

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

Injury No. 09-039352

Employee: Janis Rellergert  
Employer: MFA, Inc./Break Time (Settled)  
Insurer: Liberty Mutual 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 October 23, 2014. The award and decision of Administrative Law Judge Vicky Ruth, issued October 23, 2014, 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 18<sup>th</sup> day of March 2015.

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

# AWARD

Employee:	Janis Rellergert	Injury No. 09-039352
Dependents:	N/A	
Employer:	MFA, Inc./Break Time (SETTLED)	Before the <b>DIVISION OF WORKERS' COMPENSATION</b> Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Additional Party:	Second Injury Fund Only	
Insurer:	Liberty Mutual Insurance Company (SETTLED)	
Hearing Date:	July 22, 2014	Checked by: VR/cs

## 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: May 30, 2009.
5. State location where accident occurred or occupational disease was contracted: Callaway County, Missouri.
6. Was above employee in the employ of above employer at the time of the 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 lifted a case of soda and turned to her right while leaning against a wall. She lifted, twisted, and reached with her left arm on top of the case of soda as she tried to attach the hoses for the machine. In doing so, she injured her left shoulder.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Part(s) of body injured by accident or occupational disease: left shoulder.
14. Nature and extent of any permanent disability: 25% of the left shoulder.
15. Compensation paid to-date for temporary disability: \$1,426.16.

16. Value necessary medical aid paid to date by employer/insurer? \$21,752.22.
17. Value necessary medical aid not furnished by employer/insurer? N/A.
18. Employee's average weekly wages: N/A.
19. Weekly compensation rate: \$180.00.
20. Method of wages computation: By agreement.

**COMPENSATION PAYABLE**

21. Amount of compensation payable from employer: Previously settled.
22. Second Injury Fund liability: Yes, for permanent total disability benefits of \$180/week beginning February 10, 2012, and continuing for Claimant's lifetime or until modified pursuant to statute.
23. Future medical awarded: N/A.

Said payments to begin immediately and to be payable and subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: R. L. Veit.

Employee: Janis Rellergert

Injury No. 09-039352

**FINDINGS OF FACT and RULINGS OF LAW:**

Employee:	Janis Rellergert	Injury No. 09-025577 and Injury No. 09-039352
Dependents:	N/A	
Employer:	MFA, Inc./Break Time (SETTLED)	Before the <b>DIVISION OF WORKERS' COMPENSATION</b> Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Additional Party:	Second Injury Fund Only	
Insurer:	Liberty Mutual Insurance Company (SETTLED)	
Hearing Date:	July 22, 2014	

On July 22, 2014, Janis Rellergert (the claimant) and the Second Injury Fund appeared in Jefferson City, Missouri, for a final award hearing regarding Second Injury Fund claims in Injury Nos. 09-025577 and 09-039352; separate Awards are being issued in each case. Claimant was represented by attorney R. L Veit. The Second Injury Fund was represented by attorney Maggie Ahrens. Claimant testified in person at the hearing and by deposition. Dr. David Volarich and Gary Weimholt testified by deposition. Claimant submitted a brief on August 11, 2014. The Second Injury Fund filed a brief on August 12, 2014, and the record closed at that time.

**STIPULATIONS**

The parties stipulated to the following:

Injury No. 09-025577

1. On or about March 17, 2009, Janis Rellergert (the claimant) was an employee of MFA, Inc./BreakTime (the employer) when she sustained an injury by accident to her low back. This accident occurred while Claimant was working in the course and scope of her employment with employer.
2. The employer was operating subject to the provisions of Missouri Workers' Compensation Law.
3. The employer's liability for workers' compensation was insured by Liberty Mutual Insurance Company.
4. The Missouri Division of Workers' Compensation has jurisdiction and venue in Callaway County is proper. For trial purposes, venue is also proper in Jefferson City, Missouri.
5. Notice is not an issue.
6. Claimant filed a Claim for Compensation within the time prescribed by law.
7. The employer/insurer provided medical aid in the amount of \$1,026.10.
8. Claimant's weekly compensation rate is \$180.00 for permanent partial disability benefits and for permanent total disability benefits.
9. No temporary disability benefits were provided.

