

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

Injury No.: 05-135489

Employee: Susan Mueller  
Employer: Jo Ann Stores, Inc. (Settled)  
Insurer: Zurich American Insurance Co. (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 section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated September 29, 2010, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge John Howard Percy, issued September 29, 2010, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 2<sup>nd</sup> day of August 2011.

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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SEPARATE OPINION FILED  
Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

Employee: Susan Mueller

**SEPARATE OPINION**  
**CONCURRING IN PART AND DISSENTING IN PART**

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based upon my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the ultimate decision of the administrative law judge should be affirmed. I write separately to clarify that I reject some of the administrative law judge's reasoning.

The administrative law judge concluded that:

I find based on Section 287.190.6(2) Mo. Rev. Stat., that a medical opinion as to the percentage of permanent partial disability attributable to Claimant's cervical spine from the 2003 fusion is required in order for Claimant to sustain her burden of proof as to any disability prior to December 5, 2005 accident. I further find that apart from the requirements of Section 287.190.6(2), Claimant's preexisting neck condition is a sophisticated medical condition and that the disability is not within the realm of lay understanding and that a medical opinion is required to prove the extent of such disability. As Claimant failed to adduce any medical opinion as to the extent of any pre-December 5, 2005 disability in her cervical spine, I find that Claimant failed to prove that she had any pre-December 5, 2005 disability in her cervical spine.

(Award pp. 10-11).

Just two months ago, the Labor and Industrial Relations Commission rejected this very reasoning. I quote from the Commission's unanimous reasoning in *Simpson v. Board of Education*, LIRC, Injury No. 07-095109 (May 26, 2011).

Employer contends that § 287.190.6(2) RSMo, as amended in 2005, added two new elements to a worker's burden of proof as regards permanent partial disability; the worker must show that the permanent partial disability has been demonstrated and certified by a physician, and, 2) the worker must produce opinion evidence regarding compensability and disability that is a medical opinion(s) given with medical certainty. We disagree.

*Demonstrated and certified by a physician*

As to the first alleged new element, employer asserts that only an individual licensed as a physician under Chapter 334 RSMo may demonstrate and certify a permanent partial disability under the statute. We agree that this provision describes demonstrations and certifications to be performed only by a physician. But we do not believe the provision creates a new statutory element, without proof of which employee's claim must fail.

The subsection does not describe or define "demonstrated" or "certified" for the purposes of the subsection. Nor does the subsection provide a

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sanction for a worker's failure to produce evidence that a physician has so demonstrated or certified.

"[T]he use of 'shall' in a statute does not inevitably render compliance mandatory, when the legislature has not prescribed a sanction for noncompliance." *State ex rel. Fischer v. Brooks*, 150 S.W.3d 284 (Mo. banc 2004). Depending on context, "shall" may prescribe a mandatory duty, as in *State v. Teer*, 275 S.W.3d 258 (Mo. banc 2009), but it may be considered only directory. *Id.*

"[D]etermining if the word 'shall' is mandatory or directory requires courts to review the context of the statute and to ascertain legislative intent." *Id.*

*State ex rel. State v. Parkinson*, 280 S.W.3d 70, 76 (Mo. 2009).

We find nothing in § 287.190 or elsewhere in Chapter 287 describing sanctions for non-compliance with § 287.190.6(2) RSMo. We conclude that the provision requiring that permanent disability be demonstrated and certified by a physician is directory.

*Simpson*, pp 1-2

Years of case law make clear that a medical opinion is not always necessary to support the Commission's disability determination.

"The determination of the specific amount or percentage of disability is a finding of fact within the special province of the Commission." "When the Commission makes the determination of disability it is not strictly limited to the percentages of disability testified to by the medical experts." *Id.*

Moreover, this court has held that "[t]he Commission is authorized to base its findings and award solely on the testimony of a claimant. His testimony alone, if believed, constitutes substantial evidence . . . of the nature, cause, and extent of his disability."

*Bock v. City of Columbia*, 274 S.W.3d 555, 560 (Mo. App. 2008) (internal citations omitted).

In the instant case, I have reviewed the medical records related to employee's cervical spine surgery. I have also considered employee's testimony regarding her physical limitations and pain related to her neck. Based upon employee's testimony that she has limitations turning her neck side-to-side and she sometimes has pain in her neck that she treats with over-the-counter pain medications, I find that employee had a 10% permanent partial disability of the body as a whole referable to her cervical spine that pre-existed the primary injury.

