

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

Injury No.: 03-000624

Employee: David Murphy
Employer: Barbeque Wood Flavors (Settled)
Insurer: Travelers Casualty & Surety Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Date of Accident: January 7, 2003

Place and County of Accident: McDonald County, Missouri

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.

While the matter was pending before the Commission, employee settled his claim against employer/insurer.

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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated August 31, 2006. The award and decision of Chief Administrative Law Judge L. Timothy Wilson, issued August 31, 2006, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 23rd day of March 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: David Murphy

Injury No. 03-000624

Dependents: N/A

Employer: Barbeque Wood Flavors

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

Insurer: Travelers Casualty & Surety Company

Hearing Date: June 15, 2006

Checked by: LTW

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? **Yes**
2. Was the injury or occupational disease compensable under Chapter 287? **Yes**
3. Was there an accident or incident of occupational disease under the Law? **Yes**
4. Date of accident or onset of occupational disease: **January 7, 2003**
5. State location where accident occurred or occupational disease was contracted: **McDonald 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 and fell while disassembling a machine.
12. Did accident or occupational disease cause death? **No**
13. Part(s) of body injured by accident or occupational disease: **Right upper extremity , Right lower extremity, and body as a whole**
14. Nature and extent of any permanent disability: **Permanent total disability**
14. Compensation paid to-date for temporary disability: **\$8,304.00**
16. Value necessary medical aid paid to date by employer/insurer? **Unknown**

Employee: David Murphy

Injury No. 03-000624

17. Value necessary medical aid not furnished by employer/insurer? **-0-**
18. Employee's average weekly wages: **\$360.00**
19. Weekly compensation rate: **\$240.00**
20. Method wages computation: **Adjudicated**

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: **-0-**

-0- weeks of temporary total disability (or temporary partial disability)

157.6 weeks of permanent partial disability from Employer

Mr. Murphy sustained a permanent partial disability of 35 percent, referable to the right upper extremity at the 232 week level; Mr. Murphy

sustained a permanent partial disability of 50 percent, referable to the right lower extremity at the 160 week level; and Mr. Murphy sustained a permanent partial disability of 2 percent to the body as a whole, referable to the low back (157.6 weeks).

-0- weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning, for Claimant's lifetime -0-

22. Second Injury Fund liability: **Yes**

-0- weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits: -0-

Permanent total disability benefits from Second Injury Fund:

Second Injury Fund is ordered to pay to the employee, David Murphy, the sum of \$240.00 per week for the employee's lifetime. The payment of the permanent total disability compensation by the Second Injury Fund is effective as of August 21, 2003, which takes into consideration Mr. Murphy reaching maximum medical improvement on August 21, 2003 and 157.6 weeks of permanent partial disability compensation to be paid by the employer and insurer. (There is no differential between permanent partial disability compensation and permanent total disability compensation. Hence, the Second Injury Fund is not liable for the payment of the first 157.6 weeks of permanent disability compensation.)

TOTAL: UNDETERMINED

23. Future requirements awarded: **Future medical awarded**

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

The compensation awarded to the claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: **Bruce Copeland**

FINDINGS OF FACT and RULINGS OF LAW:

Employee: David Murphy

Injury No. 03-000624

Dependents: N/A

Employer: Barbeque Wood Flavors

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

Insurer: Travelers Casualty & Surety Company

Hearing Date: June 15, 2006

Checked by: LTW

AWARD ON HEARING

The above-referenced workers' compensation claim was heard before the undersigned Administrative Law Judge on June 15, 2006. The parties were afforded an opportunity to submit briefs, resulting in the record being completed and submitted to the undersigned on or about August 1, 2006.

The parties entered into a stipulation of facts. The stipulation is as follows:

- (1) On or about January 7, 2003 Barbeque Wood Flavors, Inc. was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully insured by Travelers Casualty & Surety Co.
- (2) On the alleged injury date of January 7, 2003 David Murphy was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.
- (3) On or about January 7, 2003 the employee sustained an accident, which arose out of and in the course and scope of his employment with the employer.
- (4) The above-referenced employment and accident occurred in McDonald County, Missouri. Venue is

proper.

- (5) The employee notified the employer of his injury as required by Section, 287.420, RSMo.
- (6) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.
- (7) Temporary disability benefits have been provided to the employee in the amount of \$8,304.00, payable for the period of January 7, 2003 to August 21, 2003.
- (8) The employer and insurer have provided medical treatment to the employee.

The sole issues to be resolved by hearing include:

- (1) Whether the accident of January 7, 2003 caused the injuries and disabilities for which benefits are now being claimed?
- (2) Whether the employee has sustained injuries that will require future medical care in order to cure and relieve the employee of the effects of the injuries?
- (3) What is the compensation rate?
- (4) Whether the employee is entitled to temporary disability compensation, payable for the period of January 7, 2003 to August 21, 2003? (The employer and insurer provided temporary total disability compensation for this period in question, but the employee contends that he is entitled to additional temporary total disability compensation for this period premised on his claim of being entitled to a higher compensation rate.)
- (5) Whether the employee sustained any permanent disability as a consequence of the accident January 7, 2003; and, if so, what is the nature and extent of the disability?
- (6) Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for payment of additional permanent partial disability compensation or permanent total disability compensation?