Employee: Janis Rellergert

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10. Claimant reached maximum medical improvement on December 29, 2010.<sup>1</sup>

Injury No. 09-039352

1. On or about May 30, 2009, Janis Rellergert (the claimant) was an employee of MFA, Inc./BreakTime (the employer) when she sustained an injury by accident to her left shoulder. This accident occurred while Claimant was working in the course and scope of her employment with employer.
2. The employer was operating subject to the provisions of Missouri Workers' Compensation Law.
3. The employer's liability for workers' compensation was insured by Liberty Mutual Insurance Company.
4. The Missouri Division of Workers' Compensation has jurisdiction and venue in Callaway County is proper. For trial purposes, venue is also proper in Jefferson City, Missouri.
5. Notice is not an issue.
6. Claimant filed a Claim for Compensation within the time prescribed by law.
7. The employer/insurer provided medical aide in the amount of \$21,752.22.
8. Claimant's weekly compensation rate is \$180.00 for permanent partial disability benefits and for permanent total disability benefits.
9. Temporary disability benefits were provided in the amount of \$1,426.16.
10. Claimant reached maximum medical improvement on December 29, 2010.

**ISSUES**

The parties agreed that the issues to be resolved in each of these proceedings are as follows:

1. Whether Claimant is permanently and totally disabled, or
2. Nature and extent of Claimant's permanent partial disabilities.
3. Liability, if any, of the Second Injury Fund.

**EXHIBITS**

On behalf of Claimant, the following exhibits were entered into evidence without objection:

- |           |  |
|-----------|--|
| Exhibit 1 | <i>Claim for Compensation</i> , Injury No. 09-025577.          |
| Exhibit 2 | <i>Stipulation for Settlement</i> , Injury No. 09-025577       |
| Exhibit 3 | <i>Claim for Compensation</i> , Injury No. 09-039352.          |
| Exhibit 4 | <i>Stipulation for Settlement</i> . Injury No. 09-039352.      |
| Exhibit 5 | Deposition of Dr. David Volarich.                              |
| Exhibit 6 | <i>Curriculum Vitae</i> of Dr. Volarich, Deposition Exhibit 1. |
| Exhibit 7 | Letter from Dr. Volarich (3/28/2011), Deposition Exhibit 2.    |

<sup>1</sup> Claimant's brief references December 21, 2010, but during the hearing the parties agreed to a date of December 29, 2010.

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Exhibit 8	Letter from Dr. Volarich (9/01/2011), Deposition Exhibit 3.
Exhibit 9	Letter from Dr. Volarich (6/22/2011), Deposition Exhibit 4.
Exhibit 10	Medical Records from Dr. Volarich, Deposition Exhibit 5.
Exhibit 11	Report of Dr. Volarich (9/15/2011), Deposition Exhibit 6.
Exhibit 12	Report of Dr. Volarich (4/03/2013), Deposition Exhibit 7.
Exhibit 13	Deposition of Gary Weimholt.
Exhibit 14	<i>Curriculum Vitae</i> of Gary Weimholt, Deposition Exhibit 1.
Exhibit 15	Correspondence to Gary Weimholt, Deposition Exhibit 2.
Exhibit 16	Report of Gary Weimholt, Deposition Exhibit 3.

On behalf of the Second Injury Fund, the following exhibit was received into the record:

Exhibit A Deposition of Claimant.

*Note: All marks, handwritten notations, highlighting, or tabs on the exhibits were present at the time the documents were admitted into evidence. All depositions were admitted subject to any objections contained therein. Unless noted otherwise, the objections are overruled.*

#### FINDINGS OF FACT

Based on the above exhibits and the testimony presented at the hearing, I make the following findings:

