

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

Injury No.: 10-090162

Employee: Helen Peek  
Employer: Western Missouri Medical Center (Settled)  
Insurer: Liberty Mutual Fire Insurance Company (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 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 § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 19, 2013, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Mark Siedlik, issued November 19, 2013, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 8<sup>th</sup> day of August 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

**FINAL AWARD DENYING COMPENSATION  
AS TO SECOND INJURY FUND ONLY**

Employee: Helen Peek Injury No: 10-090162  
Dependents: N/A  
Employer: Western Missouri Medical Center (settled)  
Insurer: Liberty Mutual (settled)  
Additional Party: Treasurer of Missouri as Custodian of the Second Injury Fund  
Hearing Date: September 10, 2013 Checked by: MSS/lh

**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: October 30, 2010
5. State location where accident occurred or occupational disease was contracted:  
Warrensburg, Johnson 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: Employee, while helping patient heavy patient out of bed injured left upper extremity, neck and back
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 upper extremity, neck and back
14. Nature and extent of any permanent disability: Permanent and Total Disability
15. Compensation paid to-date for temporary disability: \$30,502.96
16. Value necessary medical aid paid to date by employer/insurer? \$56,932.00
17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$1148.00
19. Weekly compensation rate: \$764.57
20. Method wages computation: wage statement evidence
21. Amount of compensation payable: None
22. Second Injury Fund liability: None
23. Future requirements awarded: None
24. Medical Treatment: None
25. Past Medical Treatment: None

## **FINDINGS OF FACT AND RULINGS OF LAW**

Employee: Helen Peek Injury No: 10-090162

Dependents: N/A

Employer: Western Missouri Medical Center (settled)

Insurer: Liberty Mutual (settled)

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

Hearing Date: September 10, 2013

Checked by: MSS/lh

On September 10, 2013, the final hearing in this claim was held before Honorable Mark Siedlik, Administrative Law Judge. The employee, Helen Peek, appeared in person and through counsel, Jeff Adams. The Second Injury Fund was represented by Laura Van Fleet. The parties stipulated to the following:

### **STIPULATIONS**

1. On October 30, 2010 the claimant was an employee of Western Missouri Medical Center.
2. On October 30, 2010, Employer was operating under and pursuant to the Missouri Workers' Compensation law.
3. Employer received proper notice.

### **EXHIBITS**

Employee A-EE

- A Western Missouri Medical Center Certificate for WMMC Aspire Program
- B Western Missouri Medical Center Certificate for WMMC Aspire Program
- C Western Missouri Medical Center Certificate for WMMC Aspire Program
- D Western Missouri Medical Center Certificate for WMMC Aspire Program
- E Correspondence to Helen Peek from Western Missouri Medical Center dated 8/4/2011
- F Stipulation for Compromise Settlement
- G Disability Management Association records
- H Orthopaedic and Sports Medicine Consultants Chartered records
- I Western Missouri Medical Center records
- J Premiere Spine Care records
- K Western Missouri Internal Medicine records
- L Heartland Surgical Specialty Hospital records

- M Golden Valley Memorial Hospital records
- N Johnson County Imaging Center records
- O SERC Physical and Hand Therapy records
- P Vocational Rehabilitation Evaluation by Wilbur T. Swearingin, CRC dated May 4, 2012
- Q Wilbur T. Swearingin, CRC Curriculum Vitae
- R Deposition of Wilbur T. Swearingin taken September 17, 2012
- S Report from Garth S. Russell, MD of Columbia Orthopaedic Group dated September 9, 2011
- T Report from Garth S. Russell, MD of Columbia Orthopaedic Group dated February 27, 2012
- U Garth S. Russell, MD Curriculum Vitae
- V Garth S. Russell, MD Expert Witness History
- W Deposition of Dr. Garth Russell taken September 14, 2012
- X Deposition of Tamara Jackson taken January 28, 2013
- Y Deposition of Becky Dilley taken January 28, 2013
- Z Strategic Performance System assessment 2009
- AA Strategic Performance System assessment 2010
- BB Helen Peek's Activities of Daily Life
- CC Helen Peek's payroll statements
- DD IME by Dr. Pazell dated April 14, 2009 – objection sustained
- EE Report of Dr. Townsend dated June 5, 2008 – objection sustained

