthritis and surgical menopause. This is consistent with employee's failure to mention a shoulder injury related to her repetitive work tasks to her employer or treating doctors, and the fact that she resumed working her normal work schedule at full-duty even after her left shoulder surgery in February 2006. Certainly, if it were the work tasks that ultimately sent employee to left shoulder surgery, it strains credibility that she would return after surgery to doing the exact same tasks on a daily basis, full-time, with no accommodation of any kind. Dr. Parmet's opinion more convincingly takes these factors into account.

Accordingly, we find that employee's work was not a prevailing or a substantial factor in the development of her left shoulder condition or disability.

### **Conclusions of Law**

#### *The 2005 amendments*

The administrative law judge applied the 2005 amendments to the Missouri Workers' Compensation Law to employee's claim, on findings that employee's injuries were not manifested until after August 28, 2005, the date on which the amendments went into effect. In her appeal to this Commission, employee argues that the administrative law judge erred in retroactively applying the amendments—and their more rigorous burdens of proof—to her claim.

We disagree with the administrative law judge's application of the 2005 amendments to this claim. Employee filed a claim for compensation alleging a date of injury predating August 28, 2005, and employee's evidence at the hearing was dedicated to establishing

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that she sustained an injury by accident or occupational disease to her left shoulder as of August 16, 2005. As a result, we find it inappropriate to apply the law as it existed after August 28, 2005, to this claim. Accordingly, we have applied to employee's claim the law as it existed on August 16, 2005.

*Liability of the Second Injury Fund*

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there has been previous disability." Here, employee seeks an award of permanent total disability benefits from the Second Injury Fund. The Second Injury Fund is liable for permanent total disability benefits as follows:

If any employee who has a preexisting permanent partial disability ... receives a subsequent compensable injury resulting in additional permanent partial disability ... the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for. 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"

...

Section 287.220.1 RSMo.

Under the foregoing section, in order to recover permanent total disability benefits from the Second Injury Fund, an employee is first required to prove that she sustained a "last injury" for which her employer is liable. In other words, before the extent of Second Injury Fund liability is considered, employee must establish that she sustained a compensable primary injury. Otherwise, there is no basis for Second Injury Fund liability.

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The law applicable to employee's claim provides that:

In this chapter the term "occupational disease" is hereby defined to mean, unless a different meaning is clearly indicated by the context, an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that course as a rational consequence.

Section 287.067.1 RSMo.

An occupational disease is compensable if it is clearly work related and meets the requirements of an injury which is compensable as provided in subsections 2 and 3 of section 287.020. An occupational disease is not compensable merely because work was a triggering or precipitating factor.

Section 287.067.2 RSMo.

An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor.

Section 287.020.2 RSMo.

We have found credible and adopted Dr. Parmet's opinion that employee did not sustain a work-related injury or occupational disease as of August 16, 2005, and that employee's work is not a substantial factor contributing to her left shoulder condition or disability.

Given our factual findings regarding the alleged primary injury, we conclude that employee failed to meet her burden of proving she sustained a primary injury by accident or occupational disease on August 16, 2005, that is compensable under the Missouri Workers' Compensation Law. We conclude that employee is therefore unable to meet the requirements of § 287.220.1.

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

### **Conclusion**

Based on the foregoing, the Commission concludes that employee did not sustain an injury by accident or occupational disease on August 16, 2005, that is compensable under the Missouri Workers' Compensation Law. Accordingly, employee's claim for benefits against the Second Injury Fund is denied. All other issues are moot.

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The decision of Administrative Law Judge Robert B. Miner, issued February 3, 2010, is attached solely for reference and is not incorporated by this decision.

Given at Jefferson City, State of Missouri, this 28<sup>th</sup> day of December 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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**DISSENTING OPINION FILED**

John J. Hickey, Member

Attest:

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Secretary

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### **DISSENTING OPINION**

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I agree with the majority that the 2005 amendments do not apply to this claim; however, I am convinced employee met her burden of proving she is entitled to compensation from the Second Injury Fund.

The majority's award is premised, to a large extent, on Dr. Parmet's opinion on the issue of medical causation. I disagree with the finding of the majority that Dr. Parmet is credible on this issue. Dr. Parmet specializes in aerospace and occupational medicine; he is not an orthopedic surgeon. I find Dr. Koprivica's opinion on the issue of medical causation to be more credible. Dr. Parmet ignored or brushed over any real analysis of employee's repetitive work tasks and what effect they had on her left shoulder condition. I believe Dr. Koprivica gave appropriate weight to the fact that the general population is not exposed to the type of risk inherent in the repetitive heavy lifting, pulling, and pushing tasks employee engaged in on a daily basis.

Employee's work duties in employer's packaging and labeling department required her to constantly twist and reach across her upper body to pick up bottles coming down a conveyor or turntable. Employee grabbed the bottles and twisted her body 90 degrees to set the bottles down in a tray or box for stacking on pallets. Employee sometimes processed 10,000 to 20,000 bottles in one day. The evidence is uncontested that employee's work required her to be constantly in motion, performing this twisting and reaching task over and over, on a daily basis, for 19 years. Dr. Koprivica properly considered the nature of employee's tasks and credibly opined that employee's workplace activities were a substantial factor in the development of her partial rotator cuff tear, chronic impingement syndrome, chronic acromioclavicular arthralgia, and the labral tear which were treated surgically. Dr. Koprivica assessed a 25% permanent partial disability of the left shoulder attributable to employee's work activities through August 16, 2005. Dr. Koprivica opined that employee was probably permanently and totally disabled as a result of the last injury in combination with employee's preexisting disabilities, but recommended vocational evaluation.

Given Dr. Koprivica's credible testimony, I conclude that employee's work was a substantial factor in her resulting left shoulder condition and disability. I further find that, as of August 16, 2005, employee suffered the following preexisting permanent partial disabilities, as identified by Dr. Koprivica: 30% of the body as a whole referable to the low back; 20% of the left knee for partial medial meniscectomy; and 15% of the right knee for microfractures of the medial femoral condyle.

Mary Titterington was the only vocational expert to testify in this case; she credibly opined that employee is permanently and totally disabled as a result of her preexisting low back, shoulder, elbow, and knee impairments, and their combination with the primary injury. Ms. Titterington identified preexisting disabilities which constituted a hindrance and obstacle to employment. The Second Injury Fund failed to offer any evidence to rebut the opinion of Ms. Titterington. I find Ms. Titterington credible. I find that employee is permanently and totally disabled due to the combination of her preexisting disabling conditions and her

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disability resulting from the last injury. I conclude that employee has met her burden of proving she is entitled to permanent total disability benefits from the Second Injury Fund.

Given the foregoing, I would reverse the award of the administrative law judge and find that employee is entitled to permanent total disability benefits from the Second Injury Fund commencing July 26, 2006, at the differential rate of \$40.95, for 58 weeks, and thereafter at the rate of \$406.03 per week, for life, or as provided by law.

Because the majority has determined otherwise, I respectfully dissent.

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John J. Hickey, Member

AWARD

Employee: Donna L. Moorman

Injury No.: 05-141672

Employer: Boehringer Ingelheim Corporation

Additional Party: The Treasurer of the State of Missouri as Custodian of the Second Injury Fund

Insurer: Liberty Mutual Insurance Company

Hearing Date: November 12, 2009

Checked by: RBM

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? No.
3. Was there an accident or incident of occupational disease under the Law? No.
4. Date of accident or onset of occupational disease: Alleged: August 16, 2005.
5. State location where accident occurred or occupational disease was contracted: Alleged: St. Joseph, Buchanan County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Not determined.
8. Did accident or occupational disease arise out of and in the course of the employment? No.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee alleges that while working for Employer, she injured her left shoulder by repetitively reaching, pulling, and packaging product.

12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Alleged: left shoulder.
14. Nature and extent of any permanent disability: Not determined.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? None.
17. Value necessary medical aid not furnished by employer/insurer? Not determined.
18. Employee's average weekly wages: Not determined.
19. Weekly compensation rate: Not determined.
20. Method wages computation: N/A

#### COMPENSATION PAYABLE

21. Amount of compensation payable: None. Employee's claim against Employer is denied.
22. Second Injury Fund liability: None. Employee's claim against the Second Injury Fund is denied.
23. Future requirements awarded: None.

Claimant's entire claims for benefits, including her claims against Employer/Insurer and The Treasurer of the State of Missouri as Custodian of the Second Injury Fund, are denied.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Donna L. Moorman

Injury No.: 05-141672

Employer: Boehringer Ingelheim Corporation

Additional Party: The Treasurer of the State of Missouri as Custodian of the Second Injury Fund

Insurer: Liberty Mutual Insurance Company

Hearing Date: November 12, 2009

Checked by: RBM

PRELIMINARIES

A final hearing was held in Injury No. 05-140246 and Injury No. 05-141672 on Employee's claims against Employer and the Second Injury Fund on November 12, 2009 in St. Joseph, Missouri. Employee, Donna L. Moorman, appeared in person and by her attorney, Michael A. Knepper. Employer, Boehringer Ingelheim Corporation, and Insurer, Liberty Mutual Insurance Company, appeared by their attorney, Meredith L. Moser. The Second Injury Fund appeared by its attorney, Maureen T. Shine. Michael A. Knepper requested an attorney's fee of 25% from all amounts awarded. It was agreed that briefs would be due on December 7, 2009.

STIPULATIONS

At the time of the hearing, the parties stipulated to the following:

1. On or about August 1, 2005 and August 16, 2005, Donna L. Moorman ("Claimant") was an employee of Boehringer Ingelheim Corporation ("Employer") and was working under the provisions of the Missouri Workers' Compensation Law.
2. On or about August 1, 2005 and August 16, 2005, Employer was an employer operating under the provisions of the Missouri Workers' Compensation Law and was insured by Liberty Mutual Insurance Company ("Insurer").
3. Claimant's Claims for Compensation were filed within the time allowed by law.
4. The average weekly wage in both cases was \$609.05, and the rate of compensation in both cases for temporary total disability and permanent total disability is

\$406.03 per week, and the rate of compensation for permanent partial disability is \$365.08 per week.

5. No compensation has been paid by Employer for temporary disability.
6. No medical aid has been paid or furnished by Employer.

### ISSUES

The parties agreed that there were disputes on the following issues:

1. Whether on or about August 1, 2005 and on or about August 16, 2005, Claimant sustained injuries by accident or occupational disease arising out of and in the course of her employment for Employer.

2. Whether Claimant's current condition is medically causally related to the alleged work injuries of August 1, 2005 and August 16, 2005.

3. Employer's liability, if any, for past medical expenses.

4. Employer's liability, if any, for permanent disability benefits, including permanent partial disability and permanent total disability.