1. Claimant is currently 65 years of age; her date of birth is November 1, 1948. At the time of the last injury, in May 2009, she was 60 years old. In June 2014, Claimant moved from Tebbetts, Missouri, to St. Charles, Missouri.
2. Claimant started the 12<sup>th</sup> grade in school but did not graduate and does not have a GED. In 1977 she attended "beauty college," but has not had any subsequent training or education.
3. Claimant worked for the Break Time Company (the employer) for approximately two years. She worked approximately 30 to 32 hours per week.<sup>2</sup> The last day she worked for the employer was May 30, 2009.
4. Claimant's job with the employer required her to stand for all or most of her shift. Her duties including running the cash register and stocking shelves, which required her to lift items. She also performed general cleaning tasks and filled up the ice machine.<sup>3</sup>
5. On March 17, 2009, Claimant sustained an injury by accident arising out of and in the course and scope of employment. The accident occurred when Claimant backed up from the cash register, tripped over a step stool, and fell. She landed on her buttocks on the concrete floor. Claimant injured her low back and body as a whole in the accident.

<sup>2</sup> Exh. A, p. 22.

<sup>3</sup> *Id.*

6. On April 14, 2009, Claimant saw Dr. Janet Elliot for complaints of back and tailbone pain from the fall. The doctor noted that the x-ray of the lumbar spine was negative for fracture, although degenerative changes were noted. Specifically, the x-ray report found 1) no acute fracture; 2) mild degenerative osteoarthritis in the lumbar spine; and 3) severe degenerative osteoarthritis in the lower thoracic spine.<sup>4</sup> Dr. Elliot's assessment was "history of contusion of the ribs, contusion of the low back."<sup>5</sup> Claimant's rib symptoms subsequently resolved.
7. On May 30, 2009, Claimant sustained another injury by accident arising out of and in the course and scope of her employment. This accident occurred when Claimant lifted a case of soda and turned to her right while leaning against a wall for support. She lifted, twisted, and reached with her left arm on top of the case of soda as she tried to attach the hoses for the machine. In doing so, she injured her left shoulder and arm.
8. On June 3, 2009, Claimant saw Dr. Elliot for this shoulder/arm injury.<sup>6</sup> Dr. Elliot noted that Claimant had pain generalized in her shoulder, with complete range of motion. There was negative arm drop with no crepitus, and no AC enlargement.<sup>7</sup> The x-rays of the left and right shoulders revealed no acute fracture or dislocation, although degenerative changes were present, greatest at the left AC joint.<sup>8</sup>
9. As a result of the May 2009 accident, Claimant was diagnosed with impingement and rotator cuff fraying. On July 29, 2009, Dr. Snyder examined Claimant for an evaluation of her May 2009 injury; he recommended an MRI.<sup>9</sup> The MRI revealed the following:
  - (1) subacromial and subdeltoid bursitis with some tendinopathy and bursal-sided fraying of the distal supraspinatus; no significant retraction or discrete tear identified.
  - (2) mild degenerative changes of the acromioclavicular joint with lateral down-sloping of the acromion, which could be contributing to some impingement.
  - (3) degenerative changes of the glenoid with some degeneration of the posterior labrum.<sup>10</sup>
10. Claimant underwent significant conservative treatment. On December 9, 2009, Dr. Snyder noted that Claimant had reached a plateau in her conservative treatment, including multiple cortisone injections, anti-inflammatories, and rehabilitation.<sup>11</sup> Claimant still had trouble lifting and with overhead activities. The doctor recommended surgery to treat the partial tear of the rotator cuff.
11. On January 29, 2010, Dr. Michael Snyder performed a left shoulder surgery on Claimant.

<sup>4</sup> Exh. 10, Bates p. 00013.

<sup>5</sup> Exh. 10, Bates p. 00011.

<sup>6</sup> Exh. 10, Bates p. 00003.

<sup>7</sup> Exh. 10, Bates p. 00008.

<sup>8</sup> Exh. 10, Bates p. 000012.

<sup>9</sup> Exh. 10, Bates pp. 000275-000276.

<sup>10</sup> Exh. 10, Bates pp. 000277-000278.

<sup>11</sup> Exh. 10, Bates p. 000265.

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The surgery consisted of an arthroscopic subacromial decompression and debridement and repair of a partial rotator cuff tear, supraspinatus tendon.<sup>12</sup> Dr. Snyder's post operative diagnosis was partial rotator cuff tear, supraspinatus tendon and type 3 acromion with impingement.

