

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

Injury No.: 99-159020

Employee: Nicholas Parrino

Employer: Universe Corporation

Insurer: Amerisure Corporation

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

Date of Accident: November 4, 1999

Place and County of Accident: Bridgeton, St. Louis 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. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge, as modified, 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 modified award and decision of the administrative law judge dated July 12, 2004. The award and decision of the administrative law judge (ALJ) 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.

This matter is before the Commission on a review filed by Employee from an award allowing compensation. Employee stated that the ALJ erred in finding no liability against the Second Injury Fund. We disagree and affirm the ALJ in that respect. Employee also stated that the ALJ erred in not finding permanent total disability or, in the alternative, a higher degree of permanent partial disability, in not awarding temporary total disability and reimbursement of medical expenses.

We agree with and adopt the award of the ALJ in all respects save for the amount of permanent partial disability. The Commission is charged with the responsibility of determining the nature and extent of permanent partial disability, if any, resulting from an injury. *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879 (Mo. App. S.D. 2001), *Elmer v. Bd. of Police Comm'rs*, 895 S.W.117, 120 (Mo. App. 1995). After reviewing the lay and medical testimony we find that Employee has sustained a disability of 50% of the left shoulder as a result of the injury of November 4, 1999. This amounts to 116 weeks of compensation at the rate of \$303.01 per week or \$35,149.16. Said compensation is due and payable.

Given at Jefferson City, State of Missouri, this 7th day of January 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

VACANT

Chairman

Bill I. Foster, Member

Attest: _____
John J. Hickey, Member

Secretary

AWARD

Employee: Nicholas Parrino Injury No.: 99-159020
Dependents: N/A Before the
Division of Workers'
Employer: Universe Corporation **Compensation**
Department of Labor and Industrial
Additional Party: Second Injury Fund Relations of Missouri
Jefferson City, Missouri
Insurer: Amerisure Companies
Checked by: KOB:tr
Hearing Date: April 18, 2004

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: November 4, 1999
5. State location where accident occurred or occupational disease was contracted: Bridgeton, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was engaged in heavy overhead lifting as an ironworker when he sustained an injury to his left 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 shoulder.
14. Nature and extent of any permanent disability: 40% permanent partial disability of the left shoulder.
15. Compensation paid to-date for temporary disability: \$14,547.92.
16. Value necessary medical aid paid to date by employer/insurer? \$35,438.48.

Employee: Nicholas Parrino Injury No.: 99-159020

- 17. Value necessary medical aid not furnished by employer/insurer? \$0.
- 18. Employee's average weekly wages: Maximum.
- 19. Weekly compensation rate: \$578.48 /\$303.01
- 20. Method wages computation: By agreement.

COMPENSATION PAYABLE

- 21. Amount of compensation payable:
92.8 weeks of permanent partial disability from Employer: \$28,118.33
- 22. Second Injury Fund liability: No

TOTAL: \$28,118.33

- 23. Future requirements awarded: None.

Said payments to begin immediately and 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% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Mathew J. Padberg

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Nicholas Parrino	Injury No.: 99-159020
Dependents:	N/A	Before the
Employer:	Universe Corporation	Division of Workers'
		Compensation
Additional Party:	Second Injury Fund	Department of Labor and Industrial
		Relations of Missouri
Insurer:	Amerisure Companies	Jefferson City, Missouri
		Checked by: KOB

PRELIMINARIES

The matter of Nicholas Parrino ("Claimant") proceeded to hearing on April 18, 2004 to determine the nature and extent of disability Claimant suffered as a result of his work related injury. Attorney Matthew Padberg represented Claimant. Attorney Michael Banahan represented Universe Corporation ("Employer") and its Insurer, Amerisure Companies. Assistant Attorney General Carol Barnard represented the Second Injury Fund.