5. Employer's liability, if any, for future medical aid.

6. Employer's liability, if any, for past temporary total disability from May 11, 2006 through July 26, 2006.

7. Whether Claimant gave notice of her alleged injuries to Employer as required by law.

8. Liability of the Second Injury Fund for permanent partial disability and permanent total disability.

Claimant and Charles Moorman testified in person. In addition, Claimant offered the following exhibits which were admitted in evidence without objection, provided that the depositions were admitted subject to objections contained in the depositions:

- A—Faisal Ahmad, M.D. records
- B—Heartland Health records
- C—Open MRI of St. Joseph records
- D—John Olson, M.D. records

E—C. Daniel Smith, D.O. records  
F— C. Daniel Smith, D.O. records  
G—Deposition of Edward Prostic, M.D. with deposition exhibits  
H—Deposition of P. Brent Koprivica, M.D. with deposition exhibits  
I—Deposition of Mary Titterington with deposition exhibits  
J—Claim for Compensation, DOI: 8/1/05  
K—Amended Claim for Compensation, DOI: 8/1/05  
L—Claim for Compensation, DOI: 8/16/05  
M—Amended Claim for Compensation, DOI: 8/16/05  
N—Report of Injury - # 05-140246  
O—Report of Injury - # 05-141672  
P—Medication List  
R—Prior Worker’s Compensation Claims  
S—Intra operative Photos  
T—Heartland Itemized Statement – Back Surgery  
U—Photocopy of Claimant’s hands (front and back)

Employer/Insurer offered Employer/Insurer Exhibit 1, Dr. Allan Parmet Deposition with deposition exhibits. The deposition was admitted in evidence subject to objections contained in the deposition.

The Second Injury Fund offered SIF Exhibit 1—Claimant’s deposition, which was admitted in evidence subject to objections contained in the deposition.

Any objections contained in any of the depositions are overruled unless otherwise noted.

The Briefs of the parties have been considered.

## **Findings of Fact**

### Summary of the Evidence

Donna Moorman testified she was born on November 6, 1945 and was 64 at the time of the hearing. She graduated from high school in 1964 and had no schooling after that. She wired harnesses for cars at Whitaker Cable for sixteen or seventeen years after high school. She began working for Employer in August 1982 as a bottle washer.

Claimant’s job at Employer required her to constantly load and unload bottles into a washer. She picked the bottles up by hand, loaded them into boxes, and set them on a truck. She handled several thousand bottles per day. She was laid off for five years beginning in 1986. She had two back injuries, and had two back surgeries. After her

second back surgery, she had good days and bad days, but she continued to work. She said she never got back to 100%.

Claimant was called back to work by Employer after her layoff and worked in packaging and labeling. The bottles arrived in tubs. The bottles were different sizes. She constantly turned to the right and picked up bottles. She then turned, put the bottles in a box, and put the box onto a pallet on her left. She constantly gripped, picked up bottles, and turned. She said she handled between 10,000 and 20,000 bottles per day. She said she was always reaching to her right to get bottles and then turning.

Claimant did the same job in labeling for nineteen years at Employer. Her duties were the same the last eight years she worked for Employer.

Claimant stood on a sloped floor drain at Employer for years. She testified that after working on the floor, she had problems with her knees and eventually had surgery on her left knee.

Claimant also had trouble with both of her shoulders. They were painful and she had difficulty using her arms. She saw Dr. Dan Smith in the early 2000s and had several cortisone shots in her legs and shoulders.

Claimant testified that on August 1, 2005, she was pulling bottled water in the staging area at Employer when something happened in her back. She said she felt sudden pain, like a pinched nerve, that went into her buttock and leg. She was working with 70 boxes of 100 ml bottles that had twenty bottles per box. She continued to work, but she had help. She eventually had surgery and the pain never went away after surgery. The pain was different than before August 1, 2005. It was more intense in her left buttocks. The pain went down her left leg before surgery, but she no longer has left leg pain. Her pain now is in her back, buttock, and hip.

Claimant said she complained of back pain at work, but she did not tell anyone of the specific incident. She did not remember if she told her supervisor that her back was hurting after August 1, 2005 until after she had an MRI and saw Dr. Olson in 2006. At that point she told her supervisor, Steve, that she was going to have surgery. She filled out a report at Employer in April before her surgery. She told her supervisor she was taking medical leave for surgery. She told Steve in April 2006 that surgery was scheduled, but she did not ask him to send her to a different doctor. She did not recall telling her supervisor that her surgery was from work. No one from Employer offered to send her to the doctor after that. Claimant never asked Employer to provide any treatment for her left shoulder or her back.

Claimant had left shoulder surgery in 2006. She said her shoulder has not been right since the surgery. She returned to work, but she was not able to get boxes onto the skid. She said she cannot sleep or lie on her left shoulder. She has trouble lifting now because of her shoulder.

Claimant continued to work from August 2005 until February 2006. Claimant had shoulder surgery in February 2006 and returned to work in March 2006. She returned to her regular job at Employer and worked forty hours per week.

Claimant identified Exhibit P, a list of her current medications that includes Lortab for pain. She takes Motrin.

Claimant identified Exhibit U, photographs of her left hand and right hand that were taken on November 11, 2009. She stopped wearing her wedding ring while she was still working because of swelling. She had cortisone shots before August 2005.

Claimant plays cards and dominoes. She cannot shuffle cards because she drops them. She said she does not clean her house very much—about every three weeks. She no longer washes the car. She has problems gripping things, and cannot open a carton of milk or twist off bottle tops. She drops things.

Claimant stated sitting bothers her back. It is better for her to sit in a recliner. She said she can sit thirty minutes to an hour depending on the chair. Walking up and down is difficult. She drives, but does not think she can drive long distances. She can stand thirty minutes before pain bothers her. She limits her lifting to approximately fifteen pounds. She used to go shopping before 2005. She limits her shopping now to between thirty and forty-five minutes. She could water ski before her first back surgery, but she stopped after that surgery.

On a typical day, Claimant gets up at 6:30 in the morning, goes to her daughter's house, fixes breakfast for her three grandchildren, and gets them off to school. She drives them three blocks to school and picks them up after school. She lives about a mile away from her daughter. She goes grocery shopping. She spends some time during the day in a recliner. If she mops or cleans the bathroom, she lies down during the day. She does a little housework each day. She has difficulty sleeping. She testified she sleeps about two hours, but constantly wakes up because of pain on her left side and back. She takes Excedrin PM. She also takes Lortabs every so often.

Claimant testified she did not think she could do the job she did for Employer. She did not know of any job she could do. She requested medical care for anything she needed in the future.

Claimant testified that she settled two prior worker's compensation cases on her back, one in 1985 for 15% for her back, and one in 1986 for 15% of her back. One surgery was at the L5-S1 level and the other was at the L4-L5 level. She had surgery on her left knee in 1995.

Claimant acknowledged that no doctors are recommending any tests or care for her. She sees Dr. Ahmad every six months for general check-ups.

Claimant identified Exhibit T, an itemized billing from Heartland for her back surgery. Claimant said that her bill for her back surgery has been paid by Employer's health insurer, and no one has filed a lien for that bill or has demanded payment for that bill. Health insurance also paid for her shoulder surgery.

Claimant used accumulated sick leave and vacation time after her shoulder surgery. She started family medical leave on July 26, 2006.

Claimant said that she has never been pain-free since her May 2006 surgery. She has not tried to find a job since she retired.

Claimant testified she was able to lift 50 pound tubs before her August 2005 back injury, and she did that several times a day. She acknowledged that she was released without restrictions after her prior back surgeries, and did not take prescription pain medication after her release from those surgeries. She testified she seldom used sick days before August 2005 and had no accommodations at work before August 2005. She did not see a doctor specifically for back pain prior to August 2005 after her release from her second surgery. She was able to perform her job properly and she received good evaluations at work.

Claimant testified that before 2005, she sometimes had good days and sometimes had bad days. Before 2005, she did not have to lie down often or take Aleve or Excedrin for pain. She said her sleep problems currently were related to her back and shoulder. Her knees still bother her. Claimant testified she had pain in her hands before 2005. She had arthritis in her left hand, and her little finger and ring finger did not close all the way. Some of her knuckles swelled. It affected her grip before 2005. She had trouble with her left shoulder before August 2005. Claimant said that her knees, shoulders and back hurt before August 2005. The pain bothered her for years and got worse.

Claimant testified that the year before her back injury in August 2005, she had to lie down on a picnic table while mushroom hunting because her low back pain was so severe. She stopped going mushroom hunting about a year before 2005. Claimant said her right shoulder, left knee, and right knee also hurt, and were worse at the end of the work day.

Claimant returned to her regular job after her left knee surgery in 1995. She did not miss time from work or get help from work after that.

Claimant testified that she now has back pain that goes into her buttock. She has trouble sleeping because of her back and shoulder. She did not have problems sleeping through the night before the August 2005 injury. She said she now has to lie down at times because of problems with her back and shoulder. She said she only occasionally lay down before August 2005. She was not taking Lortab before August 2005.

Claimant said she is independent in her activities of daily living. She is able to do laundry. She can take care of her personal hygiene.

Claimant said she has to lie down if she vacuums more than one room. She carries lighter amounts of groceries into the house. She limits her activities more and does not cook supper.

Claimant said she thought she would still be working at Employer if she did not have her injury in August 2005. She testified she had planned to work until she was 65. She applied for Social Security disability in June 2006, received notification in October 2006, and then advised Employer that she was retiring.

Claimant answered "I guess," to the question of whether her back pain was worse now than in August 2005.

Claimant's deposition taken on September 19, 2007 was admitted as Second Injury Fund Exhibit 1. Her deposition testimony was generally consistent with her trial testimony. She testified she was in packaging and labeling until she retired in October or November 2006, though her last day was May 2006. She worked until she had her back surgery, which was May, and then "made the decision to retire instead of returning because my doctor said he'd see me again if I went back to work."

Claimant believed her injuries were work related, but she never actually filled out a report. She testified she is five feet one and weighs one hundred thirty-five pounds. She testified in her deposition that she thought the claim on her shoulder should be August 1, 2005, and she injured her back in the middle of August 2005. She thought the dates were mixed up on the claim forms.

Claimant testified that all of her medical bills had been paid by her insurance and herself. She said her insurance carrier, Aetna, paid 100% of her hospital bill that was \$85,000.00. She does not take Aleve every day. She takes Lortab two at a time when she takes them. She takes Lortab maybe once a week or three or four times a month. She

testified that she was able to do day to day activities like grocery shopping, laundry, cooking and cleaning.

Claimant was asked whether she had ever seen a vocational expert regarding her employment. She answered, "At my age, it's time to retire." She said she had not looked for a job and had no desire now to work. She said she had planned to work until she was 65.

I find this testimony of Claimant to be credible unless otherwise noted later in this Award.