12. On March 29, 2010, Dr. Snyder provided a cortisone injection to Claimant's shoulder. He also noted that she could return to work with certain restrictions.<sup>13</sup>
13. Dr. Snyder's notes from a May 10, 2010 visit indicate Claimant presented for a follow-up visit on her shoulder, and that she was "back to 100%. She said her shoulder feels fine. She is lifting it, using it, and having no problems whatsoever."<sup>14</sup> The doctor's examination showed full passive and active range of motion, negative impingement, and normal strength. Dr. Snyder gave Claimant a "full release, and stated that she could return to work without restrictions."<sup>15</sup>
14. On May 24, 2010, Claimant saw Dr. William Blake Rodgers for low back pain/ sacral region pain due to a fall on March 17, 2010.<sup>16</sup> Claimant completed a pain diagram, upon which she noted pain in the neck, left shoulder, left buttocks/low back area, and left lower extremity below the knee.<sup>17</sup> Claimant did not note any pain that appeared to radiate down from the back or buttocks area. The doctor ordered an MRI, which was performed on June 7, 2010, found degenerative changes of the SI joints; multilevel degenerative disc disease with canal stenosis at L4-5, with some lesser degrees of narrowing at L3-4; and some neuroforaminal narrowing at L4-5 with some minor degrees of encroachment at L5-S1.<sup>18</sup>
15. On August 5, 2010, Claimant saw Dr. John Miles, noted the following:

Mrs. Rellergert has multilevel degenerative change that was exacerbated by her work place incident where she had a low energy fall to the ground. That was mitigated a bit by sliding down a wall.... I think fundamentally this work place incident represents an exacerbation of an underlying condition and hence would not really be a fully compensable injury under the current Missouri statues [sic]. She has no job to return to as she's been terminated at her place of employment. I think she could return to full unrestricted duty at work.<sup>19</sup>

#### *Pre-existing Injuries*

16. Claimant has a pre-existing injury to her right knee. She underwent a series of cortisone injections, but these did not help her condition. On May 4, 2006, she underwent a total

<sup>12</sup> Exh. 10, Bates p. 000040.

<sup>13</sup> Exh. 10, Bates p. 000252.

<sup>14</sup> Exh. 10, Bates p. 000249.

<sup>15</sup> Exh. 10, Bates p. 000249.

<sup>16</sup> Exh. 10, Bates pp. 000598-000599.

<sup>17</sup> Exh. 10, Bates p. 000622.

<sup>18</sup> Exh. 10, Bates pp. 000344-000345. See also Exh. 10, Bates pp. 000601-000602.

<sup>19</sup> Exh. 10, Bates p. 000020.

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knee replacement.<sup>20</sup> Claimant subsequently returned to work without doctor-imposed restrictions and with "minimal swelling and pain."<sup>21</sup>

17. Claimant's other pre-existing disability is to her low back/tailbone. Claimant alleges she suffered from some low back pain and discomfort after a fall in 1991. Medical records from March 2008 indicate Claimant complained of back pain and coccydynia.<sup>22</sup> An MRI of the lumbar spine revealed mild asymmetrical disk bulging at several levels.<sup>23</sup> Claimant treated with some pain medication initially, but received no other treatment.<sup>24</sup> Claimant did not have restrictions on her low back.<sup>25</sup>