EVIDENCE PRESENTED

The employee testified at the hearing in support of his claim. Also, the claimant presented at the hearing of this case two additional witnesses – Donna Murphy (employee’s wife) and Sean Bodas. In addition, the employee offered for admission the following exhibits:

- Exhibit A CV of Dale A. Halfaker, Ph.D.
- Exhibit B Psychological Report from Dr. Halfaker
- Exhibit C CV of Wilbur T. Swearingin, CRC
- Exhibit D Vocational Report from Wilbur Swearingin, CRC
- Exhibit E Vocational Wage Report from Wilbur Swearingin, CRC
- Exhibit F U. S. Department of Labor, Bureau of Labor Statistics – Wages Estimates in Fayetteville-Springdale-Rogers, AR
- Exhibit G CV of Norbert T. Belz, M.D.
- Exhibit H Medical Report from Norbert T. Belz, M.D.
- Exhibit I Medical Report from Dr. Belz – Future Medical Costs
- Exhibit J Supplemental Medical Report from Dr. Belz (02-18-06)
- Exhibit K Medical Records of David Murphy
- Exhibit L Deposition of Dale Halfaker, Ph.D.
- Exhibit M Deposition of Norbert T. Belz, M.D.
- Exhibit N Deposition of Wilbur T. Swearingin, CRC
- Exhibit O Medical Records of David Murphy
- Exhibit P Payroll Records of Employee for 01-04-03 through 01-10-03 from Employer
- Exhibit Q Employee’s W-2 from Employer
- Exhibit R Payroll Records of Sean Bodas from Employer
- Exhibit S Wage Records of Sean Bodas from Employer
- Exhibit T NOT OFFERD BY EMPLOYEE
- Exhibit U Checks Payable to Sean Bodas
- Exhibit V NOT OFFERED BY EMPLOYEE
- Exhibit W NOT OFFERED BY EMPLOYEE
- Exhibit X Check Payable to Employee from Employer
- Exhibit Y NOT OFFERED BY EMPLOYEE
- Exhibit Z Wage Statement of Adam Beck from Employer for period of 11-03-02 through 11-09-02

Exhibit AA Wage Statement of Bill Wilks from Employer for period of 11-03-02 through 11-09-02
Exhibit BB Wage Statement of Adam Beck from Employer for period of 11-09-02 through 11-15-02
Exhibit CC Wage Statement of Adam Beck from Employer for period of 12-08-02 through 12-14-02
Exhibit DD Wage Statement of Bill Wilks from Employer for period of 12-08-02 through 12-14-02
Exhibit EE Wage Statement of Adam Beck from Employer for period of 12-15-02 through 12-21-02
Exhibit FF Wage Statement of Sean Bodas from Employer for period of 01-04-03 through 01-10-03
Exhibit GG Checks payable to Sean Bodas from Employer

The exhibits were received and admitted into evidence.

The employer and insurer presented at the hearing of this case one witness – George Wartsbaugh, who is the owner of Barbeque Wood Flavors, Inc. Also, the employer and insurer offered for admission the following exhibits:

Exhibit 1 NOT OFFERED BY EMPLOYER / INSURER
Exhibit 1A Summary of FICA Earnings for Employee (for years 1963 through 2002)
Exhibit 2 Deposition of Employee
Exhibit 3 Medical Report of David A. Ball, M.D.
Exhibit T..... Discovery Documents Provided to Employee by Employer / Insurer

The exhibits were received and admitted into evidence.

The Second Injury Fund did not present any witnesses or offer any additional exhibits at the hearing of this case.

In addition, the parties identified several documents filed with the Division of Workers' Compensation, which were made part of a single exhibit identified as the Legal File. The undersigned took official notice of the documents contained in the Legal File, which include: Stipulations of the Parties; Compromise Settlement Agreement in Injury No. 93-113227; Notice of Hearing; Request for Hearing – Final Award; Computer Entries; Report of Injury; Claim for Compensation; Answer of Second Injury Fund to Claim for Compensation; and Answer of Employer & Insurer to Claim for Compensation.

DISCUSSION

The employee, David Murphy, is 59 years of age, having been born on January 21, 1947. He is married and resides in rural Pineville, Missouri with his wife Donna Murphy. Mr. and Mrs. Murphy are the parents of two children, both of whom are adults and neither are dependent upon Mr. and Mrs. Murphy.

Mr. Murphy is approximately 5'8" tall and weighs approximately 310 pounds. He is not presently working and is on social security disability, which he obtained subsequent to suffering the accident of January 7, 2003.

Mr. Murphy enjoys limited education. He attended the public school through the first grade, when his parents removed him from school to work with the family picking various crops in order to support the family. He did not return to school or obtain any additional formal education or training, and does not have a GED. It is noted that he suffers from a learning disability, and is unable to read and write. Notably, during the Vietnam War Mr. Murphy received a call by the draft board, which resulted in him submitting to an examination and being declared F-4. Although he passed the physical examination he failed the examination because of his inability to read and write.