Second Injury Fund Exhibits

- 1 Deposition of Helen Peek
- 2 Wage record

**ISSUES**

The parties requested the Division to determine:

- 1. Wage rates for PTD and PPD
- 2. The nature and extent of permanent disability
- 3. The liability of the Second Injury Fund

**FINDINGS OF FACT**

Helen Peek, the employee, is a 53 year old Caucasian woman. She has her RN license and worked at Western Missouri Medical Center, the Employer, for 3 years as a surgical floor nurse. She was terminated from her employment at Employer because of her permanent restrictions due to the last accident.

Peek had a pre-existing right shoulder injury due to a 2006 rotator cuff tear. She had reduced range of motion in her right shoulder as a result of the injury and surgical repair. She reported that she returned to full-time work following the injury. She did the same job, but did handle more tasks with her left arm to accommodate her right arm. The

employer did not provide any formal accommodations. This was Peek's only pre-existing disability.

Peek had her primary work injury at Western Missouri Medical Center on October 30, 2010. She was attempting to move a very heavy patient. She injured her neck and left upper extremity in the primary injury. Peek treated with Dr. Adrian Jackson for her cervical injury. He performed an anterior cervical discectomy and fusion at C5-6, placed a structural interbody fusion device at C5-6 and placed a local autograft on December 14, 2010. Her post-surgical diagnosis was herniated nucleus pulposus C5-6 with left upper extremity radiculopathy. Peek continued to complain of cervical and left upper extremity pain at her follow-up visits with Dr. Jackson. Due to her continued complaints she was referred to Dr. Stechschulte to check for impingement of the left shoulder. Dr. Stechschulte diagnosed a left shoulder trapezial strain with possible SLAP injury and left shoulder AC irritability with subacromial impingement. Dr. Stechschulte warned Peek that some of her problems were residual from her neck and that an arthroscopy of her shoulder was not guaranteed to relieve her pain. She opted to not receive surgical intervention for her left shoulder.

Peek has ongoing cervical and left upper extremity complaints. She testified at her deposition that she could feel the plate placed in her cervical fusion in her neck and that she had to lay down because of that sensation. She also testified that she laid down throughout the day due to her neck and left shoulder pain. Her hearing testimony added that she also laid down because of her pre-existing right shoulder problems, but I find that testimony to not be credible. Her claims as to the cause of her needing to lay down changed after she had settled with the employer. Additionally, her friend, Ruby Keelan testified that Peek laid down quite often when they socialized and always said it was because of her neck.

Peek's abilities were dramatically reduced following the primary injury. She reported that as a result of the 2010 injury she could not look up and down to use a computer, she had tense muscles, she has reduced tolerance for sitting, she reports that due to the plate in her neck she has sensations of not being able to breathe, numbness and tingling in her arms and hands due to her cervical condition, and a 50 percent reduction in the ability to turn her head side to side. She takes Percocet four to five times per day for left shoulder and neck pain. (Exhibit W, 47)

Peek settled her claim with the employer for \$142,790.00. The parties did not agree to a percentage of disability or to a wage rate.

Peek was rated by Dr. Garth Russell, an orthopaedic surgeon. Dr. Russell rated the 2010 injury to the neck as 12% to the body as a whole secondary to the loss of motion, chronic muscle spasm, and function. He rated the 2010 injury to the left shoulder at 20% to the 232. He did not rate the right shoulder, but stated that she had previously settled a claim for 23.5% to the right shoulder. He felt that she was permanently and totally disabled. Dr. Russell was asked if he would recommend that Ms. Peek lay down

to help with the muscle pain and tension in her neck and he said that he would recommend that she lay down to help take the stress off those muscles and that it was medically reasonable for her to do so. (Claimant Ex. W, p. 51-52)

Peek hired Wilbur Swearingin as a vocational expert. Mr. Swearingin opined "...I believe the impairment and disability resulting from the work injury of October 30, 2010 considered in isolation renders Ms. Peek permanently and totally disabled." (Exhibit R, Deposition exhibit 2, page 16). Mr. Swearingin agreed that someone who lays down during the day is unemployable on the open labor market, and thus permanently and totally disabled.

