

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

Injury No.: 99-172494

Employee: Marian Peck
Employer: Lee's Summit School District R-7 (Settled)
Insurer: Royal & Sun Alliance Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: March 1, 1999
Place and County of Accident: Jackson County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations 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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 15, 2004, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Mark S. Siedlik, issued July 15, 2004, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 10th day of February 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

VACANT
Member

Attest: _____
John J. Hickey, Member

Secretary

**SIF
AWARD**

Employee: Marian R. Peck Injury No. 99-172494
Dependants: N/A
Employer: Lee's Summit School District R-7
Insurer: Royal & Sun Alliance Insurance Company
Hearing Date: March 2, 2004 Checked by: MSS/bi

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: March 1, 1999.
5. State location where accident occurred or occupational disease was contracted: Jackson 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: Claimant was lifting heavy pots.
12. Did accident or occupational disease cause death? No. Date of death?
13. Part(s) of body injured by accident or occupational disease: Right shoulder.
14. Nature and extent of any permanent disability: 22.5 percent right shoulder.
15. Compensation paid to-date for temporary disability: \$2,800.64

16. Value necessary medical aid paid to date by employer/insurer? \$21,793.91
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: Unknown
19. Weekly compensation rate: \$175.04
20. Method wages computation: Agreement

COMPENSATION PAYABLE

21. Amount of compensation payable: None.
22. Second Injury Fund liability: None.
23. Future requirements awarded: None.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Marian R. Peck

Injury No: 99-172494

Dependents: N/A

Employer: Lee's Summit School District R-7

Insurer: Royal & Sun Alliance Insurance Company

Additional Party: Second Injury Fund

Checked by: MSS/bi

This case comes on for hearing before Administrative Law Judge Siedlik in Kansas City, Missouri. The parties submitted post-trial briefs April 9, 2004. The Claimant presents six claims for compensation against the State Treasurer as Custodian of the Second Injury Fund. At the outset of trial Injury No. 01-167635 was voluntarily dismissed with prejudice as to the Second Injury Fund, the remaining claims left for determination of Second Injury Fund liability. The Claimant has settled all claims with the Employer and Insurer for the amounts set forth below:

Injury No. 99-172494 settled for 22 ½ percent of the right shoulder, \$9,137.09, settled January 8, 2003.

Injury No. 00-048297 settled for 3 percent of the whole body, \$2,100.48 settled January 8, 2003.

Injury No. 00-035513 settled for 3 percent of the body, \$2,100.48 settled January 8, 2003.

Injury No. 02-095325 settled for 10 percent of the right shoulder, \$4,060.92 settled February 19, 2004.

Injury No. 02-091249 settled for 10 percent of the left shoulder, \$4,060.92 settled February 19, 2004.

The evidence of trial consisted of the testimony of Mary Titterington, a vocational expert and the Claimant in person, together with the deposition testimony of Dr. Koprivica, medical records and reports comprising of Exhibit A through K.

VOCATIONAL EVIDENCE

The Claimant was examined by Mary Titterington, a vocational expert, who interviewed the Claimant, and reviewed medical records and restrictions provided. Ms. Titterington noted the Claimant's history as a food service worker, now

retired. Ms. Titterington noted primary difficulty the Claimant has is with her upper extremities, the right upper extremity worse than the left. Ms. Titterington noted the Claimant is adhered to a seven to ten-pound lifting restriction and in that capacity Ms. Titterington would place the Claimant's employment options as sedentary activity. Ms. Titterington ultimately opined the Claimant was unemployable. Based on her restrictions, her pain complaints and her advanced age of 70, beyond the norm of expected employment.

The Claimant testified she last worked on April 28, 2002 when she left her job as a food service worker for the Lee's Summit School District. The Claimant testified she left her job because over time her shoulders caused her so much pain she could not go on. The Claimant was born April 1, 1933 and at the time of the hearing was 70 years old, with a GED received in 1950. The Claimant had in the past secured a real estate license and ran a beauty salon, work she has not been engaged in for over 20 years. The Claimant's primary work history for the last 20 plus years have been food service in the school setting.