The parties agreed that on or about November 4, 1999, Claimant sustained an accidental injury arising out of and in the course of his employment that resulted in injury to Claimant's left shoulder. At that time, Claimant earned an average weekly wage that qualified him for rates of compensation of \$578.48 for temporary total disability benefits and \$303.01 for permanent partial disability benefits. Employer paid temporary total disability benefits in the amount of \$14,547.92 covering a period of time from January 19, 2001 through July 30, 2001. Employer also paid medical benefits totaling \$35,438.48.

At the request of Employer/Insurer's attorney, I take notice of the fact that Amerisure had coverage for Employer from November 30, 1998 through November 30, 2000. Employment, venue, notice, and timeliness of the claim were not at issue.

The issues to be determined are:

1. Is Claimant's condition medically casually related to his work related accident;
2. What is the nature and extent of the disability associated with Claimant's primary left shoulder injury; and
3. What is the liability of the Second Injury Fund?

Claimant seeks permanent total disability benefits from the Second Injury Fund.

SUMMARY OF THE EVIDENCE

Claimant's Testimony

Claimant is a 62-year-old married man. As a youth, he completed the ninth grade, and worked menial jobs until joining the Army in 1960. Claimant was honorably discharged in 1962 after achieving the rank of Sergeant E-5. He was trained in combat/infantry alone, and acquired no unique skills while in the Army. Claimant is able to read and balance his checkbook.

In 1965, Claimant joined the Local Ironworkers Union. After a three-year apprenticeship, he became a journeyman, a position he held through his last day of work on January 18, 1999. Claimant described the intensely physical nature of ironwork, which involved building bridges, structural steel, concrete and other structures, often in the cold. His tool belt alone weighed from 45 to 55 pounds when loaded, and he otherwise had to carry from 70 to 90 pounds at a time. The difficult positions he was required to assume included bending, stooping, climbing and walking on four to twelve inch beams, sometimes many feet off the ground.

Claimant injured his left shoulder on November 4, 1999, while working for Employer, a company that produced and installed "skin" for high-rise buildings. In the fall of 1999, Employer was building its own plant in Bridgeton, Missouri, and Claimant was assembling material racks. While holding a 60 to 70 pound piece of metal overhead, Claimant felt a "good jolt of pain" in his left shoulder. Prior to this event, he had no problems or symptoms in his left shoulder.

Claimant testified did not get treatment immediately because getting banged around is common in his profession, and he figured it would get better. However, the next day his shoulder still hurt, so he asked for treatment. At Barnes Care Center, doctors diagnosed a strain, and provided two sessions of physical therapy, which Claimant found painful. Claimant had no improvement while he was at Barnes Care, and despite treatment, continued to have problems with pain, especially with heavy lifting, lifting over shoulder height, and sleeping. The doctor led Claimant to believe he did not have a rotator cuff injury and he would heal with time. Claimant continued to work regular hours performing regular duties for almost a year, but he claimed he favored his shoulder, and got help from his friends and son. During that time his shoulder did not improve, and no new injuries occurred.

Eventually, Claimant got treatment on his own. He first saw Dr. Hertel, who made the same diagnosis. He then saw Dr. Covert, who ordered an MRI and referred Claimant to Dr. Haupt. Dr. Haupt examined Claimant and reviewed films. He proposed, among other things, a scoping procedure to determine the cause of Claimant's complaints and possibly repair the problems. When Dr. Haupt performed the arthroscopic procedure, he found a torn rotator cuff and performed an open repair. Claimant received all this treatment through his private health insurance.

Claimant's recovery included a mechanical chair to assist in mobility of his shoulder, and six months of physical therapy and work hardening. Claimant has not had treatment for his left shoulder since July 2001. Claimant got to the point where he could move his shoulder, but he still had pain with certain movements. He testified that his arm does not physically perform in the manner it did before his injury. For example, he finds it difficult to reach to the opposite shoulder or the top of his head. He has decreased strength and cannot lift even light items overhead. Claimant testified that he was discharged without additional instructions regarding home therapy or other modalities of treatment. Claimant has not returned to work. Claimant testified he cannot do ironwork, and that there is no such thing as light duty in the union.

