

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

Injury No.: 05-030154

Employee: Roger Patton
Employer: Cedar Creek Wholesale Corp.
Insurer: Hartford Underwriters Insurance Co.
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 February 15, 2011. The award and decision of Administrative Law Judge Victorine R. Mahon, issued February 15, 2011, 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 19th day of December 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

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

Attest:

Secretary

Employee: Roger Patton

DISSENTING IN PART

I did not participate in the September 28, 2011, oral arguments in this matter. However, I have reviewed the evidence, read the briefs of the parties, and considered the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be modified to reflect a more appropriate award to employee.

It is obvious employee's work injury is compensable, and I agree employee met his burden of proving he sustained permanent disability. I disagree, however, with the administrative law judge's decision to award benefits based on a finding of only 30% permanent partial disability of the left arm at the level of the elbow. I believe the administrative law judge's award is inadequate and fails to properly account for the seriousness of this injury and the impact it has had on employee's life. I am convinced employee met his burden of proving that this work injury has rendered him permanently and totally disabled.

Employee worked for employer driving trucks. On April 4, 2005, employer sent him on a delivery to Drury College with a flatbed trailer full of long timbers. Employee understood that there would be people at the college to unload the timbers. But when employee got there, he discovered that the college had sent only some teenagers and a teacher to unload the truck. Because he was afraid someone would get hurt, employee helped unload the truck. When he was lifting the last timber, employee felt a pop in his left arm. Employer sent him for treatment where doctors diagnosed a bicep tendon rupture. Employee had two surgeries with an initial good result. But employee's left arm condition began to deteriorate a few months after his second surgery in early 2007. Employee saw multiple specialists and orthopedic surgeons in Kansas City, Columbia, St. Louis, and Springfield, tried different medications, had injections performed, and underwent physical therapy, but none of this treatment had any lasting success in alleviating his complaints of ongoing debilitating pain in his left arm.

Employee describes a pain sensation similar to a charley horse in his arm lasting fifteen minutes to three hours. Employee has this pain every day and cannot predict when it will happen. Employee's pain renders him functionally unable to use his left arm for any task requiring exertion. Increased activity involves an increase in pain. Because of this condition, employee takes a 50 milligram dose of Tramadol (an opioid drug similar to morphine) six times a day and wears a TENS unit. This is a serious pain management regimen and reveals the extent and severity of pain that employee experiences due to the April 2005 left arm injury. Employee also takes Ambien to get to sleep at night and wears a Lidoderm patch in place of the TENS unit to help with night-time pain relief. Employee's sleep is interrupted every night due to pain. Employee has to get up and stand around waiting for his pain to subside. These sleep interruptions last from one to four hours. Due to this sporadic sleep schedule, employee takes a daily nap.

Dr. Shane Bennoch evaluated employee and provided his expert medical opinions in this matter. Dr. Bennoch believes employee is experiencing nerve pain as a result of

Employee: Roger Patton

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the work injury. Dr. Bennoch believes this pain (and more particularly the regimen of medications employee has to take to control it) renders employee permanently and totally disabled.

The vocational expert, Terry Cordray, ultimately agreed with Dr. Bennoch that employee is permanently and totally disabled. Mr. Cordray opined that if we look just at employee's physical restrictions, there may be some sedentary job employee could perform, such as a cashier position. But Mr. Cordray further opined that employee's need to take Tramadol on a daily basis to control his pain takes him out of the open labor market. Mr. Cordray explained that employee's age, lack of skills, work background, and limited education (employee has only a GED) are all factors that make it even less likely that a potential employer would hire employee.

The test for permanent total disability is whether the worker is able to compete in the open labor market. The critical question is whether, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition.

Treasurer of the State - Custodian of the Second Injury Fund v. Cook, 323 S.W.3d 105, 110 (Mo. App. 2010) (citations omitted).

The administrative law judge found that employee is not permanently and totally disabled, in part, because she perceived an inconsistency in the record as to employee's use of Tramadol and its affect on his ability to work. The administrative law judge refers to the testimony of Dr. Kathryn Hedges, who provided some treatment to employee in October 2006. At that time, Dr. Hedges recorded employee as saying he did not take the Tramadol during the day because he did not want to feel "drugged up." The administrative law judge thought this conflicted with employee's testimony that he takes Tramadol daily. The administrative law judge appears to have overlooked another statement that Dr. Hedges attributes to employee in that same treatment note: "[Employee] says if he doesn't use the Tramadol [his pain] is a 10/10 in severity." *Transcript*, page 655.