*Independent Medical Evaluation - Dr. Volarich*

18. On or about September 15, 2011, Dr. David Volarich examined Claimant for an Independent Medical Examination (IME).<sup>26</sup> As to the September 2009 injury, Claimant reported that she "continues to have pain in her tailbone that radiates into her right buttock and posteriorly down her thigh to her knee."<sup>27</sup> Claimant reported that she could sit for about 90 minutes, stand for three hours, but walk only about a quarter of a mile before she has to change positions. She does not carry more than ten pounds. Claimant indicated that laying down causes more pain and her symptoms increase with riding in a car. Claimant acknowledged that she had difficulties with her back before the March 2009 incident, but she stated that her symptoms had worsened considerably since the March 2009 accident. Dr. Volarich diagnosed Claimant with "[a]ggravation lumbar syndrome including degenerative disc disease and degenerative joint disease L3-4, L4-5, and L5-S1 causing recurrent right leg radicular symptoms – S/P non-operative treatment."<sup>28</sup> Dr. Volarich rated Claimant's permanent partial disability from this injury as 20% of the body as a whole.
19. As to the May 2009 incident, Dr. Volarich recorded that Claimant continues to have problems with her left shoulder. When she hyperextends her left shoulder she has pulling and tenderness along her posterior shoulder girdle. She has pain with movement or reaching above her shoulder or head. She has pain with internal and external rotation. Dr. Volarich diagnosed Claimant with left shoulder internal derangement (impingement and rotator cuff fraying) – S/P arthroscopic subacromial decompression, acromioplasty, and debridement of the rotator cuff.<sup>29</sup> The doctor provided a rating of 40% of the left shoulder.
20. Dr. Volarich noted that Claimant has a pre-existing right knee problem, for which she

<sup>20</sup> Exh. 10, Bates p. 000558-000559.

<sup>21</sup> Exh. 11.

<sup>22</sup> Exh. 10, Bates p. 000235.

<sup>23</sup> Exh. 10, Bates p. 000237.

<sup>24</sup> Exh. A, p. 35.

<sup>25</sup> Exh. A, p. 42.

<sup>26</sup> Exh. 11.

<sup>27</sup> Exh. 11, p. 2 (Bates p. 000583).

<sup>28</sup> Exh. 11, p. 10 (Bates p. 000591).

<sup>29</sup> *Id.*

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underwent a right total knee arthroplasty on May 4, 2006. Dr. Volarich recorded that Claimant stated that after surgery, her right knee did much better and she had minimal swelling and pain, although she did take nonsteroidal anti-inflammatories on a regular basis. Dr. Volarich rated this condition as 65% of the right knee.

21. Dr. Volarich also diagnosed Claimant with chronic lumbar syndrome secondary to degenerative disease and degenerative joint disease with bulges L3-4, L4-5, and L5-S1 causing intermittent lumbar and right leg radicular pain."<sup>30</sup> He provided a rating of 25% of the body as a whole for this condition.
22. Dr. Volarich opined that the combination of Claimant's disabilities creates a substantially greater disability than the simple sum or total of each separate injury/illness, and a loading factor should be added. He noted that he was uncertain if Claimant will be able to go back to work, although he also noted that if vocational assessment is able to identify a job for which she is suited, he has no objection with her attempting to return to work based on the limitations he imposed. If vocational assessment is unable to identify a job for which she is suited, then he believes Claimant is "permanently and totally disabled as a direct result of the work related injuries of 3/17/09 and 5/30/09 in combination with each other as well as in combination with her preexisting medical conditions."<sup>31</sup>
23. Dr. Volarich imposed numerous restrictions related to Claimant's primary and pre-existing injuries.<sup>32</sup> As to the left shoulder (May 2009 injury), these restrictions include (among others) avoiding overhead use of the arm and prolonged use of the left arm away from the body; minimizing pushing, pulling, and traction maneuvers; not handle weights greater than about three pounds with the left arm extended away from the body or overhead. He noted that she can handle weight to tolerance with the left arm, but he would generally limit it 15 pounds with the left arm alone. Dr. Volarich imposed the following restrictions for the March 2009 injury of the low back: avoid bending, twisting, lifting, pushing, pulling, carrying and climbing; not handle any weight greater than 30 pounds; not handle weight over her head or away from her body and not carry weight over long distances or over uneven terrain; avoid remaining in a fixed position for more than about 30 minutes and should change positions frequently and rest when needed.
24. For the pre-existing spine condition, Dr. Volarich offered that following restrictions: bend, twist, push, pull, carry, climb to tolerance; handle weights to tolerance; handle weights over her head or away from her body, or carry weight over distances or uneven terrain, to tolerance; maintain fixed positions to tolerance and change positions and rest as needed.
25. Dr. Volarich also imposed the following restrictions with regard to her lower extremities: avoid all stooping, squatting, crawling, kneeling, pivoting, climbing, and all impact maneuvers; avoid uneven terrain, slopes, steps, and ladders; handle weight to tolerance; limit prolonged weight bearing to 60 minutes or to tolerance.