Claimant explained the problems he says preexisted his shoulder injury. Claimant testified he had problems with his knees for five or six years before his shoulder injury, including numbness, pain with lifting, trouble kneeling, and difficulty

climbing ladders. He took pain pills, but never saw a doctor, never had treatment, and never missed work because of his knees. Claimant made a point of saying that he was never much for going to the doctor. He said his knees have been the same or worse since his accident. Now, his knees are stiff in the morning but get a little better once he has a chance to move around. His legs are not as strong or flexible, and he cannot kneel, stoop or bend.

Claimant stated that he started to develop back problems early in his career, including pain and stiffness with heavy lifting. Claimant did not see a doctor, obtain treatment or miss work on account of his back prior to November 1999. Claimant's lower back limits his sitting and standing, gets aggravated from bending or picking things up, causes leg numbness when standing for a long time (like in a shower), and is a source of pain. He had treatment with a chiropractor for his low back in February and March 2003.

Prior to his work injury in November 1999, Claimant jammed his left pinky finger when he slipped and fell on ice. His finger does not feel right sometimes, is sensitive, and does not curl into a full fist.

Claimant has complaints in his right shoulder, although it is not nearly as bad as his left. He has soreness now and then, some pains, and arthritis with limited range of motion. He did not see a doctor, have treatment or miss work on account of his right shoulder before 1999. With respect to his neck, Claimant has stiffness, and he also has problems with his elbow.

Claimant retired five years before he was eligible to receive a full pension. He attempts to help with chores around the house. He still fishes and plays golf, but only putting. He takes over the counter medications for all his ailments.

Claimant has not looked, applied or trained for work since his last day with Employer. He is unaware of any job in the construction or ironwork industry that would be considered light or otherwise within his abilities, and he cannot think of any other job he could do. No doctor has told Claimant he cannot work. Claimant testified that even if a job were offered to him that was within his restrictions, Claimant would not work it if it were a non-union job.

Other Witnesses

Mr. James LaMantia is the business manager for Claimant's Union, Ironworkers Local #396. In that capacity, he oversees the day-to-day activities of the Union as a representative of the Union to the public, negotiates contracts and deals with contractors.

Mr. LaMantia confirmed the intensely physical nature of the profession, worked with Claimant in the field, and testified that as an Ironworker, Claimant was "as good as we have." He explained that Section 102, paragraph 2 of the collective bargaining agreement indicates, "There shall be no limitations as to the amount of work an employee shall perform. There should be no restrictions as to the use of machinery, tools, or appliances." Mr. LaMantia went on to testify that based upon the language of this agreement, a Union member with permanent restrictions is prevented from being able to work out of the Union hall as an Ironworker. According to Mr. LaMantia, a union member would violate the Agreement if he were to work for a nonunion contractor.

Medical Opinion Evidence

Dr. Herbert Haupt is the treating orthopedic surgeon who operated on Claimant's left shoulder and testified by deposition on behalf of Employer. Dr. Haupt testified that Claimant had preexisting degenerative changes in the area of the left AC joint, but that the reason Claimant required surgical management was because of the work related injury. He was surprised to find a full thickness tear of the rotator cuff when he performed surgery on January 19, 2001. He oversaw Claimant's rehabilitation process and started him on work hardening in June, where Claimant was able to lift up to 50 pounds overhead. On July 12, 2001, Dr. Haupt testified that he released Claimant to try to work full duty, and found him at maximum medical improvement on July 30, when Claimant said that he declined his full duty release, and opted to retire instead. Ultimately, he felt it best that Claimant limit his overhead lifting to more than 50 pounds. Dr. Haupt felt that Claimant sustained 10% permanent partial disability of the left shoulder as a result of his work injury, and had an additional 5% permanent partial disability associated with the preexisting degenerative changes

The Work Hardening records in Dr. Haupt's file indicate that although Claimant indicated he had "aching pains 'from old age' at bilateral knees and back," his active range of motion was generally within functional limits throughout the right and left lower extremities without complaints of pain. Similarly, his active range of motion was generally within functional limits throughout the lumbar area without complaints of pain.