Because employee's pre-existing cervical spine injury did not meet the thresholds set forth in § 287.220.1 RSMo, Second Injury Fund liability is not triggered in this case.

Employee: Susan Mueller

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I would affirm the administrative law judge's award, except as explained herein. For the foregoing reasons, I respectfully dissent from the portion of the majority's decision that adopts the administrative law judge's reasoning with which I disagree.

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Curtis E. Chick, Jr., Member

## AWARD

Employee: Susan Mueller Injury No. 05-135489  
Dependents: N/A Before the  
Employer: Jo Ann Stores, Inc. (previously settled) **Division of Workers' Compensation**  
Additional Party: Second Injury Fund Department of Labor and Industrial Relations of Missouri  
Insurer: Zurich American Insurance Co (previously settled) Jefferson City, Missouri  
Hearing Date: June 28, 2010 Checked by: JHP

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: December 5, 2005
5. State location where accident occurred or occupational disease was contracted St. Louis County, Mo.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
Employee tripped over fabric roll and landed on left knee and right shoulder
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: left knee and right shoulder
14. Nature and extent of any permanent disability: None against the Second Injury Fund
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None



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

Claimant:	Susan Mueller	Injury No. 05-135489
Dependents:	N/A	Before the
Employer:	Jo Ann Stores, Inc. (previously settled)	<b>Division of Workers' Compensation</b>
Additional Party:	Second Injury Fund	Department of Labor and Industrial Relations of Missouri
Insurer:	Zurich American Insurance Co (previously settled)	Jefferson City, Missouri Checked by: JHP

A hearing in this proceeding was held on June 28, 2010. Both parties submitted proposed awards, the latter of which was received on July 26, 2010.

### **STIPULATIONS**

The parties stipulated that on or about December 5, 2005:

1. the employer and employee were operating under and subject to the provisions of the Missouri Workers' Compensation Law;
2. the employee's average weekly wage was \$317.49;
3. the rate of compensation for permanent partial disability was \$211.67 and the rate of compensation for permanent total disability was \$211.67; and
4. the employee sustained an injury as a result of an accident arising out of and in the course of employee's employment occurring in St. Louis City, Missouri.

The parties further stipulated that:

1. the employer had notice of the injury and a claim for compensation against the Second Injury Fund was filed within the time prescribed by law.

### **ISSUES**

The issues to be resolved in this proceeding are:

1. the nature and extent of any permanent disability sustained as a result of the work-related injury of December 5, 2005;
2. the nature and extent of any preexisting disabilities which employee had at the time of the work-related injury of December 5, 2005; and
3. whether and to what extent the preexisting disabilities combine with the disability from the primary injury to cause any additional permanent partial disability.

## **SECOND INJURY FUND LIABILITY**

Having settled her claim against Employer/Insurer, Susan Mueller, Employee herein, is seeking an award of additional permanent partial disability from the Second Injury Fund pursuant to Section 287.220.1 Mo. Rev. Stat. (2000). Under that Section an employee who has a preexisting permanent partial disability and who subsequently sustains a compensable injury may recover from the Second Injury Fund any additional permanent disability caused by the combination of the preexisting disability and the disability from the subsequent injury. The employer is liable only for the disability caused by the work-related accident. The Second Injury Fund is liable for the difference between the sum of the two disabilities considered separately and independently and the disability resulting from their combination. Cartwright v. Wells Fargo Armored Serv., 921 S.W.2d 165, 167 (Mo. App. 1996); Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995); Brown v. Treasurer of Missouri, 795 S.W.2d 479 (Mo. App. 1990); Anderson v. Emerson Elec. Co., 698 S.W.2d 574, 576-77 (Mo. App. 1985). In order to recover from the Second Injury Fund the employee must prove a prior permanent partial disability, whether from a compensable injury or not, a subsequent compensable injury, and a synergistic combination of the preexisting and subsequent disabilities.

### **Disability from Primary Injury**

The parties stipulated that Employee sustained a work-related injury on December 5, 2005. They did not stipulate to the nature and extent of any disability from that injury.