The Claimant suffered a number of injuries at work beginning in 1999. She had a right rotator cuff, which was surgically repaired in August of 2001, after a long period of conservative treatment. The Claimant testified her right shoulder was never the same after that surgery, and after she returned to work in January of 2002 she was never the same. The Claimant testified after her return to work she began to compensate for her right shoulder problems with her left shoulder, causing her left shoulder to become extremely painful to the point she eventually ceased work.

The Claimant suffered other work injuries to her back and whole body referencing dates of injuries of May 4, 2000 and February 10, 2000. Although there was no testimony regarding these events, documents reveal each case was settled with the Employer/Insurer for 3 percent disability to the whole person. Claimant also filed a claim for workers' compensation benefits referencing date of injury of June 1, 2001, which was thereafter dismissed. The Claimant thereafter filed claims dated April 1, 2002 and April 19, 2002 referencing overuse syndrome of the right and left shoulders, which were ultimately settled with the Employer/Insurer for 10 percent of the shoulder in each case.

The Claimant testified to physical conditions predating her 1999 injury, including a left arm injury in 1951 suffered in a motor vehicle accident, which required surgery to repair her left arm. The Claimant also testified to jamming her left wrist and her back in 1995 without elaboration as to the affects of these injuries.

The Claimant testified about her current condition, which involved pain in both shoulders, the right worse than the left, which affects her social life, abilities around the house, and causes her some depression. The Claimant requires help from her son for many activities around the home. The Claimant takes medications for pain, high blood pressure and acid reflex. The Claimant's typical day involves most being housebound, with activities severely limited by shoulder pain.

The Claimant's testimony reflects a severe right shoulder injury in March 1999 which was treated conservatively and ultimately required surgery in 2001. The Claimant returned to work but continued to suffer from problems with the right shoulder and from compensation of left shoulder overuse, the left shoulder became symptomatic. The Claimant continued to work as best as she could and had three other work-related injuries, which she relates no significant testimony or problems in discussing those subsequent injuries. Claimant finally testified she simply could no longer do the job and retired in April 2002. At or near the time of her resignation the Claimant filed claims for compensation alleging overuse syndrome of the right and left shoulders, receiving settlements from the Employer in each of those cases.

FINDINGS AND RULINGS

It is well established in the State of Missouri that the burden is on the Employee to proof all material elements of the claim. Breyer v. Howard Construction Company, 736 (S.W.2d 78 Mo.App.1987). Further, the Commission is charged with the responsibility of passing the credibility of all witnesses and is not obliged to accept the employee's testimony as true, even though no contradictory of impeaching evidence is introduced. Keener v. Wilcox Electric Incorporated, 884 S.W.2d 744 (Mo.App.W.D. 1994).

The Claimant in this case seeks permanent total disability benefits from the Second Injury Fund from some combination of her preexisting and last injuries which she feels makes her unemployable. The definition of total disability is the "inability to return to any employments and not nearly inability to return to the employment in which the employee was engaged at the time of the accident." Kowalski v. M/G Metal & Sales Incorporated, 631 S.W.2d 919 (Mo.App 1982).

I find based on the evidence and testimony presented that the Claimant has failed to meet her burden of proof to establish Second Injury Fund liability for the work injuries of March 1, 1999. The Claimant suffered an injury to her right

shoulder which was settled with the Employer and Insurer for 22 ½ percent of the right shoulder. Claimant's alleged preexisting injuries of February 10, 1999 were not the subject of any evidence to establish any kind of combination of disabilities entitling the Claimant to Second Injury Fund benefits. The Claimant's claim for Second Injury Fund benefits in Injury No. 99-172494, are therefore denied.