Dr. Robert Margolis evaluated Claimant once, on August 30, 2002, and testified by deposition on his behalf. Dr. Margolis reviewed records, and took a history, which among other things included Claimant's report of "what he believes is arthritis of the knees" with morning stiffness. There was no history of back problems. In

examination, impingement testing was positive on the left with some limitation of motion. Claimant's knees revealed full range of motion, no crepitus of effusion, a bilaterally negative McMurry, and a bilaterally positive apprehension test. The lumbar region was devoid of spasm or tenderness, had 80 degrees of forward flexion, and full extension and lateral bending bilaterally.

Dr. Margolis testified that Claimant's left shoulder condition is causally related to his November 4, 1999 accident and accounts for permanent partial disability equivalent to 50% of the upper extremity at the shoulder. He offered no further treatment options. He indicated he found evidence of bilateral chondromalacia of the knees, which accounts for permanent partial disability of 25% of each knee, and stated that the activity Claimant performed as an ironworker was the substantial factor in his developing bilateral chondromalacia. He also testified that the condition would have continued to develop if Claimant was working after the shoulder injury and before he retired. His assigned a value of the pinky injury is the same as the compromised sum (Exhibit 4). Finally, he concluded that Claimant is totally disabled from ironwork, and possibly all work, on account of his shoulder, knee and finger disabilities, age, education and experience, but he would defer to a vocational rehabilitationist on the issue of permanent total disability.

Vocational Opinion Evidence

Samuel Bernstein, Ph.D., a vocational expert who testified on behalf of Claimant, examined his client on April 22, 2003. Dr. Bernstein inquired as to Claimant's limp and awkward positioning, to which Claimant replied that the doctors have told him he is developing a lot of arthritis throughout his body, including his back and knees. It should be noted that Claimant did not make such complaints to Dr. Margolis, some eight months earlier, suggesting a progressive process.

Dr. Bernstein testified he believed that Claimant was unable to compete in the open labor market as of April 22, 2003 due to a combination of factors, including his age, his arthritis, his shoulder complaints, his knee complaints, his back complaints, his lack of transferable skills and limited education.

Ms. Donna Abram, a vocational expert who performed a records review and testified on behalf of Employer, concluded that Claimant was capable of being employed in the open job market in positions other than that of a steelworker. In reaching this conclusion, Ms. Abram relied on the doctor-imposed limitations related to the left shoulder only, and disregarded any subjective complaints voiced by Claimant.

FINDINGS OF FACT AND RULINGS OF LAW

Based on the substantial and competent evidence, including Claimant's testimony at hearing, the medical records, the testimony of the various experts and other witnesses, and the Missouri Workers' Compensation Law, I find that Claimant is entitled to receive workers' compensation benefits as more fully described below.

I. Claimant's current left shoulder condition is causally related to his work injury of November 4, 1999.

Claimant bears the burden of proving an accident occurred and it resulted in injury. *Dolen v. Bandera's Cafe & Bar*, 800 S.W.2d 163, 164 (Mo.App.1990)*. ^[1] For an injury to be compensable, the evidence must establish a causal connection between the accident and the injury. *Griggs v. A.B. Chance Co.*, 503 S.W.2d 697, 704 (Mo.App. 1973); *Silman v. William Montgomery & Associates*, 891 S.W.2d 173, 175 (Mo.App. E.D. 1995)*. Claimant has met his burden of proving the causal connection between his November 4, 1999 accident and his left shoulder injury.