Employee gave his testimony at the hearing in December 2010. Clearly, employee decided somewhere in the four-plus years since he saw Dr. Hedges that experiencing relief from the severest possible pain was worth feeling "drugged up" during the day. Rather than contradict employee's testimony, Dr. Hedges' treatment note actually supports the proposition that (1) employee's pain is very severe without Tramadol; and (2) taking Tramadol during the day causes side effects that hinder employee's focus and ability to perform tasks. Stated another way, the very treatment note the administrative law judge mistakenly believes is contradictory to employee's testimony actually provides persuasive support for the proposition that employee is, in fact, permanently and totally disabled.

In sum, while I agree that employee's injury is compensable, I am convinced that the administrative law judge (and the majority) improperly overlooked the evidence of

Employee: Roger Patton

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employee's daily debilitating pain and his need to take Tramadol to control it. I dissent because I believe the award is plainly inadequate given these factors.

Based upon the entire record, I find that employee is permanently and totally disabled as a result of the work injury on April 4, 2005.

I would modify the award of the administrative law judge to award permanent total disability benefits. Because the majority has determined otherwise, I respectfully dissent from the decision of the Commission.

Curtis E. Chick, Jr., Member

AWARD

Employee: Roger Patton

Injury No. 05-030154

Dependents: N/A

Employer: Cedar Creek Wholesale Corp.

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

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

Insurer: Hartford Underwriters Insurance Co.

Medical Fee Dispute: (Dismissed)

Hearing Date: December 9, 2010

VRM/db

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: April 4, 2005.
5. State location where accident occurred or occupational disease was contracted: Greene County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? 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: He was unloading heavy beams from a truck when he ruptured his biceps tendon.

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: Arm.
14. Nature and extent of any permanent disability: 30 percent of the upper left extremity at 210 week level.
15. Compensation paid to-date for temporary disability: \$70,369.20 for 205.66 weeks.
16. Value of necessary medical aid paid to date by employer/insurer? \$69,707.30.
17. Value necessary medical aid not furnished by employer/insurer? \$6,465.32.
18. Employee's average weekly wage: \$513.21.
19. Weekly compensation rate: \$342.16.
21. Method wage computation: Stipulation.

COMPENSATION PAYABLE

22. Amount of compensation payable:

For permanent partial disability, the sum of \$342.16
for 63 weeks (30% left upper extremity at the 210 week level)
for a total of \$21,556.08.

For past medical expenses, the sum of \$6,465.32.

TOTAL: \$28,021.40

23. Second Injury Fund liability: None.
24. Future requirements awarded:

Employer shall provide medical treatment as is necessary to cure or relieve the effects of Claimant's injuries, as discussed in the Award.

The compensation awarded to the Claimant is subject to a lien of 25 percent of in favor of Attorney James H. Wesley II, as a fee for reasonable and necessary legal services rendered to Claimant.

FINDINGS OF FACT and RULINGS OF LAW

Employee: Roger Patton

Injury No. 05-030154

Dependents: N/A

Employer: Cedar Creek Wholesale Corp.

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Treasurer of Missouri as Custodian
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Insurer: Hartford Underwriters Insurance Co.

Medical Fee Dispute: (Dismissed)

Hearing Date: December 9, 2010

VRM/db

INTRODUCTION

A proceeding pursuant to § 287.203 RSMo, previously was held in this case which resulted in a Temporary/Partial Award in favor of Claimant Roger Patton on October 22, 2008. A final hearing in this case was convened in Springfield, Missouri on December 9, 2010, before the undersigned administrative law judge. The record from the previous hearing will be considered a part of the record for this final hearing. Appearing for the final hearing was Roger Patton (Claimant) with his attorney, James H. Wesley. Patricia Wohlford represented Cedar Creek Wholesale Corporation and its insurer, Hartford Underwriters Insurance Company (referenced collectively as Employer). The Treasurer of Missouri as Custodian of the Second Injury Fund (the Second Injury Fund) appeared by Assistant Attorney General Susan Colburn. A medical fee dispute previously filed in this case was dismissed prior to the date of the final hearing.

STIPULATIONS

The parties stipulate that on April 4, 2005, Claimant was employed with Cedar Creek Wholesale Corporation, an entity that was fully insured with Hartford Underwriters Insurance Company. Employer was subject to the Missouri Workers' Compensation Law, and Claimant was a covered

employee. Claimant was acting within the course and scope of his employment when he sustained a work injury in Springfield, Greene County, Missouri on April 4, 2005. Employer has paid \$69,707.30 in medical care and \$70,369.20 in temporary total disability, representing 205.66 weeks. Employer last paid benefits on December 8, 2008. Claimant's average weekly wage is \$513.21. The rate of compensation is \$342.16 for temporary total, permanent partial, and permanent total disability. The parties do not dispute notice, venue, statute of limitations, jurisdiction, accident, or medical causation. The parties agree that the following are the sole issues for determination:

ISSUES

1. What is the nature and extent of any permanent disability?
2. Is Employer liable for any past medical aid?
3. Is Employer liable for future medical care?
4. What, if any, is the liability of the Second Injury Fund?