Date: _____ Made by: _____

Mark S. Siedlik
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Renee Slusher
Director
Division of Workers' Compensation

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 00-048297

Employee: Marian Peck
Employer: Lee's Summit School District R-7 (Settled)
Insurer: Royal & Sun Alliance Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: May 4, 2000
Place and County of Accident: Jackson County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations 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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 15, 2004, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Mark S. Siedlik, issued July 15, 2004, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 10th day of February 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

VACANT
Member

Attest: _____
John J. Hickey, Member

Secretary

**SIF
AWARD**

Employee: Marian R. Peck Injury No. 00-048297

Dependants: N/A

Employer: Lee's Summit School District R-7

Insurer: Royal & Sun Alliance Insurance Company

Hearing Date: March 2, 2004 Checked by: MSS/bi

FINDINGS OF FACT AND RULINGS OF LAW

2. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: May 4, 2000.
5. State location where accident occurred or occupational disease was contracted: Jackson 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:
Claimant was lifting heavy pots at work.
12. Did accident or occupational disease cause death? No. Date of death?
13. Part(s) of body injured by accident or occupational disease: Whole body.
14. Nature and extent of any permanent disability: 3 percent.
15. Compensation paid to-date for temporary disability: 0

16. Value necessary medical aid paid to date by employer/insurer? \$288.34
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: Unknown
19. Weekly compensation rate: \$175.04
20. Method wages computation: Agreement

COMPENSATION PAYABLE

21. Amount of compensation payable: None.
22. Second Injury Fund liability: None.
23. Future requirements awarded: None.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Marian R. Peck

Injury No: 00-048297

Dependents: N/A

Employer: Lee's Summit School District R-7

Insurer: Royal & Sun Alliance Insurance Company

This case comes on for hearing before Administrative Law Judge Siedlik in Kansas City, Missouri. The parties submitted post-trial briefs April 9, 2004. The Claimant presents six claims for compensation against the State Treasurer as Custodian of the Second Injury Fund. At the outset of trial Injury No. 01-167635 was voluntarily dismissed with prejudice as to the Second Injury Fund, the remaining claims left for determination of Second Injury Fund liability. The Claimant has settled all claims with the Employer and Insurer for the amounts set forth below:

Injury No. 99-172494 settled for 22 ½ percent of the right shoulder, \$9,137.09, settled January 8, 2003.

Injury No. 00-048297 settled for 3 percent of the whole body, \$2,100.48 settled January 8, 2003.

Injury No. 00-035513 settled for 3 percent of the body, \$2,100.48 settled January 8, 2003.

Injury No. 02-095325 settled for 10 percent of the right shoulder, \$4,060.92 settled February 19, 2004.

Injury No. 02-091249 settled for 10 percent of the left shoulder, \$4,060.92 settled February 19, 2004.

The evidence of trial consisted of the testimony of Mary Titterington, a vocational expert and the Claimant in person, together with the deposition testimony of Dr. Koprivica, medical records and reports comprising of Exhibit A through K.

VOCATIONAL EVIDENCE

The Claimant was examined by Mary Titterington, a vocational expert, who interviewed the Claimant, and reviewed medical records and restrictions provided. Ms. Titterington noted the Claimant's history as a food service worker, now retired. Ms. Titterington noted primary difficulty the Claimant has is with her upper extremities, the right upper extremity worse than the left. Ms. Titterington noted the Claimant is adhered to a seven to ten-pound lifting restriction and in that capacity Ms. Titterington would place the Claimant's employment options as sedentary activity. Ms. Titterington ultimately opined the Claimant was unemployable. Based on her restrictions, her pain complaints and her advanced age of 70, beyond the norm of expected employment.

The Claimant testified she last worked on April 28, 2002 when she left her job as a food service worker for the Lee's Summit School District. The Claimant testified she left her job because over time her shoulders caused her so much pain she could not go on. The Claimant was born April 1, 1933 and at the time of the hearing was 70 years old, with a GED received in 1950. The Claimant had in the past secured a real estate license and ran a beauty salon, work she has not been engaged in for over 20 years. The Claimant's primary work history for the last 20 plus years have been food service in the school setting.

The Claimant suffered a number of injuries at work beginning in 1999. She had a right rotator cuff, which was surgically repaired in August of 2001, after a long period of conservative treatment. The Claimant testified her right shoulder was never the same after that surgery, and after she returned to work in January of 2002 she was never the same. The Claimant testified after her return to work she began to compensate for her right shoulder problems with her left shoulder, causing her left shoulder to become extremely painful to the point she eventually ceased work.