Claimant testified credibly at hearing and consistently to his treating physicians regarding his November 4, 1999 accidental injury and the problems that flowed from the injury. Drs. Hertel and Haupt both attributed the shoulder problems to the 1999 injury, even though they first evaluated Claimant nearly one year after the accident. Dr. Margolis testified that the tear ultimately diagnosed and repaired by Dr. Haupt was related to the 1999 work accident. Although he acknowledged the existence of preexisting degenerative changes, Dr. Margolis also attributed all Claimant's left shoulder disability to his work accident. There is no evidence of an intervening or otherwise non-compensable cause of Claimant's current left shoulder disability.

Despite the significant gap between his last authorized treatment and the resumption of treatment that lead to his surgery, the credible evidence establishes that Claimant's left shoulder disability, including the surgical repair, is casually related to his November 4, 1999 work accident.

II. Claimant's primary work-related injury resulted in permanent partial disability of 40% of the left upper extremity at the level of the shoulder.

Claimant seeks permanent total disability benefits, and points to the Second Injury Fund for recovery of those lifetime benefits. In deciding whether the Second Injury Fund has any liability, the first determination is the degree of disability from the last injury. *Stewart v. Johnson*, 398 S.W.2d 850, 852 (Mo.1966); *Vaught v. Vaughts, Incorporated/Southern Missouri Const*, 938 S.W.2d 931, 939 (Mo.App. S.D. 1997)*; *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo.App. E.D. 2000). If a claimant's last injury in and of itself rendered the claimant permanently and totally disabled, then the Second Injury Fund has no liability and employer is responsible for the entire amount. *Id* (citations omitted).

The evidence in this case establishes that Claimant's November 4, 1999 left shoulder injury, while significant, did not in and of itself render Claimant unable to compete in the open labor market. The testimony of Donna Abrams best support this conclusion because she primarily considered the medical records and restrictions associated with Claimant's left shoulder injury in reaching her conclusion that Claimant was employable. Dr. Haupt treated the left shoulder only and released Claimant to work with restrictions of no lifting more than 50 pounds overhead. Dr. Bernstein considered all of Claimant's disabilities, not just the left shoulder, in reaching his conclusion that Claimant was unemployable. James LaMantia, the Business Manager for Iron Worker's Local 396, testified that Claimant's shoulder restrictions prohibit him from working as an ironworker. However, "total disability" is statutorily defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. § 287.020.7; *Houston v. Roadway Express, Inc.*, 133 S.W.3d 173, 178 (Mo.App. S.D. 2004). Thus, the competent evidence establishes that Claimant's shoulder injury only caused permanent partial disability.

Employer does not dispute that Claimant has permanent partial disability associated with his shoulder injury, but there was no agreement as to the degree of disability. The Administrative Law Judge can consider all of the evidence in arriving at a percentage and is not bound by the percentage estimates of medical experts. *Sellers v. Trans World Airlines, Inc.*, 776 S.W.2d 502, 505 (Mo.App. W.D.1989)*. She is free to find a disability rating higher or lower than that expressed in medical testimony because the degree of disability is not solely a medical question. *Id*. See also *Malcom v. La-Z-Boy Midwest Chair Co.*, 618 S.W.2d 725, 728 (Mo.App. S.D. 1981); *Jones v. Jefferson City School Dist.*, 801 S.W.2d 486, 490 (Mo.App.W.D.1990)*.

Claimant's testimony regarding his significant shoulder problems is credible and consistent with the other credible evidence. I find that Claimant's non-dominant arm does not physically perform in the manner it did before his injury, and he has difficulty reaching and lifting, limitation of motion, decreased strength, and pain. His injury prohibits him from working in his trade, and accelerated his retirement. Any degenerative changes that preexisted his injury were asymptomatic, and all the disability can be attributed to his work accident. Dr. Margolis assigned a permanent partial disability rating of 50% of the shoulder. Dr. Haupt felt Claimant has a permanent ratable disability of 15% of the shoulder, with 10% considered a direct result of the work injury and the remaining disability preexisting.