The appellate courts have long held that the employee must prove the nature and extent of any disability by a reasonable degree of certainty.<sup>1</sup> Downing v. Willamette Industries, Inc., 895 S.W.2d 650, 655 (Mo. App. 1995); Griggs v. A. B. Chance Company, 503 S.W.2d 697, 703 (Mo. App. 1974). Such proof is made only by competent and substantial evidence. It may not rest on speculation. Idem. Expert testimony may be required where there are complicated medical issues. Goleman v. MCI Transporters, 844 S.W.2d 463, 466 (Mo. App. 1993); Griggs at 704; Downs v. A.C.F. Industries, Incorporated, 460 S.W.2d 293, 295-96 (Mo. App. 1970).

Section 287.020.3(1) Mo. Rev. Stat. (2005 Supp.), which was added in 2005, provides in pertinent part that “[a]n injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability.” “Prevailing factor” is defined as “the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.”

Section 287.190.6(2) Mo. Rev. Stat. (2005 Supp.), which was enacted in 2005, provides that “[p]ermanent 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.”

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<sup>1</sup> It is unclear whether this standard has been changed by the adoption of Section 287.808 Mo. Rev. Stat. (2005 Supp.) which modified the burden of proof for factual propositions to “more likely to be true than not true.”

The appellate courts have long held that the fact finder may accept only part of the testimony of a medical expert and reject the remainder of it. Cole v. Best Motor Lines, 303 S.W.2d 170, 174 (Mo. App. 1957). Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. Hawkins v. Emerson Electric Co., 676 S.W.2d 872, 877 (Mo. App. 1984). 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. 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, 163 (Mo. App. 1986). The provisions of Section 287.190.6(2) have probably modified the unfettered discretion previously given to the fact finder in accepting or rejecting expert opinions to the extent that the fact finder must now accept those opinions which are based on objective findings and reject inconsistent opinions based on subjective findings.

However, where the facts are within the understanding of lay persons, the employee's testimony or that of other lay witnesses may constitute substantial and competent evidence of the nature, cause, and extent of disability. Silman v. William Montgomery & Associates, 891 S.W.2d 173, 175 (Mo. App. 1995). This is especially true where such testimony is supported by some medical evidence. Pruteanu v. Electro Core Inc., 847 S.W.2d 203 (Mo. App. 1993); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 367 (Mo. App. 1992); Fisher v. Archdiocese of St. Louis, 793 S.W.2d 195, 199 (Mo. App. 1990); Ford v. Bi-State Development Agency, 677 S.W.2d 899, 904 (Mo. App. 1984); Fogelsong v. Banquet Foods Corp., 526 S.W.2d 886, 892 (Mo. App. 1975). The trier of facts may even base its findings solely on the testimony of the employee. Fogelsong at 892. The trier of facts may also disbelieve the testimony of a witness even if no contradictory or impeaching testimony is given. Hutchinson v. Tri-State Motor Transit Co., *supra* at 161-2; Barrett v. Bentzinger Brothers, Inc., 595 S.W.2d 441, 443 (Mo. App. 1980). The uncontradicted testimony of the employee may even be disbelieved. Weeks v. Maple Lawn Nursing Home, 848 S.W.2d 515, 516 (Mo. App. 1993); Montgomery v. Dept. of Corr. & Human Res., 849 S.W.2d 267, 269 (Mo. App. 1993). The provisions of Section 287.190.6(2) have probably modified the unfettered discretion previously given to the fact finder in accepting or rejecting lay opinions to the extent that the fact finder must now reject lay opinions which conflict with medical opinions based on objective findings.

The determination of the degree of disability sustained by an injured employee is not strictly a medical question. While the nature of the injury and its severity and permanence are medical questions, the impact that the injury has upon the employee's ability to work involves factors which are both medical and nonmedical. Accordingly, the appellate courts have repeatedly held that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission. Sellers v. Trans World Airlines, Inc., 776 S.W.2d 502, 505 (Mo. App. 1989); Quinlan v. Incarnate Word Hospital, 714 S.W.2d 237, 238 (Mo. App. 1986); Banner Iron Works v. Mordis, 663 S.W.2d 770, 773 (Mo. App. 1983); Barrett v. Bentzinger Brothers, Inc., 595 S.W.2d 441, 443 (Mo. App. 1980); McAdams v. Seven-Up Bottling Works, 429 S.W.2d 284, 289 (Mo. App. 1968). The fact finding body is not bound by or restricted to the specific percentages of disability suggested or stated by the medical experts. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences from such testimony. Fogelsong v. Banquet Foods Corporation, 526 S.W.2d 886, 892 (Mo. App. 1975). The finding of disability may exceed the percentage testified to by the medical experts. Quinlan v. Incarnate Word Hospital, at 238; Barrett v. Bentzinger