The court notes that Claimant did not ever stand during the approximately three-hour hearing, other than during a brief recess. The court did not observe Claimant moving around in her chair or grimacing as if in pain.

Charles Moorman testified that he is married to Claimant. They have been married for thirty-three years. He said Claimant has a hard time doing housework, reaching overhead, and opening prescription bottles and milk cartons. Claimant complained of her back hurting before 2005. A toilet with a higher seat was installed in their house after August 2005. Claimant is up several times during the night and moans at times. Walking bothers Claimant. Bending is a problem for her.

Mr. Moorman testified that Claimant came home in pain almost every day before August 2005. It was worse after August 2005.

I find this testimony of Charles Moorman to be credible unless otherwise noted later in this Award.

#### Medical Treatment Records

Exhibit B contains records of Heartland Health pertaining to Claimant. The records include an Operative Report dated November 30, 1984 documenting a hemilaminotomy; discectomy, L5-S1, left for a herniated nucleus pulposus, L5-S1, left. The records include an Operative Procedure Report documenting a total abdominal hysterectomy and bilateral salpingo-oophorectomy on September 17, 1986.

Exhibit E contains records of Dr. C. Daniel Smith pertaining to Claimant. His records include his June 15, 1987 report stating Claimant "can be released to go to her work activities without restrictions." Dr. Smith's June 17, 1987 report notes Claimant was seen on June 15, 1987 for an evaluation for ability to perform her work duties at Boehringer Ingelheim.

Dr. Smith's note, that appears to be dated June 18, 1987, documents an examination post lumbar laminectomy done thirteen months before at L4-5 level by Dr. Ronald Stitt. Claimant stated she felt better then than the past four to five years and only had some pain in the back with changes with the weather. She denied any numbness or tingling in either extremity. His note states that Claimant "may be released to all work activities without restrictions."

The Heartland records also include an MR left knee report dated January 28, 1995. The Impression noted is: "There is a joint effusion present which is nonspecific. I do not see evidence for internal derangement demonstrated on this study."

Dr. Smith's records also include his Operative Report dated February 23, 1995 noting an arthroscopy with arthroscopic partial meniscectomy and debridement of the patella of the left knee. Dr. Smith's February 24, 1995 note documents Claimant's return eight days post arthroscopic surgery of the left knee.

Exhibit A contains the records of Dr. Faisal Ahmad pertaining to Claimant. His record dated October 9, 1998 references the right shoulder and notes Claimant "wants to stop Buspar." His records document aches in Claimant's shoulder/back/neck on April 13, 2001 and complaints regarding her left shoulder on April 5, 2002.

Dr. Smith's March 19, 2003 note (Exhibit E) documents an injection of the left knee, complaints of left knee and left shoulder pain. The note states in part, "She does quite a bit of repetitive work and this seems to aggravate her complaints. She stands quite a bit at work as well." Dr. Smith's May 19, 2003 documents Claimant's complaints of pain in her shoulder and an injection.

Dr. Ahmad's records (Exhibit A) include an office note dated October 17, 2003 documenting a left shoulder injection for pain.

Exhibit C contains records of Open MRI of St. Joseph pertaining to Claimant. The records include a report of an examination dated August 14, 2004 for right shoulder pain. The report notes no rotator cuff tear was detected and a small amount of fluid in the subacromial-subdeltoid bursa may reflect bursitis. The records include a report pertaining to August 23, 2004 examination of Claimant's right knee. The report notes a small underlying osteocondryl lesion and small joint effusion.

Dr. Smith's records (Exhibit E) include his August 11, 2004 note that documents complaints of right knee pain and left shoulder problems. His August 23, 2004 note documents a left shoulder injection. His note dated September 8, 2004 documents relief from injection to her shoulder and review of an MRI of the knee. He released her then.

Dr. Ahmad's records (Exhibit A) include Progress Notes dated October 25, 2005 pertaining to Claimant. The records note complaints of left shoulder and back pain ranging from 5-8 over 10. These records document left lumbar radiculopathy and left shoulder pain. They make reference to MRI left shoulder and x-ray LS spine and C spine. No accident or traumatic event is identified in the Progress Notes.

Dr. Ahmad's records include a Radiology Report dated October 26, 2005 of the lumbar spine. The Impression noted is: "Anterior listhesis<sup>1</sup> of L4 onto L5, most likely degenerative in nature. There is [*sic*] degenerative changes of L4-5 and L5-S1 intervertebral disk spaces in facet joints." A radiology report dated October 26, 2005 of the cervical spine notes the Impression of: "No abnormalities of the cervical spine are identified."

Dr. Ahmad's records include a copy of Heartland Health Radiology MR left shoulder dated October 29, 2005. The Clinical History states: "Reason for exam LT shoulder pain x 6 yrs, no known injury." The indication noted is left shoulder pain. The Impression noted is: "1. No rotator cuff tear seen. 2. Degenerative changes of the acromioclavicular joint with evidence suggesting impingement syndrome."

Dr. Smith's Surgeon's History and Physical Report dated January 30, 2006 notes in part: "Left shoulder pain eight year history, prog. worse."

Dr. Ahmad's records contain a Heartland Health Radiology Report of MR lumbar spine dated February 20, 2006. The clinical history states: "Reason for exam low back pain with left leg radiculopathy for three months no recent injury." The Impression noted is: "L4 spondylolisthesis with a large left-sided disk herniation."

Dr. Smith's records include a copy of Operative Note dated February 23, 2006. The preoperative diagnosis is persistent left shoulder pain. The postoperative diagnosis is: "1. Degenerative tear of glenoid labrum. 2. Incomplete rotator cuff tear. 3. Anterior impingement syndrome. 4. AC joint arthritis." The Operative Note documents that on February 23, 2006, Dr. Smith performed a left shoulder arthroscopy with arthroscopic debridement of glenoid labrum, arthroscopic debridement of partial rotator cuff tear, arthroscopic partial acromioplasty, and arthroscopic AC joint resection."

Exhibit D contains records of Dr. John Olson pertaining to Claimant. The records include a report of Patty Waddell of his office dated March 15, 2006. Ms. Waddell's report states in part:

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<sup>1</sup> "Spondylolisthesis" is defined as "Forward movement of the body of one of the lower lumbar vertebrae on the vertebra below it, or on the sacrum." *Stedman's Medical Dictionary (28<sup>th</sup> Edition.)*

As you know, she is a sixty year old female who presents to the clinic today with a complaint of low back pain with left leg pain. She states the pain is in her entire leg, especially at the bottom of her left foot. The pain she developed in September 2005. She has had two previous surgeries on her low back. She states that she was never completely pain free post-op, but she never had the numbness in her left leg before. It is a constant, dull ache.

The Heartland records include a Heartland Health "DX lumbar complete w/bending" Radiology Report dated March 15, 2006 for low back pain with left leg radiculopathy. Clinical history is noted to be: "Reason for exam low back left leg and left hip pain x nine months." The Impression noted is: "Redemonstration of L4 spondylolisthesis. A large left paracentral disk herniation was visualized at the L4-5 level on the prior MRI. Degenerative disk disease at the level of T11-12, L4-5 and L5-S1."

Dr. Olson's Clinic Note dated April 10, 2006 notes he saw Claimant that day. She was noted to have pain in her back and parasthesia and occasionally give-way weakness in her left lower extremity. The note documents her previous microdiscectomy at L4-5 and L5-S1. It notes she has had some spondylolisthesis "that has developed in a significant amount of lateral recessed stenosis with some recurrent disk herniation on the left hand side at the L4-5 level. She also has some central stenosis from the spondylolisthesis." He thought her spondylolisthesis was about Grade II.

Dr. Olson's April 10, 2006 Clinic Note also states that the L5-S1 level "has a significant amount of degeneration in this disk space with minimal disk left II modic changes on the end plates." The report notes that he recommended a decompressive laminectomy at L4-5 with post lateral fusion from L4 to L5 all the way down to S1. The report also states: "I discussed this at length with the patient and her husband and because she has a very active job and wants to resume work for at least another five years, the only way to give her stability in her spine to facilitate this would be with a large fusion operation as described above."

Dr. Smith's records (Exhibit E) include his note dated May 3, 2006 documenting full range of motion of the left shoulder. The note states in part, "At this point in time, I will release her from my care."

The Heartland records (Exhibit B) include an Operative Report of Dr. John Olson dated May 11, 2006 documenting preoperative diagnoses: "1. Lumbar stenosis<sup>2</sup> at L4-5.

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<sup>2</sup> "Stenosis" is defined as "A stricture of any canal or orifice." *Stedman's Medical Dictionary* (28<sup>th</sup> Edition.)

2. Lumbar instability at L4-5 and L5-S1.” The report documents that Dr. Olson performed “L4-5 decompressive laminectomy, L5-S1 posterior lumbar antibody fusion, L4-5, L5-S1 pedicle screw fixation and L4-S1 post-lateral fusion.” The Heartland records include lumbar spine report dated May 12, 2006 documenting satisfactory postoperative lumbar spine with posterior lateral fusion. Dr. Olson’s records also include additional Clinic Notes documenting his treatment on May 31, 2006 and June 26, 2006.

Dr. Olson’s records include Dr. Olson’s Clinic Note dated July 26, 2006. His report notes x-rays that day showed good bone maturation and the screws and hardware all appeared to be intact. The record states that Claimant feels well and has occasional back pain and some stiffness, but her leg pain is resolved. Dr. Olson’s assessment is noted to be: “Lumbar instability, status post-fusion. The patient is doing well. Plan: I will see her back on a PRN basis.”

Exhibit F also contains records of Dr. Smith pertaining to Claimant. These include a Progress Note dated May 21, 2008 relating to left upper extremity pain that occurred when she fell about three weeks prior. The record notes her left shoulder arthroscopy in May 2006. The report states she was getting along fine until the new injury. An injection was administered to the shoulder and she was released.

### Workers’ Compensation Records

Exhibit N is a copy of Missouri Division of Workers’ Compensation Report of Injury dated April 12, 2006. It states in part: “Employee states she hurt her back pulling a pallet during the summer 2005. Employee did not report this to us until 4/11.” The form contains the date: “2005-08-01” in the box titled “Date of Injury/Illness”.

Exhibit O<sup>3</sup> is a Missouri Division of Workers’ Compensation Report of Injury stating, “Date administrator notified 2006-08-01.” It references a “date of injury/illness” of “2005/08/16”. It recites, “date employer notified: 2005-08-16.” It states in part, “Emp worked on production line, reaching across for product and packaging, allegedly causing wear/tear lt shoulder.”