The employment history for Mr. Murphy is varied, involving primarily labor-oriented work. As a child, he worked with his family picking crops, including cotton, green beans, strawberries, peanuts, watermelons, and cantaloupes, until reaching his early teens when he began working in construction as a general laborer. As an adult, for 20 to 25 years, according Mr. Murphy, he worked in the construction industry performing finish concrete work. Additionally he worked as a heavy equipment operator, working with a bull dozer. Other employment outside of construction includes employment as a dishwasher, "grease monkey," and general maintenance.

Prior to obtaining employment with Barbeque Wood Flavors, Inc. Mr. Murphy worked in general maintenance with Simmons Poultry. While in this employment, Mr. Murphy's supervisor at Simmons Poultry recommended to Mr. Murphy that he interview for a position with Barbeque Wood Flavors, Inc., which had an open position involving the maintenance of its manufacturing equipment. Noting that the work with Barbeque Wood Flavors, Inc. would be less physically demanding, Mr. Murphy pursued the employment opportunity and secured an interview.

On January 4, 2003 Mr. Murphy met with Lynn Wallace, who interviewed Mr. Murphy for the open maintenance position with Barbeque Wood Flavors, Inc. During the course of this interview Messrs. Wallace and Murphy agreed to a one-week employment arrangement. The parties agreement contemplated that, following this one-week work period, both parties could evaluate the other, and either sever their relationship or renegotiate and pursue a longer or more permanent employment relationship. In this context, according to the parties' agreement, Mr. Murphy agreed to work for Barbeque Wood Flavors, Inc. in the maintenance position for one week, at an agreed upon hourly wage of \$9.00 per hour. Additionally, while the parties did not identify the presence of overtime or weekend work as a certainty or expectation, and did not identify a scheduled work week, the parties understood that Mr. Murphy's work could possibly encompass overtime

or weekend work. The parties further agreed to begin this one-week work period on Monday, January 6, 2003.

Subsequent to entering into the employment agreement, Mr. Murphy appeared for work on Monday, January 6, 2003, and worked between 10 to 10 ½ hours. Mr. Murphy worked without incident repairing machinery. Mr. Murphy returned to work on Tuesday, January 7, 2003 and began to disassemble a machine that he had worked on the previous day. He continued with this project until finishing the disassembly process in the afternoon. Notably, while working on this machine during the afternoon Mr. Murphy tripped and fell, causing him to suffer discomfort and pain; but he continued to work with the assistance of Sean Bodas, who performed more of the physical labor. Later, however, while continuing to work on the machine Mr. Murphy tripped on a long metal hoe or "chip-puller," which caused him to lose his balance and to fall forward. While falling to the ground, Mr. Murphy's body twisted to the right, causing his face to fall directly toward the hydraulic mechanism of the equipment at a level between three and three one-half feet above the floor level. And, in an effort to protect his face and head, Mr. Murphy extended his right hand toward the hydraulic pump and mechanism, which resulted in him protecting his face, but causing him to suffer injuries to his right knee, left knee, right hand/wrist, right forearm, right shoulder, and left abdomen. Mr. Murphy experienced immediate pain in his left knee, right knee, right shoulder, and right hand/wrist. Later, he experienced pain in his low back.

Mr. Wallace became aware of the incident on the 7th, which resulted in Mr. Wallace continuing to work until the equipment was operational, and then he went home. Thereafter, Mr. Wallace reported to work on January 8, 2003, but in light of continuing pain and discomfort, Mr. Murphy spoke to Mr. Wallace and advised him of his discomfort and pain, which resulted in Mr. Wallace referring Mr. Murphy to seek medical treatment with any physician, such as his family doctor. Accordingly, consistent with the directions provided to him, Mr. Murphy presented to his family physician, David R. Hill, D.O., who is a physician in Southwest City, Missouri.

Dr. Hill provided Mr. Murphy with an initial examination, which included a diagnostic study involving x-rays, and a prescription for medication. In light of the initial findings, Dr. Hill referred Mr. Murphy to David A. Ball, M.D., who is an orthopedic surgeon in Joplin, Missouri, and who scheduled an appointment for Mr. Murphy on January 29, 2003. Subsequently, Mr. Murphy presented to Dr. Ball for examination and evaluation, which included additional diagnostic studies resulting in Dr. Ball opining that the accident of January 7, 2003 caused Mr. Hill to sustain injuries to his right shoulder and right knee. Additionally, Dr. Ball opined that the injuries to Mr. Murphy's right shoulder and knee necessitated surgical repair, which included an acromionectomy and rotator cuff tear repair of the right shoulder and arthroscopic surgery of the right knee.

Thereafter, Mr. Murphy proceeded to surgery under the care of Dr. Ball on February 28, 2003 relative to the right shoulder and right knee. Following the surgery, Mr. Murphy experienced considerable difficulty arising from a seated position, thus leading Dr. Ball to prescribe a lift chair. Notably, Mr. Murphy continues to use a lift chair for his right knee. And, Mr. Murphy continued to present to Dr. Ball for follow-up treatment.

