

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

Injury No.: 02-144485

Employee: Gary Portwood  
Employer: Golden Valley Memorial (Settled)  
Insurer: Safety National Casualty (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: March 26, 2002  
Place and County of Accident: Clinton, Henry 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 October 19, 2005, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Mark S. Siedlik, issued October 19, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 7<sup>th</sup> day of June 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

**AWARD**

Employee: Gary Portwood Injury No. 02-144485

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Employer: Golden Valley Memorial

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

Insurer: Safety National Casualty

Hearing Date: September 13, 2005

#### FINDINGS OF FACTS 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 26, 2002
5. State location where accident occurred or occupational disease was contracted: Clinton, Henry County, Missouri.
- 6. Was above employee in employ of above employer at the 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 was contracted: Employee sustained a right shoulder injury when loading linen bags arising out of and in the course of his employment.
12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Right shoulder
14. Nature and extent of any permanent disability: No Permanent Partial Disability
15. Compensation paid to-date for temporary disability: \$13,760.01
16. Value necessary medical aid paid to date by employer/insurer? \$19,938.18
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$293.00
19. Weekly compensation rate: \$190.45/\$190.45
20. Method wages computation: Comparable employee - RSMo. §287.250.1(5).

**COMPENSATION PAYABLE**

21. Benefits Currently Due

Medical Expenses  
 Medical Already  
 Incurred.....\$19938.18  
 Less credit for expenses already  
 paid.....19938.18  
 Total Medical  
 Owing.....0.00

Temporary Disability  
**Total TTD Owing.....0.00**

Costs of Recovery  
 Employee's Attorney's Fees (25% of  
 \_\_\_\_)  
 Total Costs of  
 Recovery.....N/A

Ongoing Benefits  
 Medical Care.....N/A  
 Temporary Disability until employee reaches  
 MMI.....N/A  
 Total Ongoing  
 Benefits.....N/A  
 Total Award.....N/A

22. Second Injury Fund liability:..... None  
 0 weeks of permanent partial disability from Second Injury Fund..... None  
 Uninsured medical/death benefits:..... None  
 Permanent total disability benefits from Second Injury Fund..... None  
 -- weekly differential (--) payable by SIF for -- weeks  
 beginning..... None  
 -- and, thereafter, for Claimant's lifetime..... None  
**TOTAL:**

\$ 0

23. Future requirements awarded: None

FINDINGS OF FACT AND RULINGS OF LAW

Employee: Gary Portwood Injury No. 02-144485  
 Dependants: N/A  
 Employer: Golden Valley Memorial  
 Additional Party: Treasurer of the State of Missouri, as Custodian of the Second Injury Fund  
 Insurer: Safety National Casualty  
 Hearing Date: September 13, 2005

- On September 13, 2005, the employee and the Second Injury Fund appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to Section 287.110, RSMo. 2000. The employee, Gary Portwood, did not appear in person, but was represented by counsel, Jerry Kenter. The Second Injury Fund appeared by Assistant Attorney General M. Shannon Schulte. The evidence consisted of stipulated facts, between the parties. Medical records, deposition testimony and other documents were offered and admitted into evidence.

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STIPULATIONS

The parties stipulated to the following facts:

1. **On March 26, 2002 Gary Portwood sustained an accident arising out of and in the course of his employment at the Golden Valley Hospital in Clinton, Henry County, Missouri.**
2. **That as a result of said accident he sustained an injury to the right shoulder resulting in a 25% permanent partial disability to the right upper extremity at the shoulder.**
3. **That his average weekly wage was \$293.00 resulting in a compensation rate of 190.45/190.45.**
4. **That prior to March 26, 2002 Gary Portwood had a pre-existing condition in his cervical spine called a Klippel Feil deformity. This condition caused him no lost time from work and did not constitute a hindrance or obstacle to his employment or re-employment.**
5. **This pre-existing condition was unknown to Gary Portwood and was not diagnosed until the shoulder injury of March 26, 2002.**
6. **This condition was not symptomatic until the accident of March 26, 2002.**
7. **This pre-existing condition is rated at 15% to the body as a whole referencing the cervical spine.**
8. **That if there is a Second Injury Fund Liability it is to be calculated as follows:**
  - 1 **15% to the Right Shoulder at the 232 level which is 58 weeks of compensation.**
  - 2 **15% to the cervical spine for the prior condition which is 60 weeks of compensation**
  - 3 **a 10% load factor**

The following exhibits were offered by employee:

- A. Medical records of Gary Portwood
- B. Deposition of Dr. James Stuckmeyer
- C. Independent Medical Evaluation of Dr. James Stuckmeyer

The Second Injury Fund did not offer any exhibits.