Brothers, Inc., at 443; McAdams v. Seven-Up Bottling Works, at 289. The uncontradicted testimony of a medical expert concerning the extent of disability may even be disbelieved. Gilley v. Raskas Dairy, 903 S.W.2d 656, 658 (Mo. App. 1995); Jones v. Jefferson City School Dist., 801 S.W.2d 486 (Mo. App. 1990). The fact finding body may reject the uncontradicted opinion of a vocational expert. Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995).

### **Findings of Fact**

Based on my observations of Claimant's demeanor during her testimony, I find that she is a credible witness and that her testimony is generally credible. Based on the credible testimony of Claimant and on the medical records, I make the following findings of fact.

#### Description of Accident

Susan Mueller was working as a saleswoman for Jo Ann Stores, Inc. on December 5, 2005. One of her responsibilities as a saleslady was to help customers find fabrics. As she was looking up at the inventory on shelves and trying to find a particular fabric, Ms. Mueller caught her foot in a large fabric tube that was on the floor and fell to the floor. She sustained injuries to her right shoulder and left knee.

#### Medical Treatment

Employee was initially treated at Unity Corporate Health. She was placed on light duty and told to use Tylenol and ibuprofen for pain. She was give a sling for her arm and a brace for her knee. On December 13 she was referred to an orthopedist. (Claimant's Exhibit B)

Dr. Daniel J. Schwarze, an orthopedic surgeon, examined Claimant on December 20, 2005.<sup>2</sup> He ordered MRIs of the right shoulder and left knee, which were performed on December 23. Dr. Schwarze reviewed the MRIs and reexamined Ms. Mueller on December 28, 2005. He diagnosed Claimant with contusions of the right shoulder and left knee and a possible internal derangement of the right knee as a result of the December 5, 2005 accident. He recommended conservative treatment. (Claimant's Exhibit C)<sup>3</sup>

On January 25, 2006 Dr. Schwarze reexamined Claimant. He recommended arthroscopic surgery of the left knee to further define the presumptive bone chips of the patella and the possible meniscus tear. He noted that her right shoulder had a positive impingement sign and positive Speed's maneuver. On January 30 Dr. Schwarze aspirated fluid from the left patella. He again recommended arthroscopic surgery. (Claimant's Exhibit C)

Dr. Schwarze apparently performed arthroscopic surgery on Claimant's left knee during mid-February of 2006.<sup>4</sup> The medical records do not describe what pathology was found. Dr.

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<sup>2</sup> Page 2 of the initial report was missing from Claimant's Exhibit C.

<sup>3</sup> As the records in Claimant's Exhibit C were a disorganized mess, I rearranged all of the treatment notes in chronological order.

<sup>4</sup> The operative report was not included in the medical records.

Schwarze only indicated that he removed the bursa. He released her to regular duty as of May 1, 2006. He also noted that she continued to have mild restrictions of right shoulder range of motion and mild impingement and Speed's maneuver. (Claimant's Exhibit C

Dr. Schwarze reexamined Ms. Mueller on May 30, 2006. The left knee and right shoulder examinations were fairly normal. He indicated that she had demonstrated near complete resolution of all of her initial signs and symptoms and advised her to continue home exercises. He released Claimant from active treatment. (Claimant's Exhibit C)

On December 5, 2007 Dr. Schwarze performed arthroscopic surgery on Claimant's right shoulder.<sup>5</sup> He found subacromial impingement, a partial tear of the rotator cuff, biceps tenosynovitis, SLAP-type lesion, and osteoarthritis of the acromioclavicular joint. He debrided the glenohumeral joint including the SLAP lesion, biceps tendon, and the capsule of the rotator cuff, released the coracoacromial ligament, and removed part of the distal clavicle. (Claimant's Exhibit C)