In April 2003 Dr. Ball evaluated Mr. Murphy, and determined that the right knee problems being experienced by Mr. Murphy would be progressive. Further, in light of the progressive nature of the injury and problems being experienced by Mr. Murphy with his right knee Dr. Ball opined that, in the future, Mr. Murphy would need a knee replacement.

On June 11, 2003 Dr. Ball examined Mr. Murphy relative to continuing right shoulder problems associated with anterior pain in the shoulder, which appeared to increase with physical therapy. Dr. Ball expressed the belief that the right shoulder pain related to proximal biceps tendonitis. Dr. Ball continued to provide Mr. Murphy with follow-up treatment.

In light of continuing problems with Mr. Murphy's right shoulder, the employer and insurer referred Mr. Murphy to Robert K. Lieurance, M.D. for a second surgical opinion. Thereafter, following his examination and evaluation of Mr. Murphy, Dr. Lieurance opined that Mr. Murphy should be considered for additional surgery in the nature of a rotator cuff repair; and, if the symptoms did not improve, an MRI diagnostic study to evaluate Mr. Murphy's earlier rotator cuff repair would be appropriate.

Subsequent to being evaluated by Dr. Lieurance, Mr. Murphy returned to Dr. Ball for additional follow-up treatment. And, in light of continuing problems with his right shoulder Mr. Murphy underwent an additional MRI of the right shoulder, which resulted in a diagnosis of "full thickness and moderately retracted tear of the supraspinatus tendon." Notwithstanding, Dr. Ball opined that Mr. Murphy was not a candidate for additional surgical repair. Consequently, Dr. Ball concluded that Mr. Murphy had reached maximum medical improvement, and the resulting conditions and disability attributable to the right shoulder and right knee were permanent. Notably, in rendering this assessment, on August 21, 2003, Dr. Ball propounded the following comments:

This patient is seen in follow up with respect to his right shoulder. I reviewed an MRI scan done on his shoulder on 8-8-03. This showed a full thickness tear of the rotator cuff with retraction of the supraspinatus tendon.

I had done acromionectomy and rotator cuff repair on the patient's right shoulder on 2-28-03. The patient had previous shoulder surgery on 9-4-02. At that time an acromionectomy and rotator cuff repair was also done. The occasion for the second rotator cuff repair was as a result of a second injury to his shoulder which occurred on 1-7-03.

At the present time the patient continues to have some limitation of motion in the shoulder and some weakness in abduction. The MRI scan, as I indicated, done on 8-8-03 indicates a definite rotator cuff tear of the shoulder.

It would be my opinion that this patient has a non-repairable rotator cuff tear of the right shoulder. I don't think any further surgery is indicated. This patient has obtained maximum medical improvement and should be considered discharged from further treatment.

It would be my opinion that this patient has a 24% permanent partial impairment of the right shoulder level as a result of a non-repairable rotator cuff tear.

This patient has also had problems with his right knee. An arthroscopic examination was done on his right knee on 2-28-03. At that time the patient had advanced degenerative changes involving all three of the compartments of his knee. It was my assessment that the patient probably would need to consider a knee replacement sometime in the future.

Based on my treatment of this patient, it would be my opinion that he has a 30% permanent partial impairment of his right knee. Of this impairment rating, 20% would be preexisting and 10% would be related to his current injury.

Subsequent to being released from medical care under Dr. Ball, Mr. Murphy did not return to work. According to Mr. Murphy, the multiple problems caused by his injuries of January 7, 2003, together with multiple preexisting problems, he is limited in his ability to engage in activity and not able to return to employment. In this regard, Mr. Murphy stated that the combined conditions of his shoulder and knee make it very difficult for him to find a position in which he can sleep. Generally, he is unable to sleep in a bed or other reclining position. As a consequence, Mr. Murphy obtains most of his sleep in the lift chair prescribed by Dr. Ball.

Also, Mr. Murphy testified that, because of his medical problems, particularly with regard to his right shoulder and right knee, he experiences difficulty dressing himself. Similarly, Mr. Murphy notes, he is no longer able to hunt because of his right shoulder. And, is limited to walking no more than 30 feet before needing to stop and rest; while he is not able to walk on inclines.

Prior to the accident of January 7, 2003 Mr. Murphy sustained several injuries and/or presented with industrially disabling conditions. These injuries and/or disabilities are summarized below.

Right Shoulder

In 1992 Mr. Murphy sustained an injury in the nature of a torn rotator cuff, referable to his right shoulder. The injury resulted in Mr. Murphy undergoing an open rotator cuff repair, which necessitated him being off work for a period of time. Eventually, Mr. Murphy returned to work and, although his treating physician (Dr. Ball) did not issue permanent restrictions, Mr. Murphy performed his work differently, particularly in regards to overhead work. According to Mr. Murphy the injury did not involve workers' compensation, and thus did not result in Mr. Murphy obtaining a formal rating of permanent disability.