EXHIBITS¹

The following exhibits were offered and admitted at the time of the final hearing:

For Claimant:

- A. Deposition of Shane Bennoch, M.D., dated October 14, 2009²
- B. Deposition of Terry Cordray, dated December 15, 2009
- C. Deposition of Terry L. Cordray, dated December 6, 2010, with supplemental report
- D. Prescription Profile – January 1, 2008 through October 12, 2009
- E. Prescription Profile – January 1, 2010 through December 8, 2010
- F. Medical Records
- G. Supplemental Report Letter of Shane Bennoch, M.D., dated February 11, 2009
- H. Supplemental Report Letter of Shane Bennoch, M.D., dated July 15, 2009

For Employer:

1. Deposition of Kathryn Hedges, M.D.
2. Deposition of Phillip A. Eldred
3. Deposition of Jeffrey L. Woodward, M.D.
4. Deposition of Rodney K. Geter, M.D.

¹ All objections contained in the depositions, unless specifically addressed otherwise, are overruled. Any marks or writings in the exhibits were not made by the Administrative Law Judge, but were present at the time the exhibits were received into evidence.

² Exhibit A includes a deposition exhibit consisting of Dr. Bennoch's entire file with Claimant's medical records.

For the Second Injury Fund:

I. Deposition of James M. England, Jr.

Exhibits from the 2008 Hardship Hearing Previously Admitted:

- A. Deposition – Dr. Shane L. Bennoch, and exhibits, dated August 12, 2008
- B. Letter with appendices relating to Claimant’s costs, dated September 19, 2008
- 1. Deposition – Dr. Michael S. Clarke, and exhibits, dated August 12, 2008

FINDINGS OF FACT

Claimant, aged 52, dropped out of high-school in the 10th grade. He obtained a GED when he was about 19 or 20 years of age. His working career has included physically-demanding jobs such as driving a forklift, working in construction, and truck driving. On April 4, 2005, while working as a driver for Employer, Claimant made a delivery to Drury University. The stop required him to assist in unloading some heavy beams. As Claimant reached down to assist in moving a beam he felt a pop in his left arm. Because he had ruptured a tendon in his right arm about a decade earlier, Claimant knew immediately what had occurred. After two surgeries and extensive authorized treatment from multiple doctors and physical therapy, Claimant’s left arm remains painful.

Current Complaints

Claimant wears a TENS unit during the day and takes various prescriptions, but otherwise is under no active treatment for his left arm at this time. His prescriptions include Tramadol (pain medicine), Ambien (sleep aid), and Lidoderm (a topical patch). The latter prescription he uses at night when he removes the TENS unit. He does not sleep much at night. If awakened by pain, he sometimes waits in the kitchen for the pain to subside. He often goes to another room to avoid bothering his wife’s sleep. He naps throughout the day for 45 minutes to an hour.

Claimant is most comfortable with his left arm one-half way across his lap, or with his hand in his pocket. Claimant described the pain in his arm like a Charlie-horse, which he has daily. It

might last 15 minutes or as long as three hours. He testified that nothing eliminates the pain, but medications and the TENS unit apparently help reduce the pain.

His daily activities include some household chores such as running the dishwasher. He can mow his yard because he has rigged his lawnmower in such a way that he can operate it one-handed. He can paint with a roller with his right arm, but he has to rest during the activity. He can drive his vehicle in town and on the highway, but not with both hands. He has not worked since April 2005. He admitted that he has not applied for any work. He also admitted that he has several health problems unrelated to the work accident of April 2005. Claimant admitted that he was treated for tachycardia two years ago and has experienced some back pain.

Claimant said that prior to the work accident in April 2005, he had no significant problems, even though he had suffered a biceps tendon tear in the right arm years earlier. At the time of the April 2005 work accident, Claimant was able to lift 94 pounds.

Richard Nienke, a friend, testified credibly that he has known Claimant for many years. He related Claimant's long-time passion for fishing and hunting. He said Claimant even had participated in fishing tournaments. Mr. Nienke said he had not observed Claimant engage in either activity since 2005.

Julie Patton, Claimant's wife, testified credibly. She generally corroborated Claimant's testimony from her personal observations. Although she did not marry Claimant until a year after the accident, she had known him for several years.

Medical Evidence

Dr. Michael Grillot, a board certified orthopedic surgeon, performed a surgery on April 22, 2005, to repair a left distal biceps tendon rupture, with a transverse incision in the antecubital space. When the pain did not subside, Claimant was referred to Dr. Scott Swango.