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<sup>3</sup> I do not believe that Exhibit O accurately reflects the date of “August 16, 2005” as the date Employer was notified of the alleged left shoulder injury. Claimant testified she did not fill out a report for Employer relating to her left shoulder complaints. She did not ask Employer to provide medical treatment for her shoulder. She did not testify that she notified Employer that her shoulder complaints were related to work before her left shoulder surgery.

Exhibit R contains records of Missouri Division of Workers' Compensation pertaining to Claimant. These include a report of Dr. Ronald Stitt dated September 2, 1986 documenting that Claimant underwent a left hemilaminectomy, L4-5, left lyses of adhesions, and disk excision of L4-5, left on May 5, 1986. His report notes that Claimant had a previous history of laminectomy in 1984 which, according to Claimant, was done on the left side at L4-5 level. Dr. Stitt's report states in part: "I do not know what her previous disability was but at this time I would place her at a permanent partial disability of 30% of the body as a whole." The records include a Transcript of Compromise Settlement pertaining to Claimant's January 1, 1986 injury to her back and documenting a settlement based on PPD of 15% of 400.

The Workers' Compensation records also include a report of Dr. William Benson dated June 7, 1989 documenting Claimant's chronic lateral tendinitis. The records include his October 25, 1989 report stating "I feel that the permanent partial impairment of the right upper extremity taken at the level of the shoulder is in the amount of 5%." The Workers' Compensation records also include a Transcript of Compromise Settlement dated December 8, 1989 pertaining to March 30, 1989 injury to Claimant's right arm. The records document a settlement based on 5% PPD to the right arm at the 232 week level. The Workers' Compensation records also include a compromise settlement record dated December 31, 1985 pertaining to Claimant's September 1984 injury. These document "PPD 15% of 400."

### Medical Billing Records

Exhibit T is an itemized billing from Heartland Regional Medical Center dated June 5, 2006. These show itemized billings totaling \$85,150.03 for an admission on May 11, 2006 pertaining to Claimant. The bill notes that \$85,150.03 was billed to insurance and the amount "due from you" is shown to be "0.00."

### Photographs

Exhibit U contained black and white photographs of Claimant's hands. These show some joint swelling.

### Evaluating Physicians

The deposition of P. Brent Koprivica taken on April 30, 2009 was admitted in evidence as Exhibit H, with his report dated April 26, 2008 addressed to Claimant's attorney, his March 8, 2009 addendum report, and his Curriculum Vitae. Dr. Koprivica is a licensed Medical Doctor in Missouri and Kansas. He is Board Certified in Emergency Medicine and is Board Certified by the American Board of Preventative Medicine and Occupational Medicine.

Dr. Koprivica's April 26, 2008 report notes he reviewed copies of Claimant's claims for compensation, medical records, deposition of Claimant, and worker's compensation records identified in his report. He identified Claimant's educational and vocational history. His report discusses preexisting medical treatment and worker's compensation settlements that are consistent with the treatment records and worker's compensation settlement documents in evidence. He notes her left-sided L4-L5 disk herniation in 1984, and hemilaminectomy and discectomy done at that level. He notes she received a 15% permanent partial disability to the body as a whole.

Dr. Koprivica's April 26, 2008 report notes Claimant's injury to the lumbar spine on January 1, 1986 with left L4-L5 hemilaminectomy, lysis of adhesions and recurrent discectomy surgery on May 5, 1986. He notes a second settlement of 15% permanent partial disability to the body as a whole. He notes Claimant's arthroscopic partial lateral meniscectomy and patellar chondroplasty for chondromalacia on February 23, 1995. He notes that Claimant had injections for left knee pain and left shoulder pain in 2003 and 2004. He notes Claimant's complaints in the right knee and left shoulder.

Dr. Koprivica's April 26, 2008 report identifies an injury to Claimant's back on August 2005 when she developed numbness and pain down her left leg while pulling a pallet jack to move a skid load of bottles of water. His report identifies persistent complaints of left shoulder problems up until August 16, 2005 and ongoing. He notes an MRI scan of the left shoulder on October 25, 2005 was consistent with impingement, and an MRI scan of lumbar spine of February 20, 2006 revealed a very large recurrent left-sided disk herniation of L4-L5.

Dr. Koprivica's April 26, 2008 report notes Dr. Smith performed surgery on the left shoulder on February 23, 2006, and that a degenerative tear of the glenoid labrum was debrided, the acromioclavicular joint was resected, and a partial rotator cuff tear with impingement was treated with decompression. He notes that Dr. Olson performed an L4-L5 decompressive laminectomy and instrumented fusion from L4 to S1 on May 11, 2006. He notes Claimant's last date of work was May 9, 2006. He notes that Dr. Olson released Claimant on July 26, 2006.

Dr. Koprivica notes Claimant's loss of strength and motion in her left shoulder. He notes problems with the low back, including postural limitations, limited sitting tolerance, limited standing tolerance, and limited walking tolerance. He notes ongoing pain in the left buttocks area.

Dr. Koprivica performed a physical examination of Claimant. He notes Waddell's testing was negative for symptom magnification. He notes severe degenerative arthritis involving both hands. He notes significant pain in left shoulder and limitation of motion.

He notes very severe pain in the back with motion testing. He notes limited motion of the back.

Dr. Koprivica expressed several conclusions based on a reasonable degree of medical certainty. His report notes that prior to August 1, 2005, Claimant had significant preexistent industrial disability. He notes she had hindrance vocationally from her low back that would be a significant obstacle to reemployment. He notes her need to avoid constant bending at the waist, pushing, pulling, or twisting types of tasks, and she had limits in how much she could lift. He adopted the cumulative total of 30% permanent partial disability to the body as a whole for the lumbar condition as existed prior to August 1, 2005.

Dr. Koprivica also described preexisting industrial disability to the left knee, and assigned a 20% permanent partial disability of the left lower extremity at the level of the knee. His report also notes Claimant had MRI evidence of microfractures involving the right knee and patella femoral chondromalacia and degenerative involvement of the right knee, and assigned a 15% permanent partial disability to the right lower extremity at the level of the knee. He restricted Claimant from extensive squatting, crawling, kneeling or climbing types of tasks.

Dr. Koprivica's report states that related to the primary injury to the low back, August 1, 2005 is the appropriate date for that injury. He states Claimant sustained repetitive injury up through August 1, 2005. His report further states:

At that point, with the onset of the left radicular symptoms and the subsequent identification of the large left-sided disk herniation on MRI scan of the lumbar spine on February 20, 2006, I believe that pathology was present as of August 1, 2005.

I would consider Ms. Moorman's workplace activities to be 'a' substantial factor resulting in progressive injuries as she worked up through August 2005, with the development of the identified left-sided disk herniation.

Dr. Koprivica's report notes he considered Claimant to be at maximum medical improvement in reference to the back injury. He notes Claimant's decompression and fusion and states that Claimant's workplace activities were "a" substantial factor necessitating the decompression and two-level fusion that had been performed. His report states that for Claimant's permanent injury of August 1, 2005, in isolation, he assigned a 25% permanent partial disability to the body as a whole. He further states in paragraph 6 and 7 of his report on page 18:

6. Following the work injury date of August 1, 2005, Ms. Moorman had an increase in restrictions based on her lumbar condition. I would point out that the prior industrial disability in the lumbar region contributes to the severity of the restrictions at this point.

Ms. Moorman should be allowed postural considerations. I would recommend captive sitting intervals of less than one hour with the flexibility of changing whenever necessary. Standing intervals should be limited to less than one hour with the flexibility of sitting more often as needed. Walking should be limited to less than thirty minute intervals with the flexibility of sitting whenever necessary.

Ms. Moorman would be restricted from lifting from floor level at this point.

I would recommend that Ms. Moorman limit physical demand activities to sedentary physical demand.

Ms. Moorman should avoid frequent or constant bending at the waist, pushing, pulling or twisting. She should avoid sustained or awkward postures of the lumbar spine as well.

7. Realizing that there is an injury date subsequent to this of August 16, 2005, in reference to the left shoulder, I would consider a 10 percent enhancement factor to represent the synergism from combining the permanent partial disabilities I have outlined that predated August 1, 2005, with the additional permanent partial disability attributable to the August 1, 2005, injury date.

Dr. Koprivica's report further states that he did not believe the August 1, 2005 injury was totally disabling considered in isolation, in and of itself.

Dr. Koprivica's report also states, regarding Claimant's upper extremity:

8. Ms. Moorman's upper extremity use activities represents an exposure to risk in terms of her shoulder which was unique to that employment. Ms. Moorman was doing heavy lifting, pulling and pushing types of tasks through her employment. She did not do those activities away from work. The general population is not exposed to that extent of risk.

I would consider Ms. Moorman's work place activities to represent 'a' substantial factor in the development of the identified partial rotator cuff tear, chronic impingement syndrome, chronic acromioclavicular arthralgia based on degenerative disease and the labral tear that was identified and has been treated surgically.

9. I would consider Ms. Moorman to be at maximal medical improvement in reference to the August 16, 2005, work injury claim date.

Dr. Koprivica's April 26, 2008 report further states that Claimant's permanent partial disability involving the left shoulder associated with August 16, 2005 injury "is not totally disabling considered in isolation." The report notes that in terms of disability, for the primary injury date of August 16, 2005, he would assign a 25% permanent partial disability of the left upper extremity at the level of the shoulder (232 week level) in isolation.

Paragraph 11 of his report sets forth his restrictions as follows:

11. In reference to the additional permanent partial disability associated with the impairment of the left shoulder, I would restrict Ms. Moorman from any weighted activities above shoulder girdle level on the left. She should avoid sustained or repetitive tasks above shoulder girdle level. She should do no types of climbing tasks. I would recommend she avoid repetitive reaching or pushing/pulling tasks with the left upper extremity at the shoulder level.

Dr. Koprivica's report also states:

12. When one combines all of the permanent partial disabilities that pre-dated August 16, 2005, with the additional disability attributable to the primary injury of August 16, 2005, significant enhancement of the combined disabilities arises above the simple arithmetic sum of the separate disabilities.

Dr. Koprivica also states that the medical care and treatment which Claimant received for her low back following August 1, 2005 was medically reasonable and a direct necessity of the repetitive injury she sustained from employment at Employer associated with the August 1, 2005 claim injury date. The report also states that the medical care and treatment which she received for her left shoulder was medically reasonable and a direct necessity of the repetitive injuries she sustained from her employment activities with Employer through August 16, 2005.

Dr. Koprivica's report further states: "I would recommend a formal vocational evaluation. However, it would be my opinion that it is probable that Ms. Moorman is permanently totally disabled."

Dr. Koprivica's March 8, 2009 addendum report notes that he had reviewed Dr. Prostic's report of December 1, 2008. Dr. Koprivica states that review of Dr. Prostic's report would not materially change any of his opinions or conclusions.