At the hearing Mr. Murphy stated that, following the injury to his right shoulder, he began using his left hand more and modified his activities relative to self-imposed limitations and concerns. Notably, relative to the concerns associated with Mr. Murphy's right shoulder, Norbert Belz, M.D. opines that the 1992 injury to Mr. Murphy's right shoulder causes him to be governed by permanent restrictions and limitations, including the restriction of limiting use of the right shoulder above shoulder level to weighted activities not exceeding 10 pounds; and the requirement that Mr. Murphy be able to use his left upper extremity to compensate for the right shoulder, especially when functioning at or above shoulder level. Further, Dr. Belz opines that the 1992 injury to Mr. Murphy's right shoulder caused him to present with a permanent partial disability of 15 percent, referable to the right shoulder at the 232-week level.

Low Back

In 1993 Mr. Murphy sustained an occupational injury to his low back, which resulted in him undergoing receipt of medical care; but the injury did not require surgery. According to Mr. Murphy, following this incident and a period of recovery, he returned to work full duty and without any permanent restrictions. Eventually, Mr. Murphy settled the workers' compensation case based on an approximate disability of 8.75 percent to the body as a whole. Further, Mr. Murphy notes that he recovered from the incident and did not suffer any continuing problems related to his low back; and the injury did not restrict any of his activities, including hunting and fishing.

Learning Disability

Mr. Murphy is unable to read or write, and throughout the course of his life has lacked the ability to read or write. This disability causes difficulty for him, and serves as a hindrance and an obstacle to obtaining and/or advancing in employment. Notably, Mr. Murphy is unable to read a phone book, a road map,

road signs, or written instructions, including travel directions and instruction manuals, safety warnings, road signs, and job applications. Although he recognizes stop signs and railroad crossing symbols. Consequently, because of his inability to read or write, Mr. Murphy does not write checks or make deposits; nor does he engage in shopping, except minimal trips to the local convenience store near his home.

In context of employment opportunities, the inability to read or write causes Mr. Murphy to lose employment opportunity, and in his employment history he has been denied access to the application process. Notably, Mr. Murphy has generally not worked in employment that required him to read or write; although, in his employment with B & B Sand and Gravel he worked as a "grease monkey," which required him to perform certain minimal paper work that he did secretly, unbeknown to the employer with the assistance of his wife at home. In regards to driving, Mr. Murphy is able to drive to locations wherein he has taken enough trips to know the route, but if the trip requires reading any road signs, street signs, building names or numbers, road maps or travel directions, he is unable to make the trip alone, without assistance of a person available to give him directions.

Also, it is noted that, during Mr. Murphy's adult life, on multiple occasions, he has attempted to learn to read and write, including one on one instruction from a teacher in a library environment. For example, Mr. Murphy has attempted to learn to read and write through the assistance of a local elementary school teacher, through the study of workbooks from the Tulsa Literacy Center, through use and study of the Fast Track learn-to-read materials, and through the use of other learn-to-read materials, including both audio and written materials. Also, Mr. Murphy's wife, who is a Head-Start instructor that is responsible for instructing preschool children in letter recognition, phonics, word recognition and beginning reading skills, has attempted to teach Mr. Murphy to read, but to no avail.

Dale A. Halfaker, Ph.D., who is a neuropsychologist, performed a comprehensive psychological evaluation of Mr. Murphy on or about April 14, 2004, determined that Mr. Murphy is within the Borderline (70-79) range of intellectual efficiency. Dr. Halfaker further determined that, in light of the multiple testing, Mr. Murphy suffers from a learning disorder and is unable to learn to be a functional reader. Dr. Halfaker further opined that, in light of Mr. Murphy being in the borderline of intellectual efficiency and suffering from a learning disorder that precludes him from engaging in any functional reading or written expression, Mr. Murphy is "profoundly" limited in his employability.

Norbert Belz, M.D., who is a physician practicing in the specialty of occupational medicine, testified by deposition on behalf of the employee. Dr. Belz performed an independent medical examination of the employee on or about March 17, 2004. At the time of this examination, Dr. Belz took a history from Mr. Murphy, reviewed various medical records, and performed a physical examination of him. In light of his examination and evaluation of the claimant, Dr. Belz opined that, as a consequence of the occupational injury of January 7, 2003, Mr. Murphy sustained injuries to his right shoulder, right wrist, right knee, and low back. Dr. Belz further opined that these injuries serve as hindrances and obstacles to employment, and resulted in Mr. Murphy suffering permanent disability. Specifically, Dr. Belz opined that the accident of January 7, 2003 caused Mr. Murphy to sustain a permanent partial disability of 40 percent, referable to the right shoulder; he sustained a permanent partial disability of 75 percent, referable to the right knee; he sustained a permanent partial disability of 2.5 percent, referable to the right wrist; and he sustained a permanent partial disability of 2.5 percent to the body as a whole, referable to the low back.

In addition, Dr. Belz opined that, prior to the accident of January 7, 2003, Mr. Murphy suffered from a learning disability and an injury to his right shoulder. Both conditions, according to Dr. Belz, caused Mr. Murphy to be governed by restrictions and limitations, which, prior to January 7, 2003, served as hindrances and obstacles to employment. Further, Dr. Belz opined that the learning disability caused Mr. Murphy to present with a permanent partial disability of 20 percent to the body as a whole; and Mr. Murphy presented with a permanent partial disability of 15 percent, referable to the right shoulder.