Dr. Scott Swango, a board certified orthopedic surgeon, saw Claimant in November 2005. He concluded that Claimant suffered a left median neuropathy at the wrist and left ulnar neuropathy

at the elbow. Claimant had an injection into the left ulnar bursa on November 30, 2005, which did not resolve the pain. Dr. Swango released Claimant from his care in December 2005, with the recommendation that Claimant see a physiatrist for chronic pain management.

Dr. Michael S. Clarke, a third orthopedic surgeon, saw Claimant in January 2006. Dr. Clarke recommended his own nerve conduction study, the results of which were equivocal. Dr. Clarke recommended against a carpal tunnel release. Medical records contained in Dr. Bennoch's file (appended to his deposition), indicate that Claimant also had seen physicians at the University of Missouri-Columbia in April 2006, and at Washington University Medical Center in June 2006. There was no recommendation of any additional surgery as a result of these visits.

In early 2007, Dr. Clarke performed a neurolysis and a tenovagotomy, which partially removed scar tissue about the nerves and released the tendon sheath of the biceps tendon, with the goal of eliminating Claimant's pain. Initially, Dr. Clarke anticipated a good result from this second surgery. He noted that Claimant had near full range of motion, lacked two to three degrees of having a full extension of the elbow, which was near normal, and had very little tenderness in the area of the scar. But in April 2007 Claimant exhibited some irritability. Dr. Clarke recommended the TENS unit which Employer provided and Claimant still uses.

In May 2007, Claimant exhibited mild hypersensitivity, but had regained his range of motion. Dr. Clarke noted, however, that Claimant had some trigger points in the antecubital area. In June 2007, Dr. Clarke ordered injections for the Claimant's arm. In July 2007, Dr. Clarke referred Claimant for stellate ganglion blocks. Dr. Clarke last saw Claimant on July 18, 2007.

Dr. Kathryn Hedges is a board certified neurologist who actively treats patients. She examined Claimant on October 23, 2006, and again on September 18, 2007. After her first examination of Claimant, Dr. Hedges concluded that Claimant's problems were not neurologic but orthopedic. When Dr. Hedges saw Claimant a second time about a year later in 2007, Claimant had

undergone “a lysis of neuroma of the musculocutaneous nerve in the left antecubital area...physical therapy with ultrasound, a TENS unit, and eight injections into the area around the elbow.” (Exhibit 1, page 10). Dr. Hedges believed Claimant was better in 2007. Claimant reported to her that if he took Neurontin and used the TENS unit, his pain decreased to about a four and he could go to bed and stay asleep.

Dr. Hedges found Claimant had a decreased range of motion when Claimant tried to supinate, but otherwise exhibited a normal strength in both upper extremities. Dr. Hedges said this indicated that there was no damage to the motor nerves or to the muscles that causes strength loss. She found no atrophy in the arm. She concluded that Claimant had a sensory problem and not a motor problem. She believed Claimant might suffer from a chronic regional pain syndrome and would benefit from seeing a physiatrist and a trial of ganglion blocks. She recommended at the time that Claimant continue on Neurontin. She said Tramadol can be taken during the day, but it makes about 50 percent of the patients sleepy. Claimant had reported to her that he did not take the medication during the day. She gave no opinion regarding Claimant’s ability to work. She opined that Claimant could not use his left arm in working because of the pain and hypersensitivity.

Dr. Jeffrey L. Woodward practices physical medicine in Springfield. Only five percent of his practice involves evaluations. The remainder of his practice involves treating patients. He gave his deposition on May 27, 2010. Dr. Woodward first saw Claimant in October 2007. He continued to treat Claimant until January 2008, when he believed Claimant was at maximum medical improvement.

When Claimant first saw Dr. Woodward he was using Gabapentin, Lidoderm patches, and a TENS unit, and Tramadol. Dr. Woodward said when he released Claimant to full-time work it was with a five pound lifting restriction (continuously). At that time, Claimant had no left forearm or hand deficits. Dr. Woodward’s lifting restriction was aimed at trying to improve Claimant’s pain

and comfort level, not for physical concerns. The sensory nerves in the arm were working within normal limits. Claimant exhibited no objective muscle weakness and no mobility problems in the elbow. Dr. Woodward did note, however, mild diffuse atrophy in the biceps muscle and pain on bending the elbow. He gave a rating of 25 percent permanent partial disability to the left upper extremity at the 210 week level.

With respect to future medical, Dr. Woodward believed that Claimant required an additional six months (after January 2008) of Ultram and Ambien CR due to Claimant's ongoing symptoms "and provide just some additional time for gradual increase in strength and endurance in the left upper extremity." (Exhibit 3, pp. 20-21). In his medical notes, Dr. Woodward indicated that Tramadol provided only mild relief. Based on his treatment notes, he did not believe Claimant was in need of any further medical treatment, although he would leave the decision of any surgery to the surgeons. Dr. Woodward did not believe the use of Tramadol, Ambien, a TENS unit, or Lidoderm were medically necessary, although he admitted that he had not seen Claimant since November 2007 and did not know what would clinically provide Claimant with relief. He further indicated that based on his treatment records, it would be difficult to confirm complex regional pain as a diagnosis. If Claimant had such diagnosis it would be relatively mild.