### **RULINGS OF LAW**

At issue in this case nature and extent of disability, including liability of the Second Injury Fund. The Missouri Supreme Court in the case of Stewart v. Johnson, 398 S.W.2d 850 (Mo. 1966) explained the procedure, which must be undertaken when there is a dispute as to whether the employer or the Second Injury Fund is liable for permanent total disability benefits. The Court explained that the first consideration is the disability resulting from the last injury alone. Otherwise, the words in §287.220 "considered alone and of itself" were meaningless. Therefore, a claimant's pre-existing disabilities are irrelevant until employer's liability for the last injury is determined. And if a Claimant's last injury in and of itself renders a claimant permanently and totally disabled, then the Second Injury Fund has no liability and employer is responsible for the entire amount. See Huey v. Chrysler Corporation, 34 S.W.3d 845 (Mo.App. 2000); Keysior v. TransWorld Airlines, 5 S.W.3d 195, 201 (Mo.App. 1999); Maas v. Treasurer of Missouri, 964 S.W.2d 541 (Mo.App. 1998); Roller v. Treasurer of Missouri, 935 S.W.2d 739, 741 (Mo.App. 1996).

The test for determining permanent total disability is whether the individual is able to compete in the open labor market and whether the employer in the usual course of business would reasonably be expected to employ the Employee in his present physical condition. Isaac v. Atlas Plastic Corporation, 793 S.W.2d 165 (Mo App. 1990). The critical question is whether Employer could reasonably be expected to hire the Claimant, considering her present physical condition, and reasonably expect her to successfully perform the work. Forshee v. Landmark Excavating and Equipment, et al, No.85582 (Mo app. E.D. 2005); Sutton v. Vee Jay Cement Contracting Company, 37 S.W.3<sup>rd</sup> 803, 811 (Mo App. 2000). Total disability means the inability to return to any reasonable or normal employment. It does not require that the employee be completely inactive or inert. Isaac, 793 S.W.2d 165 (Mo App. 1990).

One factor in determining whether a person is permanently and totally disabled under the Missouri Workers' Compensation Law is the Claimant's physical condition. See generally Brown v. Treasurer of Missouri, 795 S.W.2d 479 (Mo App. 1990); Isaac, 793 S.W.2d 165 (Mo App. 1990). Ms. Peek was working full-time as an RN prior to this

injury. Following this injury she was placed on light duty and had problems even doing that work due to the pain in her neck of looking at the computer screen. Ms. Peek and her friend both testified that she had to lay down intermittently during the day because her pain in her neck was so bad. Dr. Russell testified that she is taking up to 5 Percocet per day for her neck pain and that her need to lay down was medically reasonable. Additionally, Peek's own vocational expert opined in his report that the accident of October 30, 2010 rendered Peek permanently and totally disabled. The lump sum the Claimant agreed to on the morning of trial with the Employer/Insurer, at the maximum permanent partial disability rate in effect, equates to in excess of 341 weeks of disability, over 85 percent of the whole body.

While I find that Peek had medical conditions pre-dating the 2010 neck and left shoulder injuries, I find that the effects of the 2010 injuries alone remove Peek from the work force.

I find that Ms. Peek is permanently and totally disabled as the result of his October 30, 2010 injury to her left shoulder and neck in isolation. As I find the cause of the permanent and total disability to be the last accident in isolation, I find that no workers' compensation benefits are due from the Second Injury Fund.

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

Mark Siedlik  
*Administrative Law Judge*  
*Division of Workers' Compensation*