Based on all the evidence, including Claimant's testimony, the medical records, and the expert opinions, I find that as a result of his November 4, 1999 work accident, Claimant sustained permanent partial disability of 40% of the left upper extremity at the level of the shoulder. Employer shall pay Claimant the equivalent of 92.8 weeks of permanent partial disability benefits.

III. The Second Injury Fund is not liable for benefits because Claimant did not meet his burden of establishing the presence of an actual and measurable disability at the time the work injury is sustained.

When a claim is made against the Second Injury Fund for permanent disability compensation, statutory language and case law make it mandatory that the claimant provide evidence to support a finding, among other elements, that he had a preexisting permanent disability. § 287.220.1; *Leutzinger v. Treasurer of Missouri, Custodian of Second Injury Fund*, 895 S.W.2d 591 (Mo.App. E.D.1995)(emphasis added). The disability, whether known or unknown, must exist at the time the work-related injury was sustained and be of such seriousness as to constitute a hindrance or obstacle to employment or re-employment should the employee become unemployed. *Id.*; *Garcia v. St. Louis County*, 916 S.W.2d 263, 266 (Mo.App. E.D.1995)*; *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 214 (Mo.App. E.D.1999). Claimant's alleged preexisting disabilities to the knees, back and hand^[2] fail to qualify for Second Injury Fund consideration because there is insufficient proof that the respective disabilities 1) existed at the time the work related shoulder injury was sustained; and/or 2) were of such seriousness as to constitute a hindrance or obstacle to employment or re-employment should the employee become unemployed.

There is deficient evidence upon which to base a finding that Claimant had permanent partial disability of the knees and back at the time of the work-related shoulder injury. In order to calculate Fund liability, the finder of fact must determine the percentage of the disability that can be attributed solely to the preexisting condition *at the time of the last injury*. *Carlson v. Plant Farm*, 952 S.W.2d 369, 373 (Mo.App. W.D.1997)*; see also § 287.220.1. It need not be shown that the claimant or the employer knew of the preexisting disability prior to the work injury. *Messex at 214*. However, the claimant must establish that an actual or measurable disability existed at this time. *Id*; see also *Tidwell v. Kloster Co.*, 8 S.W.3d 585, 589(Mo.App. E.D. 1999)*. The Fund is not available where the employee is not shown to have had a preexisting disability at the time of the subsequent work-related injury. *Tiller v. 166 Auto Auction*, 941 S.W.2d 863, 865 (Mo.App. S.D.1997). See also *Lammert v. Vess Beverages, Inc.*, 968 S.W.2d 720, 725 (Mo.App. E.D.1998)*(The preexisting disability necessary to trigger Fund liability is permanent partial disability existing at the time of the work-related injury.); *Loven v. Greene County*, 63 S.W.3d 278, 284 (Mo.App. S.D. 2001).

Claimant asserts that for a few years before he hurt his shoulder, he had knee problems, including numbness, pain with lifting, trouble kneeling, and difficulty climbing ladders. He never went to the doctor for his knees, never missed work, and never was unable to complete assigned tasks, but he claims he took pain pills. He justified the lack of treatment records by saying he “was never much for going to the doctor.” However, after his shoulder injury, Claimant went to the doctor regularly, and even sought treatment on his own.

Claimant currently has knee disability, but I find that the only evidence that Claimant’s knee condition preexisted his shoulder injury is Claimant’s statement at hearing that his knee condition preexisted his shoulder injury. There is no documentation of any such problems until one year after the accident, when on October 26, 2000, Claimant complained to Dr. Hertel of multiple joint symptoms without swelling or erythema in the elbows, wrist or knees. Dr. Margolis’ assignment of 25% permanent partial disability of the knees is based solely on Claimant’s complaints, and is not supported by his examination, which devoid of positive findings regarding knee disability. Furthermore, Dr. Margolis’ evaluation occurred almost four years after the injury, and does not purport to consider the disability on the date of injury. Even if Claimant’s testimony that he had knee problems before November 4, 1999 is taken as true, there is still no way to determine the nature and extent of such problems at that time.