Dr. Rodney K. Geter is board certified in plastic and reconstructive surgery. He has worked in that field for 25 years. About 30 percent of his practice involves surgery to the upper extremity. He evaluated Claimant on December 9, 2008. Dr. Geter acknowledged that Claimant exhibited diffuse pain above the elbow, but Dr. Geter could not pinpoint the source of the pain. He said surgery is not an effective means of addressing Claimant's pain. He did not believe transposition of the ulnar nerve, which is a common procedure for entrapment of the nerve around the elbow, would be of any benefit to Claimant in this case.

Dr. Geter noted that he did not perform additional nerve conduction studies because Claimant has normal sensation in his hands and normal muscle function in the forearm, so there was no reason to think there was any slowing of the nerves. He diagnosed Claimant with unrelenting pain, more so with use. He believed Claimant could no longer use his left arm in manual labor. Claimant was at maximum medical improvement as of the date of his evaluation on December 9, 2008. Dr. Geter did not provide a specific opinion on the degree of disability. Dr. Geter did not suggest, however, that Claimant was permanently and totally disabled.

Dr. Shane Bennoch is a rating physician selected by Claimant. He noted that Claimant has continued pain in the left upper extremity that increases with activity. Dr. Bennoch opined that Claimant sustained a 30 percent permanent partial impairment to the left upper extremity rated at the elbow due to the biceps tendon rupture and persistent pain to the elbow. He further expressed the opinion, however, that Claimant was permanently and totally disabled from the open labor market. Dr. Bennoch imposed a number of restrictions relative to the left arm. These included no lifting greater than 20 pounds, no repetitive lifting, no climbing other than stairs, and no balancing. Dr. Bennoch believed that Claimant was capable of performing a "limited amount of things," but not in the context of an eight-hour day, five-days-a-week. He said Claimant also needed future medical treatment in the way of pain management, including prescriptions, with continued monitoring. Dr. Bennoch indicated that the medications and TENS unit that Claimant had been using were appropriate treatment modalities.

On cross-examination, Dr. Bennoch admitted that Claimant is not limited in standing, walking, or sitting. He believed Claimant could push and pull up to 20 pounds on a non-repetitive basis. He can climb stairs occasionally as long as he was not using his left arm. He can kneel, crouch, crawl, or stoop if not using his left arm. Dr. Bennoch said Claimant would have no

manipulative limitations as long as his left arm was in his lap. He had no visual, environmental, or communicative limitations.

Dr. Bennoch believed his diagnosis (trapped nerve and pain) was accurate, and his restrictions were based on that diagnosis. He acknowledged that other physicians (Dr. Grillot and Dr. Clarke) did not share his opinions. He acknowledged that he did not have any greater expertise than these other physicians.

Given the expertise of the other physicians with relevant board specialties and practices whose opinions have been provided in this case, I do not find Dr. Bennoch's opinion credible or persuasive on the issues of diagnosis or the nature and extent of disability. I do find his opinion credible that Claimant has needed pain management in the past and needs such treatment in the future.

Medications

Claimant introduced computer printouts he personally obtained from Walgreens³ pharmacy for prescriptions he purchased from January 1, 2008 through October 12, 2009 and from January 1, 2010 through December 8, 2010. Claimant identified with a yellow highlighter those prescriptions which he related to his left arm injury. These included Tramadol 50 mg, Ambien CR 12.5 g, and Lidoderm 5 percent topical. Exhibit D indicates that Claimant incurred \$1,993.37 for these prescriptions. Exhibit E indicates that Claimant incurred another \$4,471.95 for prescription medications.

Claimant also submitted certified records from his treating physician, Dr. Keith W. Ellis, who has prescribed a number of medications for Claimant, including Tramadol, Ambien and Lidoderm. After a review of these medical records, it appears that Dr. Ellis reviewed Claimant's

³ Employer objected to Exhibits D and E, which are the printouts from Walgreens Pharmacy which Claimant personally received and identified, and Exhibit F, which are certified medical records of Dr. Ellis. Employer's objection under the seven day rule objection is applicable only to the report of physicians and not with regard to all certified records. Section 287.140.7 RSMo, provides that every person furnishing medical aid to the employee shall permit its record to be copied and that certified copies of the record shall be admissible in any such proceeding.

prescriptions at each encounter with Claimant, and routinely refilled the Tramadol, Lidoderm, and Ambien. For instance, on December 8, 2008, Dr. Ellis noted that Claimant had chronic pain issues in the left arm and wears a TENS unit constantly. The Claimant inquired as to an alternative to Tramadol, but Dr. Ellis has no suggestions regarding an alternative medication for Claimant's pain. In a medical record dated September 18, 2009, Dr. Ellis noted that Claimant had requested a refill of the Lidoderm patches. "He has been using them on his left bicep because it is not comfortable to wear the TENS unit at night." On December 6, 2007, Dr. Ellis noted that Claimant had started taking Ambien CR for chronic insomnia and that he obtains only about four hours of sleep per night, but Claimant reported to Dr. Ellis, "he is not tired during the day."