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DISCUSSION OF EVIDENCE

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- Based upon the evidence and stipulated facts, I find the following:

The only issue to be answered before this Court is whether claimant's alleged neck condition meets the threshold of a pre-existing disability necessitating Second Injury Fund liability. Based upon the facts as presented, case law and statutory authority, this Court finds claimant's alleged pre-existing disability is not compensable.

- Claimant must initially establish he had a compensable work injury against the

Second Injury Fund. Section 287.220.1 RSMo states in order to assess Second Injury Fund liability, claimant must prove "that he or she has permanent disability resulting from a compensable work-related injury." Parties stipulated that claimant did sustain an injury to his right shoulder on March 26, 2002 arising out of and in the course of his employment at Golden Valley Hospital in Clinton, Henry County, Missouri. Further, parties agreed the primary injury of March 26, 2002 to claimant's right shoulder was compensable at 25% permanent partial disability at the 232-week level. Therefore, claimant has proven a compensable work-related injury.

In order to calculate Fund liability, the Commission must determine the percentage of the disability that can be attributed solely to the preexisting condition **at the time of the last injury.** *Gassen v. Liebengood*, 134 S.W.3d 75,81 (Mo.App.2004); *Carlson*, 952 S.W. 2d at 373; *see also* § 287.220.1. It need not be shown that the claimant or the employer knew of the preexisting disability prior to the work injury. *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206,214 (Mo.App.1999). However, the claimant must establish that an actual or measurable disability existed at this time. *Id*; *see also Tidwell v. Kloster Co.*, 8 S.W. 3d 585, 589 (Mo.App.1999). The disability must be "of such seriousness as to constitute a hindrance or obstacle to [his] employment." *Loven v. Greene County*, 63 S.W.3d 278, 283 (Mo.App.2001).

In support of his argument, Mr. Portwood has stipulated he was unaware of he had a pre-existing congenital neck condition and did not receive a diagnosis until after the date of his primary injury, March 26, 2002. Claimant has also stipulated he missed no work associated with the pre-existing disability and did not constitute a hindrance or obstacle to his employment or re-employment. Finally, Mr. Portwood agreed that his neck condition was not symptomatic until after his primary injury.

Claimant submitted evidence from Dr. James Stuckmeyer. Dr. Stuckmeyer's independent medical evaluation clearly states Mr. Portwood was "asymptomatic" and "denied any previous treatment or trauma or symptomatology specific to the cervical spine until March of 2002." He goes on to state "Mr. Portwood informed this examiner that prior to the accident date of March of 2002 that he had absolutely no neck or shoulder complaints." Dr. Stuckmeyer opines Mr. Portwood was "completely asymptomatic in regard to this congenital fusion until the accident date in discussion."

**Gassen's** language warrants this Court review any alleged pre-existing disability be evaluated on the date of Mr. Portwood's primary injury. Dr. Stuckmeyer's report is clear the claimant had no symptoms associated with the neck until the primary injury. Mr. Portwood has stipulated that his neck condition was not symptomatic at the time of his primary injury. Further, he states his neck condition was not a factor in his ability to maintain employment and was not aware he had the condition at the time of his primary injury. Although **Messex** states that actual knowledge of a pre-existing disability is irrelevant, it does suggest claimant must have some symptomology associated with a pre-existing condition to rise to the level of compensability even if he knew of his pre-existing condition.

In this case, Mr. Portwood had no symptoms, and no affects to his work abilities due to neck condition before or at the time of his primary injury. Dr. Stuckmeyer's report support these findings. Further, he has no legal argument his neck was a hindrance or obstacle to his employment where he stipulated to the same. Thus, the facts of this case do not support Mr. Portwood having a measurable disability for which this Court can assess liability. Thus, not meeting the threshold of an actual or measurable disability, this Court need not answer the question of whether it arises to a seriousness as to constitute a hindrance or obstacle to his employment.

Therefore, this Court finds no measurable disability associated with the Mr. Portwood's neck condition and any liability for permanent partial benefits against the Second Injury Fund is denied.

Date: \_\_\_\_\_

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

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

**A true copy: Attest:**

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**Patricia "Pat" Secret**  
*Director*  
*Division of Workers' Compensation*