After the surgery, Dr. Schwarze kept Ms. Mueller off work and prescribed physical therapy. On May 14, 2008 Dr. Schwarze reexamined Claimant's right shoulder. Her physical examination was fairly normal, except for mild muscle weakness of the rotator cuff muscles. He encouraged her to resume her home exercises. He advised her that, should she not continue with her home exercises, her left shoulder would not improve and she would probably always require Arthrotec. He released Employee from active medical treatment. (Claimant's Exhibit C)

#### Claimant's Testimony

Claimant testified that she can lift her right arm, but it is still painful and that she has some loss of strength. She stated that the range of motion of her shoulder has returned to its pre-injury level, though she has pain when she raises her right arm. She stated that with weather changes her right shoulder aches a little more.

Ms. Mueller testified that her left knee feels a little swollen. She indicated that it swells when she is on her feet for a long time. She climbs ladders and steps more slowly. On cross examination she stated that she wears a knee brace if she has to be on her feet for any length of time and that she wears it while bowling.

Employee testified that she takes ibuprofen and Tylenol after work because of knee and shoulder pain.

#### Medical Opinions

On June 30, 2008 Dr. Schwarze reevaluated Ms. Mueller. He noted that she still had difficulty with the left knee with certain activities, including climbing more than one to two flight of stairs, occasional stiffness with sitting more than 30 to 45 minutes, and mild difficulty with repetitive stooping and squatting. Ms. Mueller told him that she had mild difficulty with

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<sup>5</sup> The treatment records which preceded the December 5, 2007 surgery were not included in the medical records.

repetitive overhead activities with the right shoulder, occasional tingling in the right shoulder, and occasional discomfort over the lateral aspect of her shoulder at the end of the workday and following repetitive outstretched reaching, pushing, pulling, and lifting. Her physical examination was fairly normal, except for mild supraspinatus muscle weakness.

Dr. Schwarze opined that Claimant sustained 18% permanent partial disability of the left knee and 21% permanent partial disability of the right shoulder as a direct result of the December 5, 2005 work-related injury.

### Settlement Agreements

Claimant settled her claim against Employer/Insurer for the December 5, 2005 injury on August 5, 2009 for 27.5% permanent partial disability of the right shoulder and 25% permanent partial disability of the left knee. (Claimant's Exhibit A)

### Additional Findings

I find Claimant's testimony concerning her current symptoms related to her right shoulder and left knee are credible.

Taking into account all of the evidence, I find that the December 5, 2005 work-related accident resulted in bone chips of the left patella and bursitis, for which Claimant underwent arthroscopic surgery for the removal of the chips and the bursa, and subacromial impingement and a partial tear of the right shoulder rotator cuff, biceps tenosynovitis, and a SLAP-type lesion, for which she underwent arthroscopic surgery for debridement of the glenohumeral joint including a SLAP lesion, of the biceps tendon, and of the capsule of the rotator cuff, release of the coracoacromial ligament, and removal of part of the distal clavicle.

Taking into account all of the evidence, I find Claimant sustained 27.5% permanent partial disability of the right shoulder and 25% permanent partial disability of the left knee as a result of the December 5, 2005 work-related accident.

### Thresholds

The 1993 amendment to Section 287.220.1 also established minimum threshold requirements with respect to the subsequent compensable injury of 50 weeks for a body as a whole injury or 15% of a major extremity.

As I found that Claimant sustained 27.5% permanent partial disability of the right shoulder and 25% permanent partial disability of the left knee as a result of the primary injury, I find that Claimant has met the threshold requirements for the primary injury.

### Disability from Prior Injuries or Conditions

The employee must next prove that he or she had a permanent partial disability or disabilities preexisting the present injury and the amount thereof which existed at the time of the compensable injury. Garcia v. St. Louis County, 916 S.W.2d 263, 267 (Mo. App. 1995); Reiner