Although Claimant provided no medical records after March 3, 2010, effective that date, Dr. Ellis had continued a number of medications. These included 180 tabs of Tramadol (Ultram) 50 mg, 1-2 tabs every six hours as needed (two refills). He also continued the Lidoderm patch, 30 patches, one to be applied every 24 hours (11 refills), and Ambien CR 12.5 mg, one time per day as needed, 30 tabs, for insomnia (11 refills). Simple mathematics indicates that these refills could take Claimant through the date of the hearing if he took the medication as directed.

Dr. Ellis' medical records indicated that he prescribed these medications because of Claimant's left arm, peripheral neuropathy, arm pain, or lack of sleep due to arm discomfort. Dr. Ellis was not the first physician to prescribe some of these medications. The opinions and/or records of Drs. Clarke and Hedges indicate they had recommended the use of prescription medicine. Dr. Woodward also had recommended medication, although he would have discontinued their use before August 2008.

Vocational Opinions

Terry L. Cordray⁴ testified on Claimant's behalf. He interviewed Claimant on April 9, 2009. He noted that Claimant reported to Mr. Cordray that he was not on any medication at the time of the interview that interfered with his ability to be tested. He was able to perform various tests Mr. Cordray administered. Mr. Cordray explained in his depositions of December 15, 2009, and December 6, 2010, that Claimant may be capable of sedentary work based on the various functional restrictions opined by various doctors. But, even if Claimant was capable of sedentary work placement was not realistic. Moreover, if Claimant was taking Tramadol, as he had self-reported, Claimant could work in the open labor market; thus, he ultimately opined that Claimant was permanently and totally disabled.

Phillip Aaron Eldred testified on Employer's behalf. He interviewed Claimant on September 17, 2009. Mr. Eldred believed Claimant was capable of working on the open labor market despite his restrictions from all *treating* physicians. Mr. Eldred said the restrictions from Drs. Hedges and Woodward limited Claimant to a sedentary level. Dr. Clarke effectively gave no restrictions. Dr. Geter's opinion placed Claimant at sedentary and light level of work. Mr. Eldred noted that Claimant had average intelligence, and scored "pretty good" in the regards to the oral directions test (Exhibit 2, page 12). He noted that Claimant reported pain from zero to ten. At the time of his interview, Claimant's worst pain was a four.

Mr. Eldred said only if one accepted Dr. Bennoch's opinions, Claimant would be classified as permanently and totally disabled. All other physicians have indicated that Claimant is employable based on their medical opinion of Claimant's functional ability. Mr. Eldred said he was aware of no preexisting conditions that constituted a hindrance or obstacle to employment.

⁴ Employer objected to the admission of a supplemental report of Mr. Cordray. The seven day rule set forth in § 287.210.3 RSMo, pertains to physicians and their medical reports rather than the reports of vocational experts. Moreover, Employer's counsel went forward with cross-examination of the expert, so no prejudice is apparent.

James M. England, Jr. testified on behalf of the Second Injury Fund after a records review. He noted that Claimant could read at an eighth-grade level and perform math at the sixth-grade level. Claimant had an average IQ of 108. Mr. England concluded that Claimant had the academic and intellectual ability to learn new things. Based on the treating physicians' restrictions, Mr. England said Claimant could not perform his past work as a truck driver. He would be limited to sedentary to light activities that did not involve the use of the left upper extremity. Mr. England said these included some security positions, office cleaning, cashiering, retail sales work, and light courier work such as delivering small parcels. He said Claimant also could be retrained to be a dispatcher if he used a Dragon voice-activated dictation system that costs about \$150.00. Mr. England saw nothing in the records suggesting that Claimant had any self-imposed work restrictions before this left arm injury.

Mr. England said nothing in Dr. Bennoch's report caused him to change his opinions. Mr. England said if someone only has problems with one arm, he could be placed in the light work category. He said there were a number of persons who have only one arm and do light work. He conceded, however, that if Claimant has pain in the left elbow to the extent indicated by Dr. Bennoch, then he would not be able to work. He also agreed that if Tramadol was making Claimant feel foggy, it could negatively impact his ability to work.

I accept the opinion of Mr. Eldred and Mr. England that Claimant is capable of working in the open labor market.