The Claimant suffered other work injuries to her back and whole body referencing dates of injuries of May 4, 2000 and February 10, 2000. Although there was no testimony regarding these events, documents reveal each case was settled with the Employer/Insurer for 3 percent disability to the whole person. Claimant also filed a claim for workers' compensation benefits referencing date of injury of June 1, 2001, which was thereafter dismissed. The Claimant thereafter filed claims dated April 1, 2002 and April 19, 2002 referencing overuse syndrome of the right and left shoulders, which were ultimately settled with the Employer/Insurer for 10 percent of the shoulder in each case.

The Claimant testified to physical conditions predating her 1999 injury, including a left arm injury in 1951 suffered in a motor vehicle accident, which required surgery to repair her left arm. The Claimant also testified to jamming her left wrist and her back in 1995 without elaboration as to the affects of these injuries.

The Claimant testified about her current condition, which involved pain in both shoulders, the right worse than the left, which affects her social life, abilities around the house, and causes her some depression. The Claimant requires help from her son for many activities around the home. The Claimant takes medications for pain, high blood pressure and acid reflex. The Claimant's typical day involves most being housebound, with activities severely limited by shoulder pain.

The Claimant's testimony reflects a severe right shoulder injury in March 1999 which was treated conservatively and ultimately required surgery in 2001. The Claimant returned to work but continued to suffer from problems with the right shoulder and from compensation of left shoulder overuse, the left shoulder became symptomatic. The Claimant continued to

work as best as she could and had three other work-related injuries, which she relates no significant testimony or problems in discussing those subsequent injuries. Claimant finally testified she simply could no longer do the job and retired in April 2002. At or near the time of her resignation the Claimant filed claims for compensation alleging overuse syndrome of the right and left shoulders, receiving settlements from the Employer in each of those cases.

FINDINGS AND RULINGS

It is well established in the State of Missouri that the burden is on the Employee to proof all material elements of the claim. Breyer v. Howard Construction Company, 736 (S.W.2d 78 Mo.App.1987). Further, the Commission is charged with the responsibility of passing the credibility of all witnesses and is not obliged to accept the employee's testimony as true, even though no contradictory of impeaching evidence is introduced. Keener v. Wilcox Electric Incorporated, 884 S.W.2d 744 (Mo.App.W.D. 1994).

The Claimant in this case seeks permanent total disability benefits from the Second Injury Fund from some combination of her preexisting and last injuries which she feels makes her unemployable. The definition of total disability is the "inability to return to any employments and not nearly inability to return to the employment in which the employee was engaged at the time of the accident." Kowalski v. M/G Metal & Sales Incorporated, 631 S.W.2d 919 (Mo.App 1982).

I find from the evidence and testimony presented the Claimant has failed to meet her burden of proof to establish Second Injury Fund liability for the injuries of May 4, 2000. The Claimant suffered injuries to her back and settled with the Employer and Insurer for 3 percent of the whole person. The Claimant's preexisting conditions alleged included a settled workers' compensation case for a right shoulder injury at 22 ½ percent of the right shoulder and a prior back injury, which also settled for 3 percent of the whole person from February 10, 2000. I find the combination of those injuries do not rise to the levels of Second Injury Fund liability and for that reason, Second Injury Fund disability benefits are denied for Injury No. 00-048297.