Finally, Dr. Belz is of the opinion that, as a consequence of the accident and injury of January 7, 2003, Mr. Murphy will need future medical care, particularly in regard to the right shoulder and right knee, in order to cure and relieve him of the effects of the injury. And, Dr. Belz is of the opinion that the prior and last injuries and disabilities combine in excess of the simple sum, and that a 15 to 18 percent load should be considered in assessing a multiplicity factor. Yet, Dr. Belz opines that, as a consequence of the combination of prior and last disabilities, Mr. Murphy is permanently and totally disabled.

Wilbur T. Swearingin, CRC, testified by deposition in behalf of the employee. Mr. Swearingin performed a vocational evaluation, relative to assessment of Mr. Murphy's vocational employability on or about August 22, 2005. In light of his examination and evaluation of Mr. Murphy, Mr. Swearingin opined that, in light of Mr. Murphy's medical restrictions, illiteracy, age, and manual labor work history, Mr. Murphy is unemployable in the open and competitive labor market. Notably, Mr. Swearingin is of the opinion that the restrictions and limitations caused by the injury of January 7, 2003, in combination with the restrictions and limitations caused by the learning disability and prior injury to Mr. Murphy's right shoulder, render Mr. Murphy unemployable in the open and competitive labor market.

In light of the multiple problems and in the inability to return to work, Mr. Murphy is seeking permanent total disability compensation.

FINDINGS AND CONCLUSIONS

The Workers' Compensation Law for the State of Missouri underwent substantial change on or about August 28, 2005. However, in light of the underlying workers' compensation case involving an accident date of January 7, 2003, the legislative changes occurring in August 2005 enjoy only limited application to this case. The legislation in effect on January 7, 2003, which is substantive in nature, and not procedural, governs substantively the adjudication of this case. Accordingly, in this context, several familiar principles bear reprise.

The Workers' Compensation Law for the State of Missouri is to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment. The law is to be broadly and liberally interpreted and is intended to extend its benefits to the largest possible class. Any question as to the right of an employee to compensation must be resolved in favor of the injured employee. *Cherry v. Powdered Coatings*, 897 S.W. 2d 664 (Mo. App., E.D. 1995); *Wolfgeher v. Wagner Cartage Services, Inc.*, 646 S.W.2d 781, 783 (Mo. Banc 1983). Yet, a liberal construction cannot be applied in order to excuse an element lacking in the claim. *Johnson v. City of Kirksville*, 855 S.W.2d 396 (Mo. App., W.D. 1993).

The party claiming benefits under The Workers' Compensation Law for the State of Missouri bears the burden of proving all material elements of his or her claim. *Duncan v. Springfield R-12 School District*, 897 S.W.2d 108, 114 (Mo. App. S.D. 1995), citing *Meilves v. Morris*, 442 S.W.2d 335, 339 (Mo. 1968); *Brufflat v. Mister Guy, Inc.* 933 S.W.2d 829, 835 (Mo. App. W.D. 1996); and *Decker v. Square D Co.* 974 S.W.2d 667, 670 (Mo. App. W.D. 1998). Where several events, only one being compensable, contribute to the alleged disability, it is the claimant's burden to prove the nature and extent of disability attributable to the job-related injury.

Yet, the claimant need not establish the elements of the case on the basis of absolute certainty. It is sufficient if the claimant shows them to be a reasonable probability. "Probable", for the purpose of determining whether a worker's compensation claimant has shown the elements of a case by reasonable probability, means founded on reason and experience, which inclines the mind to believe, but leaves room for doubt. See, *Cook v. St. Mary's Hospital*, 939 S.W.2d 934 (Mo. App., W.D. 1997); *White v. Henderson Implement Co.*, 879 S.W.2d 575,577 (Mo. App., W.D. 1994); and *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650 (Mo. App., W.D. 1995). All doubts must be resolved in favor of the employee and in favor of coverage. *Johnson v. City of Kirksville*, 855 S.W.2d 396, 398 (Mo. App. W.D. 1993).

I.

Compensation Rate

The provisions of Section 287.250, RSMo, govern the determination of the applicable compensation rate. Section 287.250, RSMo, in pertinent part, states:

1. Except as otherwise provided for in this chapter, the method of computing an injured employee's average weekly wage earnings which will serve as the basis for compensation provided for in this chapter shall be as follows:

* * *

(3) If the wages are fixed by the year, the average weekly wage shall be the yearly wage fixed divided by fifty-two;

(4) If the wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be computed by dividing by thirteen the wages by the day, hour, or output per day actually worked by the employee that such employee earned in the employ of the employer in the last thirteen consecutive calendar weeks immediately preceding the week in which the employee was injured... For purposes of computing the average weekly wage pursuant to this subdivision, absence of five regular or scheduled work days, even if not in the same calendar week, shall be considered as absence of for a calendar week. ...