CONCLUSIONS OF LAW

Nature and Extent of Disability

"To determine if claimant is totally disabled, the central question is whether, in the ordinary course of business, any employer would reasonably be expected to hire claimant in his present physical condition." *Ransburg v. Great Plains Drilling*, 22 S.W.3d 726, 732 (Mo. App. W.D. 2000),

overruled on other grounds Hampton v. Big Boy Steel Erectors, 121 S.W.3d 220 (Mo. banc 2003).

But the term also “does not require that the claimant be completely inactive or inert.” *Sifferman v.*

Sears Roebuck and Co., 906 S.W.2d 823, 826 (Mo. App. S.D. 1995), *overruled on other grounds*,

Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. banc 2003). In determining the extent of

disability, the fact finder may choose between the conflicting opinions of the experts. *Pavia v.*

Smitty's Supermarket, 118 S.W.3d 228, 233 -235 (Mo. App. S.D. 2003). An employee claiming

permanent total disability benefits has the burden to prove every element of his claim. *Fisher v.*

Archdiocese of St. Louis Cardinal Ritter Institute, 793 SW2d 195, 198 (Mo. App. E.D. 1990).

Missouri law allows the consideration of Claimant’s age and education, along with physical abilities, in determining whether he is disabled to any extent. *BAXI v. United Technologies Automotive*, 956 S.W.2d 340 (Mo. App. E.D. 1997). Claimant is not at an advanced age. While he does not have a high school diploma, he has a GED, average intelligence, and functional skills in reading and math. He has no limitations with walking, sitting, speaking, seeing, or hearing. While he has difficulty performing some tasks one-handed, he manages to drive, mow his lawn and paint his home. Having reviewed the whole record, I conclude that Claimant is not permanently and totally disabled from the work injury.

The opinions of Drs. Woodward, Hedges, and Geter, along with the opinions of vocational experts, Mr. England and Mr. Eldred, are more persuasive than those of Claimant’s experts, Dr. Bennoch and Mr. Cordray. First, Dr. Woodward was a treating physician who examined Claimant on a number of occasions, and consistently noted a number of normal physical findings on examination. Drs. Hedges, and Geter have more expertise than Dr. Bennoch. Dr. Geter evaluated Claimant in late 2008 and found that the nerve in question was functioning normally for the left hand, and that the sensation and muscle function of the hand was normal. Dr. Geter could not find any source of specific pain, but noted, at best, Mr. Patton had generalized pain with no specific source. Dr. Hedges also evaluated Claimant. As a board certified neurologist, she found there was no damage to the motor nerves or to the muscles that causes strength

loss. The opinions of Dr. Geter (board certified orthopedic surgeon) and Dr. Hedges (board certified neurologist), specifically contradict the opinion of Dr. Bennoch who diagnosed an entrapped nerve. Given that Dr. Bennoch has no specialty in orthopedics or neurology, I reject both his diagnosis and his opinion that Claimant is permanently and totally disabled in this case. Mr. Cordray's opinion necessarily hinges on the opinion of Dr. Bennoch, and I reject his opinion also as to the nature and extent of disability.

There is some dispute in the record among the experts as to whether the use of Tramadol would make it impossible for Claimant to work in the open labor market. Dr. Hedges indicated that taking the medication during the day makes about 50 percent of the patients sleepy. While Claimant indicated that he napped during the day, his own personal physician, who has been prescribing Tramadol, recorded that Claimant told him he was not tired during the day, and Dr. Hedges testified that Claimant told her he did not take the medication during the day. Given this conflicting evidence, I am not persuaded that the Claimant's use of Tramadol is what is causing him to nap during the day or precludes him from working in the open labor market.

The fact finder is not bound by the exact percentages of the expert witness, and is free to find another percentage of disability. *Ransburg v. Great Plains Drilling*, 22 S.W.3d 726, 732 (Mo. App. W.D. 2000). Dr. Woodward rated Claimant's upper left extremity as having a 25 percent permanent partial disability at the level of the elbow (210 weeks). Dr. Bennoch opined that the impairment to the left arm alone was 30 percent. Given the whole record, I believe the degree of disability to the left arm is greater than that opined by Dr. Woodward. I award a 30 percent permanent partial disability to the left arm at the level of the elbow. At the disability rate of \$342.16 per week, Claimant is awarded \$21,556.08 for permanent partial disability as a result of the work injury in April 2005.