Date: _____ Made by: _____
Mark S. Siedlik
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Renee Slusher
Director
Division of Workers' Compensation

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION _____

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

Injury No.: 02-091249

Employee: Marian Peck
Employer: Lee's Summit School District R-7 (Settled)
Insurer: Royal & Sun Alliance Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: April 19, 2002

Place and County of Accident: Jackson County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations 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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 15, 2004, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Mark S. Siedlik, issued July 15, 2004, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 10th day of February 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

VACANT
Member

Attest: _____
John J. Hickey, Member

Secretary

**SIF
AWARD**

Employee: Marian R. Peck Injury No. 02-091249

Dependants: N/A

Employer: Lee's Summit School District R-7

Insurer: Royal & Sun Alliance Insurance Company

Hearing Date: March 2, 2004 Checked by: MSS/bi

FINDINGS OF FACT AND RULINGS OF LAW

3. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: April 19, 2002.
5. State location where accident occurred or occupational disease was contracted: Jackson 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:
Claimant's overuse of the left shoulder caused injury.
12. Did accident or occupational disease cause death? No. Date of death?
13. Part(s) of body injured by accident or occupational disease: Left shoulder.
14. Nature and extent of any permanent disability: 10 percent left shoulder.
15. Compensation paid to-date for temporary disability: 0

16. Value necessary medical aid paid to date by employer/insurer? 0
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: Unknown
19. Weekly compensation rate: \$174.29
20. Method wages computation: Agreement

COMPENSATION PAYABLE

21. Amount of compensation payable: None.
22. Second Injury Fund liability: None.
23. Future requirements awarded: None.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Marian R. Peck

Injury No: 02-091249

Dependents: N/A

Employer: Lee's Summit School District R-7

Insurer: Royal & Sun Alliance Insurance Company

Additional Party: Second Injury Fund

Checked by: MSS/bi

This case comes on for hearing before Administrative Law Judge Siedlik in Kansas City, Missouri. The parties submitted post-trial briefs April 9, 2004. The Claimant presents six claims for compensation against the State Treasurer as Custodian of the Second Injury Fund. At the outset of trial Injury No. 01-167635 was voluntarily dismissed with prejudice as to the Second Injury Fund, the remaining claims left for determination of Second Injury Fund liability. The Claimant has settled all claims with the Employer and Insurer for the amounts set forth below:

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Injury No. 00-048297 settled for 3 percent of the whole body, \$2,100.48 settled January 8, 2003.

Injury No. 00-035513 settled for 3 percent of the body, \$2,100.48 settled January 8, 2003.

Injury No. 02-095325 settled for 10 percent of the right shoulder, \$4,060.92 settled February 19, 2004.

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The evidence of trial consisted of the testimony of Mary Titterington, a vocational expert and the Claimant in person, together with the deposition testimony of Dr. Koprivica, medical records and reports comprising of Exhibit A through K.

VOCATIONAL EVIDENCE

The Claimant was examined by Mary Titterington, a vocational expert, who interviewed the Claimant, and reviewed medical records and restrictions provided. Ms. Titterington noted the Claimant's history as a food service worker, now retired. Ms. Titterington noted primary difficulty the Claimant has is with her upper extremities, the right upper extremity worse than the left. Ms. Titterington noted the Claimant is adhered to a seven to ten-pound lifting restriction and in that capacity Ms. Titterington would place the Claimant's employment options as sedentary activity. Ms. Titterington ultimately opined the Claimant was unemployable. Based on her restrictions, her pain complaints and her advanced age of 70, beyond the norm of expected employment.

The Claimant testified she last worked on April 28, 2002 when she left her job as a food service worker for the Lee's Summit School District. The Claimant testified she left her job because over time her shoulders caused her so much pain she could not go on. The Claimant was born April 1, 1933 and at the time of the hearing was 70 years old, with a GED received in 1950. The Claimant had in the past secured a real estate license and ran a beauty salon, work she has not been engaged in for over 20 years. The Claimant's primary work history for the last 20 plus years have been food service in the school setting.

The Claimant suffered a number of injuries at work beginning in 1999. She had a right rotator cuff, which was surgically repaired in August of 2001, after a long period of conservative treatment. The Claimant testified her right shoulder was never the same after that surgery, and after she returned to work in January of 2002 she was never the same. The Claimant testified after her return to work she began to compensate for her right shoulder problems with her left shoulder, causing her left shoulder to become extremely painful to the point she eventually ceased work.