There are similar problems with Claimant’s allegations of preexisting back problems because Claimant never complained of problems and the only medical evidence of the existence of a back condition is years after the accident. Furthermore, Claimant’s own medical expert fails to provide a rating for the back. Expert opinion evidence is necessary to prove the extent of the preexisting disability. See *Reeves v. Midwestern Mortg. Co.*, 929 S.W.2d 293, 296 (Mo.App. E.D.1996)*; *Plaster v. Dayco Corp.*, 760 S.W.2d 911, 913 (Mo.App. S.D. 1988). In 2003, Claimant told Dr. Ellenbogen that he had back pain off and on his entire life, but there is no evidence to establish whether Claimant’s back condition was permanent or to what degree, if any, it existed as of November 4, 1999.

It is not necessary for a doctor to see and diagnose an employee’s preexisting condition before the work injury in order for Second Injury Fund liability to be triggered. Claimant correctly cites *Garibay v. Treasurer of Missouri*, 930 S.W.2d 57 (Mo.App. E.D.1996) for the proposition that a claimant need not be diagnosed with a disabling condition prior to a work injury for Fund liability to attach. In *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 210 (Mo.App. E.D.1999)*, the court distinguished *Garibay*, noting, “The primary dispute in *Garibay* focused on the *time* of diagnosis of the preexisting *disability* relative to the work injury.... The crux of *Garibay* is that an *otherwise-qualified disability* could not be ignored just because it was not diagnosed before the work-related injury, was unknown to the employer, or the claimant did not know what he had.” In *Garibay*, unlike here, there was credible evidence the condition existed at a certain level before the work accident despite the lack of treatment records. However, the lack of medical documentation makes it difficult to determine the extent of disability that existed at the time of the primary injury.

Because the preexisting disability necessary to trigger Second Injury Fund liability is permanent partial disability existing at the time of the work-related injury, it stands to reason that the Fund cannot be held responsible for the subsequent deterioration of a condition. There is evidence in this case that the condition of Claimant’s knees and back have deteriorated since his shoulder injury. Claimant testified that his symptoms have likely gotten worse since the accident. His joint complaints multiplied significantly from his visit to Dr. Margolis in the Summer 2002 to his visit with Dr. Bernstein in Spring 2003. In *Garcia v. St. Louis County*, 916 S.W.2d 263, 266 (Mo.App. E.D. 1995)*, the court held, “the Second Injury Fund is not liable for any progression of claimant’s preexisting disabilities not caused by claimant’s last injury. See *Frazier v. Treasurer of Missouri as Custodian of Second Injury Fund*, 869 S.W.2d 152, 155 (Mo.App.E.D.1993). It may well be true that Claimant has arthritis in his knees, back and other joints. In a sixty-two year old man who made his living working his body to its limits in a highly demanding profession, degenerative diseases such as arthritis would be hardly surprising. Yet, because his alleged disease is progressive in nature, and the Second Injury Fund cannot be held liable for progression unrelated to the primary injury, it is all the more necessary for Claimant to establish the extent of disability that existed on the day of injury. [3]

Claimant also cannot establish that the alleged disabilities were of such seriousness as to constitute a hindrance or obstacle to employment or re-employment. As a prerequisite to imposing liability on the Second Injury Fund, a claimant must ... establish that a pre-existing permanent partial disability ... was of such seriousness as to constitute a hindrance or obstacle to employment or re-employment. *Karoutzos v. Treasurer of State*, 55 S.W.3d 493, 498 (Mo.App. W.D. 2001)*; *Muller v. Treasurer Of Missouri*, 87 S.W.3d 36, 40 (Mo.App. W.D. 2002)*.