Dr. Koprivica testified regarding portions of his April 26, 2008 report. His testimony was generally consistent with his report. He testified that Claimant would have an expected ongoing need to take Lortab, and would need to be able to see a doctor for monitoring for pain purposes, and she would need some medication to cure and relieve her of the effects of either the back or left shoulder work-related injuries.

On cross-examination, Dr. Koprivica stated he could not answer specifically which of the conditions she was taking Lortab for. He did not attribute the disk herniation to a specific event in August 2005. He thought it was repetitive. He stated his restrictions for her back incorporated her overall lumbar condition.

Dr. Koprivica testified on cross examination that he agreed that Claimant had a great deal of degenerative change and arthritis in multiple joints in her body. He thought that Claimant's disk herniation was repetitive. He did not attribute it to a specific event in August 2005. He thought the onset of the radicular symptoms was August 1, 2005. He thought that was when she reported it. He acknowledged that her most recent stint of treatment started in October 2005 with Dr. Ahmad.

Dr. Koprivica was asked the following question and gave the following answer:

Q. (By Ms. Shine) If she is not – if she did not have to lie down during the day before August 1 of '05 but now she has to because of back pain, isn't the need to lie down attributable directly to the August 1, '05, injury, back injury?

A. And I – I don't know how that's interpreted legally. I – as an analogy, if – if the need to lay down structurally is like a rag being torn in two, you have to have the rag completely torn in two to have that need. The rag wasn't torn in two prior to August of 2005, but it was partially torn. This last – the last contribution tore it in two. And what I was saying earlier is that the fact that it's torn in two considers the contribution to the tear that occurred back in '84 and '86, but that need to lay down didn't follow until after this last injury. And if the tearing of the rag is 50 percent due to this

event, that alone would not necessarily necessitate the need to lie down. It's the structural change where the rag is completely torn in two.

Now, factually, it is true. She wasn't laying down during the day as she is now prior to the – the last work injury claim. And how that gets interpreted, you know, I don't – legally, I'm not sure, but that's – but that's – that's how I would view it structurally, is that the severity of her situation incorporates what happened in '84 and '86.

Dr. Koprivica also testified that the consequences of the back injury up through August 1, 2005 would not have been as extensive as they were had she not had the two prior injuries and surgeries. He also testified he did not issue a medical restriction that Claimant had to lie down unpredictably during the day in his report to Claimant's attorney.

Dr. Koprivica was also asked the following questions and gave the following answers:

Q. And if I understood your – your testimony, it was that this injury in isolation wouldn't result in the need to lie down, but because she had a history of multiple surgeries to the back in the past and continuing problems that all those things put together would result in the need to lie down?

MS. SHINE: I'm going to object to that. That misstates the evidence, and I don't believe that's what Dr. Koprivica actually testified to.

Q. (By. Ms. Moser) Is that fair to say, Dr. Koprivica?

A. That's what I was attempting to say. I thought it was a cumulative – accumulation of the structural changes that would be associated with all three of the back surgeries. And predicting that – the need to lie down from this injury alone, in isolation, I don't know that I could do that.

Dr. Koprivica was asked about a temporary total disability period following Claimant's back surgery in May 2006 and when she was at maximum medical improvement. He noted Dr. Olson released her from care on July 26, 2006, and stated she was at MMI that day based on the treatment records. He also stated he did not know at what point in her treatment Employer could have accommodated her restrictions "had she not voluntarily resigned her employment."

Dr. Prostic's deposition taken in this case on March 13, 2009 was admitted as Exhibit G with Prostic Deposition 1, his Curriculum Vitae, and Prostic Deposition 2, his December 1, 2008 medical report addressed to Claimant's attorney. Dr. Prostic is a Medical Doctor licensed in Missouri and Kansas. He is a Diplomat of the National Board of Medical Examiners, a Fellow of the American Academy of Orthopedic Surgeons, and a member of the American Board of Orthopedic Surgeons.

Dr. Prostic's December 1, 2008 medical report pertaining to Claimant recites Claimant's history of her injuries on August 1, 2005 to her back and August 16, 2005 to her left shoulder. He identified the records he reviewed, which include records of Dr. Smith, Open MRI of St. Joseph, Dr. Ahmad, Heartland Health, Dr. Olson, and Dr. Koprivica. His report discusses Claimant's course of treatment, her complaints, including pain in her left lower back, left shoulder, and numbness and tingling going down the ring and little finger since her traumatic fall in May 2008 with injury to her neck, and her past medical history. The results of Dr. Prostic's examination and interpretations of left shoulder and lumbar spine x-rays are noted.

Dr. Prostic's report contains the following comments:

On or about August 1, 2005 and August 16, 2005, Donna L. Moorman sustained injuries during the course of her employment. She has been operated for subacromial decompression, excision of the lateral clavicle, and rotator cuff repair. By physical examination, she has recurrent tear of her supraspinatus. If she desires more treatment to the left shoulder, she should have repeat MRI or arthrogram and consideration of additional surgery. She has had excellent decompression and stabilization L4 to the sacrum. Additional treatment to the low back other than therapeutic exercises is not likely to be beneficial. Presently, she is unable to do any activity with the left hand above shoulder level or that requires forceful pushing or pulling or more than mild reaching left handed. She also should not frequently bend or twist at the waist or do activities below knee level. She needs to be able to change position for comfort. When combining all of the work restrictions, she seems fit only for predominately right handed predominantly sedentary activity. Based upon her education, training, and experience, she appears to be permanently and totally disabled from gainful employment. Permanent partial impairment is rated at 25% of the left upper extremity for the shoulder and new impairment of 20% of the body as a whole for the lumbar spine.

Dr. Prostic's report notes his opinions were reached within reasonable medical certainty.

Dr. Prostic testified that Claimant gave him a history of injury to her low back on or about August 1, 2005. She also described ongoing warehouse type duties loading things onto a cart, or moving boxes and containers of things essentially rotating with a load throughout the day. He said both of those were contributing factors to the condition that resulted in her low back and which resulted in surgery in 2006. He said the surgery of Dr. Olson, the fusion, was reasonably necessary to cure and relieve the effects of the back injury of August 1, 2005.

Claimant also described an injury to her left shoulder on or about August 16, 2005. He testified that Claimant's work activities of reaching and pulling for the materials and "again loading and doing warehouse type loading and unloading of containers and moving those containers through various stages of the warehouse in the shipping process" were a substantial factor in causing the injury to her left shoulder. He testified the surgery by Dr. Smith, the arthroscopic subacromial decompression and debridement of the rotator cuff and the resection of the lateral clavicle, were reasonably necessary to cure and relieve the effects of that injury to the left shoulder. He testified the work activities were a substantial factor in causing the need for that treatment and the injury to her left shoulder. He testified regarding his physical examination of Claimant. His testimony was consistent with his report. He noted in part that Claimant's shoulder examination "was suspicious for full thickness tearing of the rotator cuff."

Dr. Prostic defined spondylolisthesis as "a forward slippage of the upper spine through L4 and L5 in the sacrum." He did not think that was the source of Claimant's continuing pain. He said that should have been stabilized by the hardware in her back.

Dr. Prostic recommended that Claimant not be required to do activities with her left hand above shoulder level or that require forceful pushing or pulling or significant reaching left handed as the consequence of the August 16, 2005 injury. He restricted her against lifting weights greater than twenty-five pounds occasionally or ten pounds frequently as a consequence of the August 2005 injury to her low back. He stated that he would "ask her not to do activities below knee level, to minimize activities above shoulder level, to avoid forceful pushing or pulling, to avoid repetitious bending or twisting at the waist or use of vibrating equipment." He also hoped that "she would be in a position where she could change positions as needed for comfort for her low back." He thought she needed to be allowed to change positions every thirty to forty minutes.

Dr. Prostic testified that Claimant had 25% permanent partial disability of the left upper extremity at the 232 week level by reason of her August 16, 2005 injury considered alone. He also testified that Claimant had 20% permanent partial disability to the body as a whole for the injury to her low back with a claimed injury date of August 1, 2005 for the cumulative wear and tear on her back and the incident with the pallet jack and bottled water pallet.

Dr. Prostic also testified, "I did ask her at the time I met with her about her work history and based upon the work history that she provided I thought that she was essentially permanently and totally disabled from gainful employment." He restricted her from not doing any of the jobs that she described doing in the past, and that was because of the back injury of 2005 in combination with the shoulder injury. His testimony was stated to have been given to a reasonable degree of medical certainty.

Dr. Prostic testified that Claimant had disability related to her low back that preexisted August 2005.

Dr. Prostic testified on cross examination that the history, as it related to Claimant's injuries, was based on the report that Claimant gave him. He agreed that Dr. Faisal, who ordered an MRI, did not make any admission of any work related injuries that Dr. Prostic recalled. He also testified that Claimant is unable to access the open labor market, that is based on a combination of her physical conditions, and not one single condition in isolation. He did not review medical records regarding injuries prior to August 2005. He did not review Claimant's personnel records. He further testified: "For the problems from her shoulder and her low back she is quite limited in the number of jobs that she could obtain and she is further limited by her age, education, and experience. So practically speaking, I think it's going to be most difficult for her to obtain reasonably gainful employment in the labor market."

Exhibit 1 is the deposition of Dr. Allan Parmet taken on October 9, 2009 with Dr. Parmet's Curriculum Vitae and medical report dated September 2, 2009. Dr. Parmet is a licensed Medical Doctor and is Board Certified by the American Board of Preventive Medicine and Aerospace Medicine and Occupational Medicine. His Curriculum Vitae notes numerous activities, awards, academic appointments, articles and lectures.

Dr. Parmet's September 2, 2009 report addressed to Employer's attorney notes that he performed an independent medical evaluation of Claimant on September 1, 2009. He reviewed medical records of Dr. Koprivica, Dr. Prostic, Dr. C. Daniel Smith, and records of Mary Titterington. His report recites the history of present illness. The report notes that Claimant told him that she had worked the last nineteen years in packaging and labeling at Employer. She stood at a turntable removing bottles as they came off a table. She had a maximum lift requirement of fifty pounds. She reported processing ten to twenty thousand bottles per day. She would take the bottles and put them into a package, box or tub, fill pallets, and pull pallets using a hand jack. She also did paperwork, but did not do over head work. He reported she did continual bending and twisting while standing.

Dr. Parmet's report notes Claimant's low back injury in 1984 with surgery and subsequent surgery two years later. She reported that she thought she had back pains beginning again in 2003. She described those as general aching and low back pain radiating into the buttocks and legs. She reported that she pulled a skid or something and twinged her back in August 2005. The report notes her seeing Dr. Ahmad in October 2005, and a referral to a neurosurgeon, Dr. Olson. She had a posterior fusion in 2006. The report notes that it was about that time when she reported it as a work injury. She was noted to have been released in August 2006 and was told not to return to work. The report notes Claimant complained that her back still hurt and notes her standing limitations.