The Claimant suffered other work injuries to her back and whole body referencing dates of injuries of May 4, 2000 and February 10, 2000. Although there was no testimony regarding these events, documents reveal each case was settled

with the Employer/Insurer for 3 percent disability to the whole person. Claimant also filed a claim for workers' compensation benefits referencing date of injury of June 1, 2001, which was thereafter dismissed. The Claimant thereafter filed claims dated April 1, 2002 and April 19, 2002 referencing overuse syndrome of the right and left shoulders, which were ultimately settled with the Employer/Insurer for 10 percent of the shoulder in each case.

The Claimant testified to physical conditions predating her 1999 injury, including a left arm injury in 1951 suffered in a motor vehicle accident, which required surgery to repair her left arm. The Claimant also testified to jamming her left wrist and her back in 1995 without elaboration as to the affects of these injuries.

The Claimant testified about her current condition, which involved pain in both shoulders, the right worse than the left, which affects her social life, abilities around the house, and causes her some depression. The Claimant requires help from her son for many activities around the home. The Claimant takes medications for pain, high blood pressure and acid reflex. The Claimant's typical day involves most being housebound, with activities severely limited by shoulder pain.

The Claimant's testimony reflects a severe right shoulder injury in March 1999 which was treated conservatively and ultimately required surgery in 2001. The Claimant returned to work but continued to suffer from problems with the right shoulder and from compensation of left shoulder overuse, the left shoulder became symptomatic. The Claimant continued to work as best as she could and had three other work-related injuries, which she relates no significantly testimony or problems in discussing those subsequent injuries. Claimant finally testified she simply could no longer do the job and retired in April 2002. At or near the time of her resignation the Claimant filed claims for compensation alleging overuse syndrome of the right and left shoulders, receiving settlements from the Employer in each of those cases.

FINDINGS AND RULINGS

It is well established in the State of Missouri that the burden is on the Employee to proof all material elements of the claim. Breyer v. Howard Construction Company, 736 (S.W.2d 78 Mo.App.1987). Further, the Commission is charged with the responsibility of passing the credibility of all witnesses and is not obliged to accept the employee's testimony as true, even though no contradictory of impeaching evidence is introduced. Keener v. Wilcox Electric Incorporated, 884 S.W.2d 744 (Mo.App.W.D. 1994).

The Claimant in this case seeks permanent total disability benefits from the Second Injury Fund from some combination of her preexisting and last injuries which she feels makes her unemployable. The definition of total disability is the "inability to return to any employments and not nearly inability to return to the employment in which the employee was engaged at the time of the accident." Kowalski v. M/G Metal & Sales Incorporated, 631 S.W.2d 919 (Mo.App 1982).

I find from the evidence and testimony presented the Claimant has failed to meet her burden of proof to establish Second Injury Fund liability for the injuries suffered on April 19, 2002, Injury No. 02-091249. In that case the Claimant alleged an overuse condition to her left shoulder settled with the Employer/Insurer for 10 percent of the left shoulder. Claimant alleged as part of that claim that she was permanently and totally disabled as a combination of that injury with prior injuries and settlements to the right shoulder and whole body. I find more credible reading of the evidence and testimony presented by the Claimant is that the Claimant had never fully recovered from her March 1999 injury to her right shoulder and although she attempted to return to work and did work for two more years, her testimony is that she never recovered from that right shoulder injury and because of that, had caused her left shoulder to become symptomatic. I find the evidence less then clearly seems to the affects of the injuries in February and May of 2000 involving claimed injuries to the Claimant's back, which were settled for 3 percent of the whole person each. The Claimant made little mention of these injuries and their affects in her testimony. The Claimant's testimony clears seems to indicate that the 1999 injury to the right shoulder which was not surgically repaired until 2001 was not a good result and the Claimant continued to suffer until the point in her own testimony, she simply could no longer do the work and retired. The best reading of the evidence is that if the Claimant were in fact to be determined permanently and totally disabled it would be as a result of injuries of March 1, 1999.

It is for that reason that I find the Claimant's request for permanent and total disability benefits and benefits from the Second Injury Fund are therefore to be denied.