No Second Injury Fund Liability

Section 287.220 RSMo, creates the Second Injury Fund, and prescribes the compensation that shall be paid from the Fund in “all cases of permanent disability where there has been previous disability.” To trigger liability of the Second Injury Fund, Claimant must show the presence of an actual and measurable disability at the time the work injury is sustained, and that work-related injury is of such seriousness as to constitute a hindrance or obstacle to employment or re-employment. *E. W. v. Kansas City, Missouri, School District*, 89 S.W.3d 527, 537 (Mo. App. W.D. 2002), *overruled on other grounds*, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). Claimant also must show “either that (1) a preexisting disability combined with a disability from a subsequent injury to create permanent and total disability or (2) the two disabilities combined to result in a greater disability than that which would have resulted from the last injury by itself.” *Gasson v. Liebengood*, 134 S.W.3d 75, 79 (Mo. App. W.D. 2004).

The bulk of the evidence in the record focuses on whether Claimant is permanently disabled from the last accident alone. Claimant indicated that prior to the last accident he had no problem performing his work duties, even with his previously injured right arm. Phillip Eldred, who testified for Employer, found no preexisting disabilities that were a hindrance or obstacle to employment. I find and conclude that there is no credible evidence that Claimant had a preexisting disability that combines synergistically with the primary disability to create any liability against the Second Injury Fund in this case.

Past Medical Treatment

An employer is charged with the duty of providing the injured employee with medical care, but the employer is given control over the selection of a medical provider. *Blackwell v. Puritan-Bennett Corp.*, 901 S.W.2d 81, 85 (Mo.App. E.D.1995). When the employer fails to do so, the employee is free to pick his own provider and assess those costs against his employer. 901 S.W.2d at 85. An employer is held liable for medical treatment procured by an employee when the employer

has notice that the employee needs treatment, or a demand is made on the employer to furnish medical treatment, and the employer refuses or fails to provide the needed treatment. 901 S.W.2d at 85.

Section 287.140 provides, in pertinent part:

1. [T]he employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury. If the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense.

10. The employer shall have the right to select the licensed treating physician, surgeon, chiropractic physician, or other health care provider; provided, however, that such physicians, surgeons or other health care providers shall offer only those services authorized within the scope of their licenses[.]

Employer relies, in part, on Dr. Woodward's opinion that Claimant did not need additional medication after a period of six months, although it has continued to provide the TENS unit. Dr. Woodward had not seen Claimant after he released him from his care in 2008. Dr. Bennoch believed Claimant could use medication for treatment of his work injuries. Although I do not agree with Dr. Bennoch's opinion as to the degree of disability, I find credible his opinion that Ambien, Tramadol, and the Lidoderm patch are reasonable medications to relieve Claimant from the effects of his disability. Claimant testified as to why his was taking the prescription medications of Ambien, Tramadol, and the Lidoderm patch. He presented certified medical records substantiating that these medications were prescribed by his personal physician for left arm pain complaints. Dr. Geter admitted in his June 10, 2010 deposition that Claimant had pain, even though he could not pinpoint the source of the pain. And even Dr. Hedges believed Claimant would benefit from continued use of the TENS unit and some prescription medication, although she suggested Neurontin.

I conclude the record is sufficient to support an award reimbursing Claimant for his past prescription medication under the standard set forth in *Martin v. Mid-America Farm Lines, Inc.*, 769

S.W.2d 105 (Mo. banc 1989). Claimant is awarded \$6,465.32 for prescriptions for Tramadol, Ambien CR, and Lidoderm patches.

Future Medical

The Worker's Compensation Act permits the allowance for the cost of future medical treatment in a permanent partial disability award. § 287.140.1; *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 283 (Mo. App. E.D.1997). Claimant is not required to present evidence on the specific medical treatment which will be necessary in the future in order to receive an award of future medical care, nor provide conclusive testimony or evidence to support his claim for future medical benefits. 963 S.W.2d at 283. It is sufficient if Claimant shows “by reasonable probability” that additional treatment may cure or relieve the effects of the injury and that such treatment is related to the work injury. *Bowers v Hiland Dairy Co.*, 188 S.W.3d 79, 86 (Mo. App. S.D. 2006). “Probable means founded on reason and experience which inclines the mind to believe but leaves room for doubt.” *Sifferman v. Sears, Roebuck and Co.*, 906 S.W.2d 823, 828 (Mo. App. S.D. 1995).

I conclude that Claimant has demonstrated the need for future medical in the way of pain management and follow-up visits with a physician to monitor the effects of any medications or use of a TENS unit. Employer, however, shall determine the treating physician(s) for such treatment. It shall be up to the treating physician chosen by Employer to determine what modality is appropriate for Claimant’s pain management needed to cure or relieve the effects of Claimant’s work injury.

Summary

As against Employer, Claimant is awarded past medical in the amount of \$6,465.32, \$21,556.08 for 30 percent permanent partial disability to the left upper extremity at the level of the elbow, and future medical care for treatment of pain management. The Second Injury Fund has no liability.

Date: February 15, 2011

Made by: /s/ Victorine R. Mahon
Victorine R. Mahon
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Naomi Pearson
Naomi Pearson
Division of Workers' Compensation