(5) If the employee has been employed less than the two calendar weeks immediately preceding the injury, the employee's weekly wage shall be considered to be equivalent to the average weekly wage prevailing in the same or similar employment at the time of the injury, except if the employer has agreed to a certain hourly wage, then the hourly wage agreed upon multiplied by the number of

weekly hours scheduled shall be the employee's average weekly wage;

(6) If the hourly wage has not been fixed or cannot be ascertained, or the employee earned no wage, the wage for the purpose of calculating compensation shall be taken to be the usual wage for similar services where such services are rendered by paid employees of the employer or any other employer;

* * *

3. If an employee is hired by the employer for less than the number of hours per week needed to be classified as a full-time or regular employee, benefits computed for purposes of this chapter for permanent partial disability, permanent total disability and death benefits shall be based upon the average weekly wage of a full-time or regular employee engaged by the employer to perform work of the same or similar nature and at the number of hours per week required by the employer to classify the employee as a full-time or regular employee, but such computation shall not be based on less than thirty hours per week.

4. If pursuant to this section the average weekly wage cannot fairly and justly be determined by the formulas provided in subsections 1 to 3 of this section, the division or the commission may determine the average weekly wage in such manner and by such method as, in the opinion of the division or the commission, based upon the exceptional facts presented, fairly determined such employee's average weekly wage.

In the present case, the employee and employer entered into an employment agreement, wherein Mr. Murphy agreed to work for Barbeque Wood Flavors, Inc. in the maintenance position for one week, at an agreed upon hourly wage of \$9.00 per hour. Additionally, while the parties did not identify the presence of overtime or weekend work as a certainty or expectation, and did not identify a scheduled work week, the parties understood that Mr. Murphy's work could possibly encompass overtime or weekend work. Yet, and unfortunately, while on the job for only two days Mr. Murphy sustained an occupational injury, which necessitated receipt of medical care and removed him from work.

After consideration and review of the evidence, I find and conclude that the evidence presented in this case does not allow for an average weekly wage to be determined by the provisions of subsections 1 through 3 of Section 287.250, RSMo. Notably, Section 287.250.1(5), RSMo is not applicable, insofar as the parties had agreed to and established an hourly weekly wage, but the parties did not establish a specific or defined work schedule. Nor is Section 287.250.1(6), RSMo applicable to the present case, insofar as the parties agreed to a fixed hourly wage. Thus, I find and conclude that Section 287.250.4, RSMo governs the determination of the applicable compensation rate in the present case.

Rendering a fair determination of the employee's average weekly wage is difficult, at best. However, it is clear that the parties intended to compensate Mr. Murphy at an agreed upon hourly wage of \$9.00 per hour. It is further clear that the parties' agreement contemplated the opportunity for Mr. Murphy to work a full workweek, at the agreed upon hour wage of \$9.00 per hour, and thereafter the two parties would reevaluate the employment relationship. Also, while the parties did not identify a scheduled workweek, and the parties understood that Mr. Murphy's work could possibly encompass overtime or weekend work, the parties did not identify the presence of overtime or weekend work as a certainty or expectation.

Accordingly, after consideration and review of the evidence, I find and conclude that it is reasonable to assume a 40 hour workweek, multiplied by the agreed upon hourly wage of \$9.00 per hour, to render a fair determination of the average weekly wage of \$360.00. Therefore, in light of the foregoing, I find and conclude that the applicable compensation rate is \$240.00.

II. Medical Care

On January 7, 2003, while engaged in his employment with Barbeque Wood Flavors, Inc., Mr. Murphy suffered a slip and fall, which caused him to lose his balance and to fall forward. While falling to the ground, Mr. Murphy's body twisted to the right, causing his face to fall directly toward the hydraulic mechanism of the equipment at a level between three and three one-half feet above the floor level. And, in an effort to protect his face and head, Mr. Murphy extended his right hand toward the hydraulic pump and mechanism, which resulted in him protecting his face, but causing him to suffer injuries to his right knee, left knee, right hand/wrist, right forearm, right shoulder, and left abdomen. Mr. Murphy experienced immediate pain in his left knee, right knee, right shoulder, and right hand/wrist. Later, he experienced pain in his low back.

The injuries sustained by Mr. Murphy necessitated receipt of medical care, which the employer and insurer provided to him, primarily through treatment provided by Dr. Ball. Significantly, the injury to the right shoulder and right knee necessitated surgical repairs. Yet, the injuries did not provide complete relief, resulting in Mr. Murphy continuing to experience significant pain and discomfort relative to his right shoulder and right knee. Further, as a consequence of the

accident and injury of January 7, 2003, Mr. Murphy will require future medical care in order to cure and relieve him of the effects of the injuries. In particular, Mr. Murphy will likely need a right knee replacement in the future.

Accordingly, after consideration and review of the evidence, I find and conclude that Mr. Murphy is entitled to future medical care. The employer and insurer are ordered to provide such medical care as may be authorized and directed by Dr. Ball, or such other authorized orthopedic surgeon, and which is reasonable, necessary and causally related to the accident of January 7, 2003.

III.