Dr. Parmet's report also describes Claimant's report of a left shoulder injury that she thought was due to repetitive activities. The report notes she had no specific injury and was not sure of the onset of her symptoms. She had seen Dr. Smith and had shots for several years. She had shoulder surgery by Dr. Smith in February 2006. She was released in March 2006 and returned to work. She reported continued left shoulder pain. She stated it hurt to sleep and she could not lie on her shoulder. He reported restricted range of motion.

Dr. Parmet's report discusses the records he reviewed. The report contains the results of his physical examination of Claimant.

Dr. Parmet's report sets forth the following diagnoses: "1. Degenerative joint disease, lumbar spine, status post-1984 and 1986 surgical procedures resulting in additional degenerative changes and disk herniation status post-2008 posterior lumbar fusion. 2. Degenerative joint disease, left shoulder, with impingement syndrome and partial rotator cuff tear." Dr. Parmet's discussion recites that primary medical records of Drs. Smith, Ahmad and Olson should be obtained and reviewed. He notes that Claimant has been surgically post-menopausal for over twenty years "and has wide spread and multi joint findings of degenerative joint disease compatible with osteoarthritis, a nonoccupational degenerative disease." His report further states:

While she reportedly had an occupational injury in 1984 with recurrence in 1986, it would be anticipated that the same level would progress into degenerative changes over the ensuing 20 years magnified by surgical menopause as well as osteoarthritis. There is no reason to suppose that any occupational event precipitated either her shoulder or back problems. Clearly, these events were not of such an acute nature as to raise the specter of a work-related injury in Ms. Moorman, who delayed the initial evaluation for several months and subsequently reporting them as a work-related injury even longer. This is despite the fact that she had experience and first-hand knowledge with reporting of worker's

compensation injuries. Without objective evidence of a precipitating injury and with obvious degenerative changes, there is no information to support that her current condition is work-related. I will be happy to review the primary medical records when they become available.

Currently, Ms. Moorman has a good surgical response in her left shoulder, which is not quite as good as her right shoulder, but neither shoulder is normal as they both suffer degenerative changes. I would rate her left shoulder disability at 20% at the 232-week level and her low back, which had two prior surgeries before the fusion, at 25% of the body as a whole. I note that she previously had a 30% permanent partial disability attributable to her low back, but I find that difficult to accept as a degree of disability followed by over 20 years of subsequent employment at the same position of medium labor.

Ms. Moorman can return to the light level of labor but should avoid frequent kneeling, crawling, or overhead work.

Dr. Parmet testified regarding his report. His testimony was generally consistent with his report. He testified that he thought in 2008, 47% of his time doing medical/legal evaluations was for plaintiffs or claimants, 42% was for defendants, and the remainder was neutral. He also testified that after he initially prepared his report, he reviewed additional treatment records related to Claimant. He also testified that his opinions were to a reasonable degree of medical certainty.

Dr. Parmet testified that Claimant had surgery to remove her ovaries and that disturbs female hormone status and accelerates bone demineralization and bone aging. He testified regarding some of the findings of his examination of Claimant. He noted there were a lot of osteoarthritic changes in Claimant's hands and swelling of the joints and nodes—much more than you would expect for average. He also noted Claimant had a lot of degenerative changes in her lower extremities as well. He testified that the prevalence of osteoarthritis in multiple parts of Claimant's body is degenerative process that takes place over time. He testified that Claimant's ovary removal surgery, which causes surgical menopause, would have accelerated the degenerative process further.

Dr. Parmet was asked the following questions and gave the following answers (pp 16-18):

Q. Doctor, in your medical opinion, to a reasonable degree of medical certainty, what was the substantial contributing factor or factors in Ms. Moorman's low back condition as she presented it to you?

A. Well, first, she had an acute injury back in the early 1980's and had two surgeries at that time. These accelerate the degenerative process that occurs in everybody. She has generalized osteoarthritis. Change – degenerative changes throughout her whole body. Virtually all her joints are involved and she had surgical menopause.

So these together are very synergistic. So you have her genetic background, the surgical changes and time add up to cause accelerated degenerative changes and a collapse of the lumbar spine, degenerative changes of the left shoulder and rotator cuff.

Q. In your opinion, to a reasonable degree of medical certainty, was her work that – was claimed was a work-related injury in this case at Boehringer-Ingelheim, either the substantial contributing factor – a substantial contributing factor or the prevailing factor in the development of her low back condition?

A. I don't believe so.

Q. And how about her shoulder condition?

A. I also don't believe so. At most we might have had a minor contribution, but in general, the work makes you aware of the injury without causing it. It's like you break your leg and then you get up and walk on it. Well, you know, walking doesn't break your leg but it sure makes you aware of it.

Q. Was her work at Boehringer-Ingelheim over time, which is the claimed injury in this case, was that a substantial contributing factor in her need for either the low back surgery or the left shoulder surgery?

A. I don't believe so.

Q. In your medical opinion, Doctor, would her work over time at Boehringer-Ingelheim be the – a substantial contributing factor in the need for any future medical treatment as it related to either her low back or her shoulder – left shoulder?

A. I don't believe so.

Dr. Parmet also testified that he rated her overall back condition at 30% permanent partial disability to the body as a whole. He also stated he would have rated the prior two surgeries together at 25% and subsequent surgery an additional 5%.

Dr. Parmet testified he would limit Claimant to light labor which would be a frequent ten pound lifting or occasional twenty pound lifting. She should avoid crawling, bending and overhead work above the shoulder level.

Dr. Parmet thought Claimant probably would have been a zero on the Waddell test. He did not see any evidence of exaggeration.

Dr. Parmet noted that according to Dr. Olson's note, Claimant was planning to work another five years when she saw him in 2006. He noted Dr. Olson commented on Grade 2 spondylolisthesis at L4-5.

Dr. Parmet agreed there may have been some effect by her work activities on the already vulnerable spine, but he said it would not have been significant enough to cause spondylolisthesis. He said that was just degenerative breakdown of that condition. He was asked about the pallet jack incident where Claimant was pulling a pallet in August 2005. He said that was a strain, and there was nothing severe at that time that triggered an evaluation.

Dr. Parmet discussed Dr. Ahmad's record of February 20, 2006 and noted the clinical history recorded was low back pain with left leg radiculopathy for three months, no recent injury. Dr. Parmet thought Claimant could sit and change position and would probably be able to do so all day.

#### Vocational Evidence

The deposition of Mary Titterington taken on June 30, 2009 was admitted as Exhibit I with Titterington Deposition 1, her Curriculum Vitae, Titterington Deposition Exhibit 2, her report of her vocational evaluation of Claimant dated March 15, 2009, and Titterington Exhibit 3, Claimant's junior high and high school records.

Ms. Titterington's Curriculum Vitae notes that she has a M.S. degree and has been a self-employed vocational rehabilitation consultant from 1987 to the present. She is a licensed professional counselor in the state of Kansas, a certified disability management specialist, and a certified forensic counselor. Her consulting experience, training seminars given, and professional relations are detailed in her Curriculum Vitae.

Titterington Deposition 1 describes Claimant's background, Ms. Titterington's evaluation, and the records she reviewed that included Claimant's claims for

compensation, prior workers' compensation records, personnel file, school records, Heartland Health treatment records, C. Daniel Smith treatment records, Open MRI of St. Joseph treatment records, Dr. Ahmad treatment records, Dr. Olson treatment records, Dr. Prostic report, Dr. Koprivica report, and Claimant's deposition taken September 19, 2007.

Ms. Titterington evaluated Claimant on March 5, 2009. Her report notes that at that time Claimant was treated by her family physician, Dr. Ahmad, every six months or as needed, and by Dr. John Olson, a neurosurgeon, monthly since undergoing cervical fusion in January 2009.

Ms. Titterington's report notes numerous conditions for which Claimant has been diagnosed and/or treated. Her report identifies the surgical procedures that Claimant has had, and the medications she takes, including Lortab three to four times per week. The report identifies Claimant's reports of medical problems, including low back and hip pain daily intermittently, pain and limitation in range of motion in left shoulder with any use, sleep disturbance, constant pain in all fingers, and limitation in motion and ability to make a fist and straighten out ring and little fingers on left hand prior to 2005.

Ms. Titterington's report sets forth physical limitations identified in the reports of Dr. Prostic and Dr. Koprivica. It includes Claimant's estimates of average physical capabilities, including sitting, standing, walking, bending and others. It discusses Claimant's activities of daily living and notes Claimant is independent but has some difficulty in performing activities of daily living. The report notes that sleep is a substantial problem and that "approximately two to three times a week she will lie down due to back pain and fatigue. If she takes her pain medication she will lie down because it makes her sleepy." The report discusses pre- and post-injury activities, education, work history and results of vocational testing. The report also discusses the vocational implications.

Ms. Titterington's report sets forth the following summary:

Ms. Moorman worked for over twenty four years for Boehringer Ingelheim as a production worker. Prior to that job, she worked for sixteen years for Whitaker Cable in production. All of her jobs have been unskilled and required good physical functioning. Over the forty years of this type of work, she developed impairments to her low back, shoulder, elbow, and knee. The combination of these impairments and the resultant restrictions, remove her from the competitive labor market. Her work base is eroded. There are no jobs for a sixty-three year old woman with no advanced education, with tested academic skills less than her educational attainment, chronic pain, severe restrictions on her upper extremities, ability to stand, walk and sit, reach, push, pull and twist.

There is no expectation that any employer would be willing to hire her as she presents and as the physicians limit her. She cannot meet the essential requirements of work. She is unemployable.

Ms. Titterington's report notes that her conclusions are given within a reasonable degree of vocational certainty.

At the beginning of Ms. Titterington's deposition, the attorneys stipulated that Ms. Titterington is qualified as an expert to testify in areas of vocational matters. She identified her report. Her testimony about her report was consistent with the contents of her report.

Ms. Titterington testified that in Claimant's case, it was really the way that her various problems interact with one another that caused her to ultimately conclude that Claimant cannot work in any job in the labor market. She excluded consideration of Claimant's cervical fusion.

Ms. Titterington testified that the need to lie down during the day on an intermittent basis of unpredictable times renders one unemployable in isolation. Ms. Titterington was asked about entries in various medical records regarding complaints of pain and treatment prior to 2005, and agreed that Claimant was experiencing some difficulty prior to 2005 and was seeking medical attention for shoulder and knee pain and low back. She testified that there is no job that Claimant can perform in the open labor market and maintain it.

### **Rulings of Law**

Based on a comprehensive review of the substantial and competent evidence, including the testimony of Claimant and Claimant's husband, the medical reports and records, the depositions, the stipulations of the parties, and my personal observations of Claimant at the hearing, I make the following Rulings of Law:

1. Did Claimant sustain injuries by accident or occupational disease arising out of and in the course of her employment for Employer, and if so, was her injury medically causally related to accidents or occupational diseases arising out of and in the course of employment?