v. Treasurer of State of Mo., 837 S.W.2d 363, 366 (Mo. App. 1992); Anderson v. Emerson Elec. Co., 698 S.W.2d 574, 577 (Mo. App. 1985). It is not necessary that the "previous disability" be due to an injury. Section 287.220.1 was amended in 1993 to define the nature of the preexisting disability as "of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed ...." The appellate courts have held that the portion of the 1993 amendment to Section 287.220.1 which modified the definition of preexisting disability was applicable to all pending cases without regard to the date of injury. Leutzinger v. Treasurer, 895 S.W.2d 591 (Mo. App. 1995); Lane v. Schreiber Foods, Inc., 903 S.W.2d 616 (Mo. App. 1995); Faulkner v. St. Luke's Hospital, 903 S.W.2d 588 (Mo. App. 1996). In Wuebbeling v. West County Drywall, 898 S.W.2d 615 (Mo. App. 1995), the court of appeals stated in dicta that "a previously existing condition that a cautious employer could perceive as having the potential to combine with a work related injury so as to produce a greater degree of disability than would occur in the absence of such condition" would constitute a hindrance or obstacle to employment or reemployment. Id. at 620. that test was adopted in Garibay v. Treasurer of Missouri, 930 S.W.2d 57, 60 (Mo. App. 1997). Being able to work, though in pain, following a previous injury is not incompatible with that injury being treated as a preexisting permanent partial disability. Hedrick v. Chrysler Corp., 900 S.W.2d 233, 236 (Mo. App. 1995).

The nature and extent of the preexisting disabilities are determined as of date of the primary injury. Garcia v. St. Louis County, 916 S.W.2d 263, 267 (Mo. App. 1995); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 366 (Mo. App. 1992); Anderson v. Emerson Elec. Co., 698 S.W.2d 574, 577 (Mo. App. 1985). The Second Injury Fund is not liable for any post-accident worsening of an employee's preexisting disabilities which are not caused or aggravated by the last work-related injury or for any conditions which arise after the last work-related injury. Garcia v. St. Louis County, supra; Frazier v. Treasurer of Missouri, 869 S.W.2d 152 (Mo. App. 1994); Lawrence v. Joplin R-VIII School Dist., 834 S.W.2d 789 (Mo. App. 1992); see also Wilhite v. Hurd, 411 S.W.2d 72 (Mo. 1967).

Employee claims that the following condition constitutes a "previous disability[y]" under Section 287.220.1: 2003 fusion of two cervical intervertebral discs.

#### Medical Treatment

On September 2, 2003 Dr. Thomas R. Forget performed a C6 corpectomy with C5-6 and C6-7 excision of herniated disks and with fibular allograft fusion with reflex plate arthrodesis on Ms. Mueller. (Claimant's Exhibit I)

There were no other medical records in evidence pertaining to the 2003 cervical surgery.

#### Claimant's Testimony

On direct examination Claimant testified that she lost some range of motion in her neck; it is hard to rotate to the right or left. She tends to turn her whole body when she wants to look to the left or to the right. She testified that she takes Tylenol and ibuprofen for neck pain.

On cross examination Claimant testified that prior to December 5, 2005, her neck was doing quite well. She took ibuprofen with weather changes and could not turn her head side to side. Her Employer had not made any accommodations for her neck.

### Medical Opinions

There were no medical opinions in evidence opining that Claimant had any permanent partial disability in her neck prior to December 5, 2005.

### **Findings with Respect to Preexisting Disabilities**

Based on the medical records I find that on September 2, 2003 Claimant underwent a C6 corpectomy with C5-6 and C6-7 excision of herniated disks and with fibular allograft fusion with reflex plate arthrodesis.

I find Claimant's testimony concerning her current symptoms related to her neck are credible.

Prior to the enactment of the 2005 amendments to Section 287.190.6(2) Mo. Rev. Stat., there was a split among the Missouri Courts of Appeals as to whether Claimant was required to offer a medical opinion rating any preexisting permanent partial disability. In Meyer v. Superior Insulating Tape, 882 S.W.2d 735, 740 (Mo. App. 1994) and Gilley v. Raskas Dairy, 903 S.W.2d 656, 658-59 (Mo. App. 1995) the Eastern District held that the employee failed to prove the extent of the employee's preexisting disability where there was no credible medical opinion rating such disability in evidence. In Bock v. City of Columbia, 274 S.W.3d 555 (Mo. App. 2008), the Western District held that a medical opinion rating Claimant's permanent disability from a July, 2005 injury to claimant's leg, which was diagnosed as a bruise with inflammation and which required only minimal treatment, was within the realm of lay understanding. The court held that the injury was not sophisticated, did not require surgery or technical, scientific diagnosis, was within lay understanding and that its effect on the disability was within the expertise of the Commission.