Temporary Total Disability Compensation

The parties stipulated to the employee being temporarily and totally disabled during the period of January 7, 2003 to August 21, 2003 (32 and 2/7 weeks or 226 days). The parties further stipulated that the employer and insurer paid to the employee temporary total disability compensation in the amount of \$8,304.00, payable for the period of January 7, 2003 to August 21, 2003.

Having determined that the applicable compensation rate is \$240.00, and in light of the employee being temporarily and totally disabled for the period of January 7, 2003 to August 21, 2003, I find and conclude that the employee is entitled to \$7,748.58 in temporary total disability compensation. The employer and insurer, therefore, are entitled to a credit of \$555.42, relative to their overpayment of temporary total disability compensation in the amount of \$8,304.00.

IV.

Nature & Extent of Permanent Disability

The evidence is supportive of a finding that, as a consequence of the January 7, 2003 accident, Mr. Murphy sustained injuries to his right upper extremity, right lower extremity, and low back. The evidence is further supportive of a finding that, as a consequence of the January 7, 2003 accident, the injury to the right shoulder includes a tear of the rotator cuff with retraction of the supraspinatus muscle, thinning of the right supraspinatus muscle, partial detachment and atrophy of the right deltoid muscle, injury of the long head of the right biceps tendon and aggravation of the acromioclavicular joint arthrosis. And, while the injury necessitated a surgical repair, the repair was unsuccessful and Mr. Murphy now suffers from a non-repairable rotator cuff tear. Also, in regards to the right knee, Mr. Murphy suffers from advanced degenerative changes involving all three compartments of his knee, which will likely require a knee replacement in the future, and the degenerative nature of this condition is causally related to the accident of January 7, 2003.

Accordingly, in light of the foregoing, and after consideration and review of the evidence, I find and conclude that Mr. Murphy sustained a permanent partial disability of 35 percent, referable to the right upper extremity at the 232 week level; Mr. Murphy sustained a permanent partial disability of 50 percent, referable to the right lower extremity at the 160 week level; and Mr. Murphy sustained a permanent partial disability of 2 percent to the body as a whole, referable to the low back (157.6 weeks).

The accident of January 7, 2003 causes Mr. Murphy to be governed by certain restrictions and limitations, which present Mr. Murphy with hindrances and obstacles to employment. However, the restrictions caused by the accident of January 7, 2003, considered alone, do not render Mr. Murphy unemployable in the open and competitive labor market. These findings and conclusions include consideration of the medical opinions of Drs. Belz and Dr. Ball, the opinions of Dr. Halfaker, the permanent restrictions governing Mr. Murphy, and the vocational opinion of Mr. Swearingin.

Therefore, the employer and insurer are ordered to pay to the employee the sum of \$37,268.58, which takes into consideration the credit owed to the employer and insurer (157.6 weeks x \$240.00 = \$37,824.00 - \$555.42 == \$37,268.58).

V.

Second Injury Fund

The accident of January 7, 2003, considered alone, does not render the employee permanently and totally disabled. Yet, prior to the accident of January 7, 2003, Mr. Murphy suffered from preexisting injuries and disabilities involving a learning disability and his right shoulder; and these preexisting injuries / conditions caused Mr. Murphy to suffer certain permanent disability and to be governed by certain restrictions and limitations. Additionally, these disabilities presented Mr. Murphy with hindrances and obstacles to employment or potential employment, particularly with use of his right upper extremity in overhead activities and the ability to engage in sedentary activities involving reading or writing.

The disability caused by the accident of January 7, 2003 combines with the preexisting industrial disabilities to cause Mr. Murphy to be governed by additional restrictions and limitations, including restrictions and limitations associated with standing and walking. The restrictions resulting from the accident of January 7, 2003, together with the preexisting injury to the right shoulder and learning disability, considered as a whole, render Mr. Murphy permanently and totally disabled. Notably, all of the physicians and experts appear to agree that, with consideration of all the restrictions imposed on Mr. Murphy, he is permanently and totally disabled.

Accordingly, after consideration and review of the evidence, I find and conclude that, as a consequence of the accident of January 7, 2003, in combination with the preexisting industrial disabilities, Mr. Murphy is permanently and totally disabled. Therefore, the Second Injury Fund is ordered to pay to the employee, David Murphy, the sum of \$240.00 per week for the employee's lifetime. The payment of the permanent total disability compensation by the Second Injury Fund is effective as of August 21, 2003, which takes into consideration Mr. Murphy reaching maximum medical improvement on August 21, 2003 and 157.6 weeks of permanent partial disability compensation to be paid by the employer and insurer. (There is no differential between permanent partial disability compensation and permanent total disability compensation. Hence, the Second Injury Fund is not liable for the payment of the first 157.6 weeks of permanent disability compensation.)

The award is subject to modifications as provided by law.

An attorney's fee of 25 percent of the benefits ordered to be paid is hereby approved, and shall be a lien against the proceeds until paid. Interest as provided by law is applicable.

Date: August 31, 2006

Made by: /s/ L. Timothy Wilson

L. Timothy Wilson

*Chief Administrative Law Judge
Division of Workers' Compensation*

A true copy: Attest:

/s/ Patricia "Pat" Secest

Patricia "Pat" Secest

Director

Division of Workers' Compensation