As discussed in more detail later in this Award, I find that Claimant failed to prove that she sustained back and left shoulder injuries prior to August 28, 2005 under the Workers' Compensation Law, and I find these cases are governed by the provisions of the 2005 amendments to the Workers' Compensation Law.

Section 287.800, RSMo<sup>4</sup> provides in part that administrative law judges shall construe the provisions of this chapter strictly and shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.

Section 287.808, RSMo provides:

The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation under this chapter is on the employee or dependent. In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true.

Section 287.020.2, RSMo provides:

The word 'accident' as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

Section 287.020.3, RSMo provides in part:

3. (1) In this chapter the term 'injury' is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. 'The prevailing factor' is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

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

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<sup>4</sup> All statutory references are to RSMo 2006 unless otherwise indicated. In a workers' compensation case, the statute in effect at the time of the injury is generally the applicable version. *Chouteau v. Netco Construction*, 132 S.W.3d 328, 336 (Mo.App. 2004); *Tillman v. Cam's Trucking Inc.*, 20 S.W.3d 579, 585-86 (Mo.App. 2000). See also *Lawson v. Ford Motor Co.*, 217 S.W.3d 345 (Mo.App. 2007).

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

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

(3) An injury resulting directly or indirectly from idiopathic causes is not compensable.

(5) The terms 'injury' and 'personal injuries' shall mean violence to the physical structure of the body. . . .

Section 287.020.10, RSMo provides:

In applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of 'accident', 'occupational disease', 'arising out of', and 'in the course of the employment' to include, but not be limited to, holdings in: *Bennett v. Columbia Health Care and Rehabilitation*, 80 S.W.3d 524 (Mo.App. W.D. 2002); *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo.banc 1999); and *Drewes v. TWA*, 984 S.W.2d 512 (Mo.banc 1999) and all cases citing, interpreting, applying, or following those cases.

Occupational diseases are compensable under the Missouri Workers' Compensation Act. Sections 287.067.1, 2, RSMo. An employee's claim for compensation due to an occupational disease is to be determined under Section 287.067.1, RSMo. It defines occupational disease as:

1. In this chapter the term 'occupational disease' is hereby defined to mean, unless a different meaning is clearly indicated by the context, an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

Section 287.067.2, RSMo provides:

2. An injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The 'prevailing factor' is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

Section 287.067.3, RSMo provides:

An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. An occupational disease due to repetitive motion is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The 'prevailing factor' is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

Section 287.067.8, RSMo provides:

With regard to occupational disease due to repetitive motion, if the exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than three months and the evidence demonstrates that the exposure to the repetitive motion with the immediate prior employer was the prevailing factor in causing the injury, the prior employer shall be liable for such occupational disease.

Section 287.063.1 provides:

An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when for any length of time, however short, he is employed in an occupation or process in which the hazard of the disease exists, subject to the provisions relating to occupational disease due to repetitive motion, as is set forth in subsection 8 of section 287.067.

Section 287.190.6 (2), RSMO provides:

Permanent partial disability or permanent total disability shall be demonstrated and certified by a physician. Medical opinions addressing compensability and disability shall be stated within a reasonable degree of medical certainty. In determining compensability and disability, where inconsistent or conflicting medical opinions exist, objective medical findings shall prevail over subjective medical findings. Objective medical findings are those findings demonstrable on physical examination or by appropriate tests or diagnostic procedures.

Claimant must present substantial and competent evidence that he or she has contracted an occupationally induced disease rather than an ordinary disease of life. The Courts have stated that the determinative inquiry involves two considerations: "(1) whether there was an exposure to the disease which was greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee's job which is common to all jobs of that sort." *Polavarapu v. General Motors Corp.*, 897 S.W.2d 63, 65 (Mo.App. 1995); *Dawson v. Associated Elec.*, 885 S.W.2d 712, 716 (Mo.App. 1994), *overruled in part on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 228 (Mo.banc 2003)<sup>5</sup>; *Hayes v. Hudson Foods, Inc.*, 818 S.W.2d 296, 300 (Mo.App. 1991); *Prater v. Thorngate, Ltd.*, 761 S.W.2d 226, 230 (Mo.App. 1988); *Sellers v. Trans World Airlines, Inc.*, 752 S.W.2d 413, 415 (Mo.App. 1988); *Jackson v. Risby Pallet and Lumber Co.*, 736 S.W.2d 575, 578 (Mo.App. 1987).

In proving up a work-related occupational disease, "[a] claimant's medical expert must establish the probability that the disease was caused by conditions in the work place." *Smith v. Donco Const.*, 182 S.W.3d 693, 701 (Mo.App. 2006) (citing *Brundige v. Boehringer Ingelheim*, 812 S.W.2d 200, 202 (Mo.App. 1991) (quoting *Sheehan v. Springfield Seed & Floral, Inc.*, 733 S.W.2d 795, 797 (Mo.App. 1987))); *Dawson*, 885 S.W.2d at 716. There must be medical evidence of a direct causal connection between the conditions under which the work is performed and the occupational disease. *Coloney v. Accurate Superior Scale Co.*, 952 S.W.2d 755 (Mo.App. 1997); *Dawson*, 885 S.W.2d at 716; *Sheehan v. Springfield Seed & Floral, Inc.*, 733 S.W.2d 795, 797 (Mo.App. 1987); *Estes v. Noranda Aluminum, Inc.*, 574 S.W.2d 34, 38 (Mo.App. 1978). Even where the causes of the disease are indeterminate, a single medical opinion relating the disease to

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<sup>5</sup> Several cases are cited herein that were among many overruled by *Hampton* on an unrelated issue (Id. at 224-32). Such cases do not otherwise conflict with *Hampton* and are cited for legal principles unaffected thereby; thus *Hampton's* effect thereon will not be further noted.

the job is sufficient to support a decision for the employee. *Dawson*, 885 S.W.2d at 716; *Prater v. Thorngate, Ltd.*, 761 S.W.2d 226, 230 (Mo.App. 1988).

In claims for compensation for medical conditions associated with repetitive activities, a claimant must prove: 1) the injury arose out of and in the course of employment; 2) causation from job-related activities; and 3) nature and extent of disability. *Kintz v. Schnucks Markets, Inc.*, 889 S.W.2d 121, 124 (Mo.App. 1994). Manipulations and flexions, iterated and reiterated within a concentrated time, are unusual conditions, and if they inhere in an employment task being performed by an employee, they expose the employee who performs them to a risk not shared by the public generally and to which the employee would not have been exposed outside of employment, and thus qualify for compensation pursuant to The Law. *Collins v. Neevel Luggage Manufacturing Company*, 481 S.W.2d 548, 555 (Mo.App. 1972).

Missouri courts have interpreted section 287.063, RSMo to provide that an employee with an occupational disease is "injured" within the meaning of the section 287.120, RSMo when the disease causes a "compensable injury." *Coloney*, 952 S.W.2d at 759, citing *Hinton v. National Lock Corp.*, 879 S.W.2d 713, 717 (Mo.App. 1994) (citing *Prater v. Thorngate, Ltd.*, 761 S.W.2d 226, 228 (Mo.App. 1988)). The "injury" requirement of the Act necessitates that the employee's "injury" create a harm that tangibly affects the employee's earning ability. *Coloney*, 952 S.W.2d at 763; *Johnson v. Denton Constr. Co.*, 911 S.W.2d 286, 287 (Mo. banc 1995). Requiring that the harm tangibly affect the employee's earning ability upholds the intent of the legislature in enacting the Workers' Compensation Act which was to provide indemnity for loss of earning power and disability to work and not for pain, suffering, or mere physical ailment. *Coloney*, 952 S.W.2d at 760.

The quantum of proof is reasonable probability. *Thorsen v. Sachs Electric Company*, 52 S.W.3d 611, 620 (Mo.App. 2001); *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo.App. 1995); *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 199 (Mo.App. 1990). "Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." *Thorsen*, 52 S.W.3d at 620; *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 329 (Mo.App. 1986); *Fischer*, 793 S.W.2d at 198. Such proof is made only by competent and substantial evidence. It may not rest on speculation. *Griggs v. A. B. Chance Company*, 503 S.W.2d 697, 703 (Mo.App. 1974). Expert testimony may be required where there are complicated medical issues. *Goleman v. MCI Transporters*, 844 S.W.2d 463, 466 (Mo.App. 1992). "Medical causation of injuries which are 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." *Thorsen*, 52 S.W.3d at 618; *Brundige v. Boehringer Ingelheim*, 812 S.W.2d 200, 202 (Mo.App. 1991).

Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *Kelley v. Banta & Stude Constr. Co. Inc.*, 1 S.W.3d 43, 48 (Mo.App. 1999); *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo.App. 1992); *Hutchinson v. Tri-State Motor Transit Co.*, 721 S.W.2d 158, 162 (Mo.App. 1986). The Commission's decision will generally be upheld if it is consistent with either of two conflicting medical opinions. *Smith v. Donco Const.*, 182 S.W.3d 693, 701 (Mo.App. 2006). The acceptance or rejection of medical evidence is for the Commission. *Smith*, 182 S.W.3d at 701; *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 263 (Mo.App. 2004).

A claimant has the burden to prove all the essential elements of his or her case, and a claim will not be validated where some essential element is lacking. *Thorsen*, 52 S.W.3d at 618; *Cook v. Sunnen Products Corp.*, 937 S.W.2d 221, 223 (Mo. App. 1996).

Under the 2005 amendments to the Workers' Compensation Law, a claimant must establish that a work accident was the prevailing factor in causing the resulting medical condition, disability, and need for medical treatment. *Gordon v. City of Ellisville*, 268 S.W.3d 454, 459 (Mo. App. 2008). The *Gordon* court states at 459:

Case law preceding the 2005 amendments to the Worker's Compensation Law indeed permitted a claimant to recover benefits by establishing a direct causal link between job duties and an 'aggravated condition.' See *Rono v. Famous Barr*, 91 S.W.3d 688, 691 (Mo.App. E.D.2002). However, since *Rono* was decided, the legislature amended Section 287.020, changing the criteria for when an injury is compensable. In particular, the legislature struck out language stating that an injury is deemed to arise out of and in the course of employment where it is reasonably apparent that the 'employment' is a 'substantial' factor in causing the injury, 'can be seen to have followed as a natural incident of the work' and 'can be fairly traced to the employment as a proximate cause.' See S.B. Nos. 1 & 130, section A 93rd Gen. Assem., 1st Reg. Sess. (Mo.2005). Thus, while *Rono's* approval of compensation where the claimant establishes a causal link between his aggravated condition and his job duties fits within the former version of section 287.020, we review causation in light of a new statutory standard.