Date: _____ Made by: _____

Mark S. Siedlik
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Renee Slusher
Director
Division of Workers' Compensation

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 02-095325

Employee: Marian Peck
Employer: Lee's Summit School District R-7 (Settled)
Insurer: Royal & Sun Alliance Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: April 1, 2002
Place and County of Accident: Jackson County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations 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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 15, 2004, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Mark S. Siedlik, issued July 15, 2004, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 10th day of February 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

VACANT

Member

Attest: _____
John J. Hickey, Member

Secretary

**SIF
AWARD**

Employee: Marian R. Peck Injury No. 02-095325

Dependants: N/A

Employer: Lee's Summit School District R-7

Insurer: Royal & Sun Alliance Insurance Company

Hearing Date: March 2, 2004 Checked by: MSS/bi

FINDINGS OF FACT AND RULINGS OF LAW

4. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: April 1, 2002
5. State location where accident occurred or occupational disease was contracted: Jackson 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:
Claimant's repetitive lifting injured her right shoulder.
12. Did accident or occupational disease cause death? No. Date of death?
13. Part(s) of body injured by accident or occupational disease: Right shoulder.
14. Nature and extent of any permanent disability: 10 percent right shoulder.
15. Compensation paid to-date for temporary disability: 0

16. Value necessary medical aid paid to date by employer/insurer? 0
17. Value necessary medical aid not furnished by employer/insurer? N/A

18. Employee's average weekly wages: Unknown
19. Weekly compensation rate: \$174.29
20. Method wages computation: Agreement

COMPENSATION PAYABLE

21. Amount of compensation payable: None.
22. Second Injury Fund liability: None.
23. Future requirements awarded: None.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Marian R. Peck

Injury No: 02-095325

Dependents: N/A

Employer: Lee's Summit School District R-7

Insurer: Royal & Sun Alliance Insurance Company

Additional Party: Second Injury Fund

Checked by: MSS/bi

This case comes on for hearing before Administrative Law Judge Siedlik in Kansas City, Missouri. The parties submitted post-trial briefs April 9, 2004. The Claimant presents six claims for compensation against the State Treasurer as Custodian of the Second Injury Fund. At the outset of trial Injury No. 01-167635 was voluntarily dismissed with prejudice

as to the Second Injury Fund, the remaining claims left for determination of Second Injury Fund liability. The Claimant has settled all claims with the Employer and Insurer for the amounts set forth below:

Injury No. 99-172494 settled for 22 ½ percent of the right shoulder, \$9,137.09, settled January 8, 2003.

Injury No. 00-048297 settled for 3 percent of the whole body, \$2,100.48 settled January 8, 2003.

Injury No. 00-035513 settled for 3 percent of the body, \$2,100.48 settled January 8, 2003.

Injury No. 02-095325 settled for 10 percent of the right shoulder, \$4,060.92 settled February 19, 2004.

Injury No. 02-091249 settled for 10 percent of the left shoulder, \$4,060.92 settled February 19, 2004.

The evidence of trial consisted of the testimony of Mary Titterington, a vocational expert and the Claimant in person, together with the deposition testimony of Dr. Koprivica, medical records and reports comprising of Exhibit A through K.

VOCATIONAL EVIDENCE

The Claimant was examined by Mary Titterington, a vocational expert, who interviewed the Claimant, and reviewed medical records and restrictions provided. Ms. Titterington noted the Claimant's history as a food service worker, now retired. Ms. Titterington noted primary difficulty the Claimant has is with her upper extremities, the right upper extremity worse than the left. Ms. Titterington noted the Claimant is adhered to a seven to ten-pound lifting restriction and in that capacity Ms. Titterington would place the Claimant's employment options as sedentary activity. Ms. Titterington ultimately opined the Claimant was unemployable. Based on her restrictions, her pain complaints and her advanced age of 70, beyond the norm of expected employment.

The Claimant testified she last worked on April 28, 2002 when she left her job as a food service worker for the Lee's Summit School District. The Claimant testified she left her job because over time her shoulders caused her so much pain she could not go on. The Claimant was born April 1, 1933 and at the time of the hearing was 70 years old, with a GED received in 1950. The Claimant had in the past secured a real estate license and ran a beauty salon, work she has not been engaged in for over 20 years. The Claimant's primary work history for the last 20 plus years have been food service in the school setting.