There is no credible evidence that Claimant's alleged preexisting knee or back conditions hindered his ability to work prior to his shoulder injury. In *Loven v. Greene County*, 63 S.W.3d 278, 285 (Mo.App. S.D. 2001), the Court reviewed various workers' compensation decisions dealing with the meaning of "disability" and held:

In keeping with the definition of "disability" and the purpose of workers' compensation as being to indemnify for a loss resulting from a disability to work, or harm to earning capacity, it is logical that the "preexisting permanent partial disability" referred to in Section 287.220.1 relates to a condition that affects or has the potential to affect an ability to work and earn. This is fortified by the additional requirement in that statute that the "disability" be of such seriousness as to constitute a hindrance or obstacle to employment or reemployment.

Claimant had an exemplary work record. He performed a job that, by all accounts, is one of the most physically demanding jobs imaginable. He worked full duty up to, and for nearly one year after, his shoulder injury. His Union boss said he was as good an ironworker as there is. Even Claimant testified that before his shoulder injury, he was one good ironworker.

Claimant's work records (Exhibit 3) reflect the fact that there were no preexisting conditions harmful to Claimant's earning capacity. In 1999, the year he was injured, and 2000, the year before his surgery, Claimant had the fifth and sixth best years in hours of his thirty-four year career. Claimant asserted that his knee problems started in the mid-1990's, but from 1994 to 2000, Claimant had four of his top five years ever. Even if he did have knee problems for five years before his accident, they certainly did not hinder his employment, as demonstrated by records of his pension contributions and retirement eligibility.

I acknowledge the fact that Claimant devoted much time and effort to arguing that he is permanently and totally disabled, yet no finding is made in this award as to whether Claimant is indeed unable to compete in the open labor market. Of the two vocational experts presented, neither based their opinion on the appropriate evidence for a Second Injury Fund case. Ms. Abrams considered primarily the shoulder injury alone, and did not give any weight to all Claimant's symptoms and disabilities. While she establishes that the last injury alone did not result in total disability, she does not support a finding of permanent total disability against the Second Injury Fund only. Dr. Bernstein considered a multitude of factors present three and one half years after the accident, but did not focus on the proper combination of disabilities for determining Second Injury Fund liability. Claimant may well be permanently and totally disabled, but it is not due to the combination of the primary shoulder injury and the disabilities that preexisted that injury.

CONCLUSION

Claimant sustained a work-related shoulder injury for which Employer shall provide 92.8 weeks of permanent partial disability benefits. As there was insufficient evidence presented to establish that a disability existed at the time the work-related injury was sustained *and* was of such seriousness as to constitute a hindrance or obstacle to employment, I find there is no Second Injury Fund liability.

This award is subject to a lien of 25% in favor of Claimant's attorney for legal services.

Date: _____ Made by: _____

Karla Ogrodnik Boresi
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Reneé T. Slusher
Director
Division of Workers' Compensation

^[1]On December 9, 2003, the Missouri Supreme Court restated the standard of review in Workers' Compensation cases in *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 200 (Mo. 2003). Cases cited herein that were overruled by *Hampton* on the issue of the standard of review are marked with an asterisk (*).

^[2]

Claimant had a prior work related finger injury that settled for 5½ weeks of permanent partial disability benefits. This injury was too minor to consider for Second Injury Fund benefits and does not factor into the total disability determinations presented.

[\[3\]](#) I am cognizant of the fact that cases have held § 287.220.1 does not require the finder of fact to determine the percentage of the claimant's preexisting disabilities. See *Vaught v. Vaughts, Inc./Southern Missouri Const.*, 938 S.W.2d 931, 942 (Mo.App.1997)*; *Kizior v. Trans World Airlines*, 5 S.W.3d 195, 201 (Mo.App. W.D.1999)*. While these cases may be in conflict with the *Carlson, Tidwell* and *Messex* cases cited above, I am not requiring Claimant to prove the exact percentage of preexisting disability, only that the preexisting disability existed and was otherwise capable of measurement.