In August of 2005 Section 287.190.6(2) Mo. Rev. Stat. was enacted. It provides that "[p]ermanent 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." (Emphasis added)

Employee offered no medical opinion stating that Employee had any permanent disability from the 2003 fusion of two cervical intervertebral discs, let alone rating the extent of any such disability.

I find based on Section 287.190.6(2) Mo. Rev. Stat., that a medical opinion as to the percentage of permanent partial disability attributable to Claimant's cervical spine from the 2003 fusion is required in order for Claimant to sustain her burden of proof as to any disability prior to

December 5, 2005 accident. I further find that apart from the requirements of Section 287.190.6(2), Claimant's preexisting neck condition is a sophisticated medical condition and that the disability is not within the realm of lay understanding and that a medical opinion is required to prove the extent of such disability. As Claimant failed to adduce any medical opinion as to the extent of any pre-December 5, 2005 disability in her cervical spine, I find that Claimant failed to prove that she had any pre-December 5, 2005 disability in her cervical spine.<sup>6</sup>

### **Thresholds**

The 1993 amendments also established minimum threshold requirements with respect to the disability caused by the preexisting condition of 50 weeks for a body as a whole injury or 15% of a major extremity.

Based on my prior finding that Claimant failed to prove that she had any pre-December 5, 2005 disability in her cervical spine, I find that she failed to prove that she had a preexisting disability equal to 50 weeks for a body as a whole injury or 15% of a major extremity.<sup>7</sup>

### **Combination Of Preexisting And Primary Disabilities**

The employee must next prove a combination effect. The 1993 amendment also added the word "substantially" in describing the greater overall disability. The employee must show that his or her present compensable injury combines with the preexisting permanent partial disability to cause a substantially greater overall disability than the sum of the disabilities considered independently. Cartwright v. Wells Fargo Armored Serv., 921 S.W.2d 165, 167 (Mo. App. 1996); Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995); Brown v. Treasurer of Missouri, 795 S.W.2d 479, 482 (Mo. App. 1990); Anderson v. Emerson Elec. Co., 698 S.W.2d 574, 576-77 (Mo. App. 1985).

### **Claimant's testimony**

Ms. Mueller testified that she has pain in her neck and shoulder when carrying buckets of water and dusting the tops of door frames and that when she sits at a table, she cannot lean forward.

### **Medical Opinions**

There were no medical opinions in evidence opining that Claimant's disability from her left knee and right shoulder combine with any pre-December 5, 2005 disability in her cervical

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<sup>6</sup> If an appellate body holds that no expert opinion is required to prove the extent of Claimant's pre-December 5, 2005 disability in her cervical spine, I would find, based on the minimal symptoms described by Claimant, that she had 10% permanent partial disability of the body referable to the cervical spine prior to December 5, 2005.

<sup>7</sup> If an appellate body holds that no expert opinion is required to prove the extent of Claimant's pre-December 5, 2005 disability in her cervical spine, I would find, based on the minimal symptoms described by Claimant, that she had 10% permanent partial disability of the body referable to the cervical spine prior to December 5, 2005 and that she failed to prove that she had a preexisting disability equal to 50 weeks for a body as a whole injury or 15% of a major extremity.

spine to cause a substantially greater overall disability than the sum of the disabilities considered independently. See Anderson v. Emerson Elec. Co., 698 S.W.2d 574 (Mo. App. 1985).

**Additional Findings**

The only evidence concerning the combination of preexisting and primary disability was Claimant’s minimal testimony. Whether disability from Claimant’s left knee and right shoulder combine with any disability from her cervical spine to cause a substantially greater overall disability than the sum of the disabilities considered independently is a sophisticated medical concept and not within the realm of lay understanding. It is not obvious that Claimant’s neck condition combines with her left knee and right shoulder disabilities to cause a substantially greater overall disability than the sum of the disabilities considered independently.

Based on the evidence, I find that Claimant failed to prove that the disability in her left knee and right shoulder from the December 5, 2005 accident combine with any pre-December 5, 2005 disability in her cervical spine to cause a substantially greater overall disability than the sum of the disabilities considered independently.

Based on my prior findings, the claim against the Second Injury Fund is denied.

Date: \_\_\_\_\_

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

**JOHN HOWARD PERCY**  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
NAOMI PEARSON  
Division of Workers' Compensation