The amount of proof required is reasonably probable. Probable means founded on reason and experience, which inclines the mind to believe, but leaves room to doubt. I find that Claimant's back injury is not within the common knowledge or experience and

that medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause is necessary in this case.

Based on substantial and competent evidence, including the testimony of fact and opinion witnesses, the medical records, my credibility determinations, and the application of Missouri Workers' Compensation Law, I find that Claimant failed to sustain her burden of proof that she sustained a back injury or a left shoulder injury arising out of and in the course of her employment for Employer. I find that Claimant failed to sustain her burden to prove that her work for Employer was the prevailing factor in causing her back and left shoulder conditions and disability.

I find that these cases are therefore governed by the provisions of the 2005 amendments to the Workers' Compensation Law. I find that Claimant did not prove that she sustained back or left shoulder injuries by accident or occupational disease prior to August 28, 2005 that resulted in her need for her surgeries in 2006 or that resulted in disability. *Coloney v. Accurate Superior Scale Co.*, 952 S.W.2d 755 (Mo.App. 1997).

These conclusions are supported by the following.

Claimant did not credibly identify any traumatic events or unusual strains identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift which occurred at work while working for Employer. No medical records or other records document that either.

Claimant did not report an injury to Employer in August 2005. She did not fill out an accident report or report of injury in 2005. Claimant offered no corroborating witnesses to her alleged pulling incident of August 1, 2005 or August 16, 2005, or to her alleged reports of pain to her coworkers. She did not seek any medical treatment for her alleged back or left shoulder injuries in August or September 2005. She continued to work full time, regular duty for Employer until she had left shoulder surgery on February 23, 2006. Claimant's left shoulder condition did not affect her earning ability until February 23, 2006. Claimant's low back condition did not affect her earning ability until May 11, 2006 when she had surgery.

The next treatment record after August 2004 relating to Claimant's left shoulder and back was not until October 25, 2005 when Dr. Ahmad noted complaints of left shoulder and back pain and left lumbar radiculopathy. No accident or traumatic event is identified in Dr. Ahmad's records.

Claimant was sixty-four years old at the time of the hearing. The treatment records document objective medical findings of degenerative conditions in Claimant's left

shoulder and low back. Dr. Ahmad's records include Heartland's left shoulder MRI report dated October 29, 2005. The Clinical History notes, "Reason for exam *LT shoulder pain x 6 yrs, no known injury.*" (Emphasis added.) The Impression noted is "*degenerative changes of the acromioclavicular joint with evidence suggesting impingement syndrome.*" (Emphasis added.)

The next treatment record related to Claimant's left shoulder is Dr. Smith's report dated January 3, 2006 that notes in part: "Left shoulder pain 8 year history, prog. worse." Dr. Smith's February 23, 2006 Operative Note pertaining to the left shoulder notes in part *a degenerative tear of glenoid labrum, incomplete rotator cuff tear, anterior impingement syndrome and AC joint arthritis.* (Emphasis added.)

Dr. Ahmad's records include an October 26, 2005 radiology report of the lumbar spine that notes anterior listhesis of L4 and L5 "*most likely degenerative in nature.*" (Emphasis added.) That radiology report also notes "degenerative changes of L4-5 and L5-S1 intervertebral disk spaces in facet joints."

Heartland's MRI report dated February 20, 2006 pertaining to Claimant's lumbar spine notes the reason for the exam was low back pain with left radiculopathy "*for three months no recent injury.*" (Emphasis added.) The Impression notes L4 spondylolisthesis with large left-sided disk herniation.

Dr. Olson's March 15, 2006 record states that Claimant developed pain in September 2005. That record notes Claimant had two previous surgeries on her low back and had never been completely pain free post-op.

Dr. Olson's April 10, 2006 note stated that Claimant had spondylolisthesis, stenosis, and recurrent disk herniation at the L4-5 level. He noted Claimant had significant degeneration in the L5-S1 disk space. He also noted then that Claimant wanted to resume work for at least another five years, and the only way to give her stability in her spine to facilitate that would be with a large fusion operation.

Dr. Olson's May 11, 2006 Operative Report notes the indications for the procedure: "The patient is with severe stenosis at L4-5, *severe degenerative disk disease at L5-S1* with mechanical pain consistent with instability." (Emphasis added.) The Operative Report notes Claimant's previous laminectomy site at L4-5 was covered with thick scar tissue.

Claimant's 2005 and 2006 treatment records do not state that Claimant's work for Employer caused her left shoulder injury or her low back injury, or her need for left shoulder surgery or low back surgery. The doctors who performed the left shoulder surgery and the low back surgery in 2006 were not deposed. No doctors expressed

opinions that Claimant's work for Employer was the prevailing factor or the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

Claimant has a well-documented history of treatment for back pain and left shoulder pain before August 2005. She had low back surgeries in 1984 and 1986. Dr. Koprivica noted her two prior workers' compensation settlements for 15% of the body for her low back cases, and said she had 30% permanent partial disability of the body as a whole for the lumbar condition as existed prior to August 1, 2005. Claimant testified she never got back to 100% after those surgeries. She had to lie down on a picnic table while mushroom hunting the year before August 2005 because her low back pain was so severe and she stopped going mushroom hunting after that. Claimant testified she had pain in her hands, knees, shoulders, and back before August 2005.

The treatment records document Claimant's ongoing shoulder complaints prior to August 2005. Dr. Smith documents Claimant's shoulder complaints in March 2003, May 2003, October 2003 and August 2004. Claimant had a left shoulder injection in August 2004.

Claimant had prior worker's compensation injuries before August 2005 and received benefits in connection with those cases. However, she did not request medical aid or temporary disability benefits from Employer under workers' compensation at or near the time that she had her shoulder surgery in February 2006, or her low back fusion operation in May 2006.

Dr. Koprivica testified he did not attribute the disk herniation to a specific event in August 2005. He believed Claimant's disk herniation was present as of August 1, 2005, and would consider Claimant's workplace activities to be "a" substantial factor resulting in progressive injuries as she worked up through August 2005, with the development of the identified left-sided disk herniation. But he did not credibly explain why. Claimant's disc herniation was not noted in a radiology report until February 26, 2006. That report referenced "left leg radiculopathy for three months no recent injury." Dr. Koprivica's opinion is contradicted by the treatment records. Dr. Koprivica did not explain the mechanism of a herniation injury, or how Claimant could continue to work full time, full duty for several weeks without seeking any medical treatment. I do not find this opinion of Dr. Koprivica's to be credible.

Neither Dr. Koprivica nor Dr. Prostic concluded that an accident or occupational disease was the prevailing factor in causing Claimant's medical conditions, her need for her low back and shoulder surgeries, or her disability. Both said her work activities were "a substantial factor" in causing her low back and shoulder injuries, the need for her low back and shoulder surgeries, and disability. But they did not explain or define the work

activities in relation to any other factor. They did not conclude that Claimant's work activities were the primary factor in relation to any other factors in causing Claimant's resulting medical conditions and disability. They did not distinguish between the effect her work had on her injuries, her need for treatment, and her disability, in relation to any other factors, including her long-term significant preexisting degenerative conditions.

Dr. Koprivica's and Dr. Prostic's opinions that Claimant sustained injuries in August 2005 were based on the history provided by Claimant. Those opinions were not supported by contemporaneous treatment records or diagnostic records. Their opinions do not convince me that Claimant's work for Employer was the prevailing factor in causing her low back and shoulder conditions, her need for surgeries, and disability.

I believe Claimant's testimony that she had occasional complaints of pain in her back and left shoulder in the summer and fall of 2005. I also believe that she engaged in repetitive motion work for Employer for years that involved lifting, grasping, twisting, and turning. But Claimant having complaints of pain and engaging in repetitive work does not necessarily prove that her work was the prevailing factor in causing her condition. Further, even if Claimant's work was "a" substantial factor in causing her need for left shoulder surgery and low back surgery in 2006, and in causing disability, that is not the same as work was "the prevailing factor" in causing the need for treatment and disability. The 2005 amendments to the Workers' Compensation Law made the causation standard more stringent. The statute provides that an injury by accident or occupational exposure is compensable *only* if the accident or occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. (Emphasis added.)

Dr. Parmet diagnosed degenerative joint disease in Claimant's lumbar spine and left shoulder. He noted Claimant had widespread and multi-joint findings of degenerative joint disease compatible with osteoarthritis, a non-occupational degenerative disease. He did not believe that any occupational event precipitated either her shoulder or back problems. He noted those problems were not acute because of Claimant's delay in treating and reporting the injuries.

Dr. Parmet also noted that the removal of Claimant's ovaries over twenty years before accelerated bone demineralization and bone aging. He noted that Claimant had osteoarthritic changes in her hands, swelling of the joints, and large degenerative changes in her lower extremities. He testified that Claimant's surgeries in the 1980s accelerated degenerative process. He did not believe that Claimant's work was either a substantial contributing factor or the prevailing factor in the development of her low back or shoulder condition. He did not believe that her work at Employer over time was a substantial contributing factor in her need for either the low back surgery or the left

shoulder surgery, or in the need for any future medical treatment relating to the low back or left shoulder.

I find Dr. Parmet's opinion that Claimant's work was not the prevailing factor in the development of her low back or shoulder conditions to be credible.

I find that Claimant has failed to prove that her work activities at Employer were the prevailing factor in causing her current low back condition, her current left shoulder condition, the need for any treatment that she received for those conditions on and after October 25, 2005, or in any disability.

In conclusion, based upon substantial and competent evidence and the application of the Missouri Workers' Compensation Law, I find in favor of the Employer/Insurer and deny Claimant's request for benefits. I find that Claimant failed to sustain her burden of proof that she sustained injuries by accident or occupational disease arising out of and in the scope and course of her employment for Employer. I find Claimant failed to show that her work for Employer was the prevailing factor in the cause of her alleged occupational left shoulder and low back injuries, the alleged resulting medical conditions, and disability. Because I have found that Claimant failed to sustain her burden of proof that she sustained injuries by accident or occupational disease arising out of and in the scope and course of her employment for Employer, Claimant's claims against the Second Injury Fund must also be denied. Section 287.220, RSMo. Claimant's entire claims for benefits, including her claims against Employer/Insurer and The Treasurer of the State of Missouri as Custodian of the Second Injury Fund in Injury No. 05-140246 and Injury No. 05-141672 are denied, and all other issues are moot.

Made by: /s/ Robert B. Miner

Robert B. Miner

*Administrative Law Judge*

*Division of Workers' Compensation*

This award is dated and attested to this 3rd day of February, 2009.

/s/ Naomi Pearson

Naomi Pearson

*Division of Workers' Compensation*