The Claimant suffered a number of injuries at work beginning in 1999. She had a right rotator cuff, which was surgically repaired in August of 2001, after a long period of conservative treatment. The Claimant testified her right shoulder was never the same after that surgery, and after she returned to work in January of 2002 she was never the same. The Claimant testified after her return to work she began to compensate for her right shoulder problems with her left shoulder, causing her left shoulder to become extremely painful to the point she eventually ceased work.

The Claimant suffered other work injuries to her back and whole body referencing dates of injuries of May 4, 2000 and February 10, 2000. Although there was no testimony regarding these events, documents reveal each case was settled with the Employer/Insurer for 3 percent disability to the whole person. Claimant also filed a claim for workers' compensation benefits referencing date of injury of June 1, 2001, which was thereafter dismissed. The Claimant thereafter filed claims dated April 1, 2002 and April 19, 2002 referencing overuse syndrome of the right and left shoulders, which were ultimately settled with the Employer/Insurer for 10 percent of the shoulder in each case.

The Claimant testified to physical conditions predating her 1999 injury, including a left arm injury in 1951 suffered in a motor vehicle accident, which required surgery to repair her left arm. The Claimant also testified to jamming her left wrist and her back in 1995 without elaboration as to the affects of these injuries.

The Claimant testified about her current condition, which involved pain in both shoulders, the right worse than the left, which affects her social life, abilities around the house, and causes her some depression. The Claimant requires help from her son for many activities around the home. The Claimant takes medications for pain, high blood pressure and acid reflex. The Claimant's typical day involves most being housebound, with activities severely limited by shoulder pain.

The Claimant's testimony reflects a severe right shoulder injury in March 1999 which was treated conservatively and ultimately required surgery in 2001. The Claimant returned to work but continued to suffer from problems with the right shoulder and from compensation of left shoulder overuse, the left shoulder became symptomatic. The Claimant continued to work as best as she could and had three other work-related injuries, which she relates no significant testimony or problems in discussing those subsequent injuries. Claimant finally testified she simply could no longer do the job and retired in April 2002. At or near the time of her resignation the Claimant filed claims for compensation alleging overuse syndrome of the right and left shoulders, receiving settlements from the Employer in each of those cases.

FINDINGS AND RULINGS

It is well established in the State of Missouri that the burden is on the Employee to prove all material elements of the claim. Breyer v. Howard Construction Company, 736 (S.W.2d 78 Mo.App.1987). Further, the Commission is charged with the responsibility of passing the credibility of all witnesses and is not obliged to accept the employee's testimony as true, even though no contradictory or impeaching evidence is introduced. Keener v. Wilcox Electric Incorporated, 884 S.W.2d 744 (Mo.App.W.D. 1994).

The Claimant in this case seeks permanent total disability benefits from the Second Injury Fund from some combination of her preexisting and last injuries which she feels makes her unemployable. The definition of total disability is the "inability to return to any employments and not nearly inability to return to the employment in which the employee was engaged at the time of the accident." Kowalski v. M/G Metal & Sales Incorporated, 631 S.W.2d 919 (Mo.App 1982).

I find from the evidence and testimony presented the Claimant has failed to meet her burden of proof to establish Second Injury Fund liability for Injury No. 02-095325. In that case the Claimant alleged an overuse injury to her right shoulder and settled with the Employer and Insurer for 10 percent of the right shoulder. The Claimant had alleged preexisting conditions including a 1999 injury to the right shoulder settled for 22 ½ percent of the right shoulder and two injuries in the year 2000 each settled for 3 percent of the back. I find those injuries do not combine to establish Second Injury Fund liability and for that reason, deny Second Injury Fund disability benefits for Injury No. 02-095325.

Date: _____ Made by: _____

Mark S. Siedlik
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Renee Slusher
Director
Division of Workers' Compensation