<sup>30</sup> *Id.*

<sup>31</sup> Exh. 11, p. 12 (Bates p. 000593).

<sup>32</sup> Exh. 10, pp. 13-14 (Bates pp. 000594 and 000595).

*Vocational Evaluation – Gary Weimholt*

26. On October 28, 2012, Mr. Gary Weimholt performed a Vocational Evaluation of Claimant.<sup>33</sup> Mr. Weimholt is a Certified Disability Management Specialist; he interviewed Claimant and reviewed various medical records. Mr. Weimholt opined that Claimant has a total loss of access to the open competitive labor market. He believes there is “no reasonable expectation that an employer, in the normal course of business, would hire her for any position, or that she would be able to perform the usual duties of any job that she is qualified to perform.”<sup>34</sup> He indicated that the conditions that resulted in her loss of labor market access and total vocational disability are the March 2009 injury when Claimant aggravated her lumbar syndrome of degenerative disc disease, degenerative joint disease, with recurrent right leg radicular symptoms; the May 2009 injury to the left shoulder; and the combination of these conditions with her pre-existing chronic lumbar syndrome, degenerative disease and the right total knee replacement. Mr. Weimholt further noted that “[i]n view of her age, education and semi-skilled work experiences, combined with her work restrictions and limitations, I do not believe she can compete for or be hired in any occupation for which she is qualified.”<sup>35</sup>

27. During his deposition, Mr. Weimholt was asked whether a person needs to be able to work 40 hours per week to be employable in the open labor market. Mr. Weimholt responded as follows:

Well, I think employment in the open labor market would include the expectation that an employer who needs someone 40 hours a week - - most full-time work is going to be in that range of 34 to 40 hours a week. Some exceed that. Some people in convenience stores pull double shifts, so you can get beyond 40 hours a week. I think if a person is capable only of 20 hours at best, then they're not really fully employed in the open competitive labor market.<sup>36</sup>

28. Upon questioning, Mr. Weimholt also indicated that he did not know if Claimant could “get a job where she works 20 hours a week.”<sup>37</sup>

*Current Complaints*

29. Claimant continues to experience pain and ongoing difficulties from both of these injuries in addition to her preexisting knee condition. She continues to have pain in her tailbone that radiates into her right buttock and posteriorly down her thigh to her knee. Her symptoms increase with riding in a car at which point she has more low back and tailbone discomfort. She can sit for about 90 minutes, stand for about three hours, but walk only a quarter of a mile before she has to change positions. She can carry no more than 10

<sup>33</sup> Exh. 16.

<sup>34</sup> Exh. 16, p. 15 (Bates p. 000640).

<sup>35</sup> Exh. 16, p. 16 (Bates p. 000641).

<sup>36</sup> Exh. 13, p. 40.

<sup>37</sup> Exh. 13, pp. 40-41.

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pounds. She cannot have overhead shoulder movement without pain in that area.

30. Claimant has not been able to return to her previous employment since her last work related injury with Employer. She is currently receiving Social Security benefits. The parties stipulated that Claimant reached maximum medical improvement (MMI) on December 21, 2010.

*Stipulations for Compromise Settlement*

31. Claimant settled her case against the employer/insurer in Injury Number 09-025577 for 5% permanent partial disability of the body as a whole referable to the low back.
32. Claimant settled her case against the employer/insurer in Injury Number 09-039352 for 25% permanent partial disability of the left shoulder.

**CONCLUSIONS OF LAW**

Based upon the findings of fact, the stipulations, and the applicable law, I find the following:

Under Missouri Workers' Compensation law, the claimant bears the burden of proving all essential elements of his or her workers' compensation claim.<sup>38</sup> The employee must prove by a preponderance of credible evidence all material elements of his or her claim, including Second Injury Fund liability.<sup>39</sup> Proof is made only by competent and substantial evidence, and may not rest on speculation.<sup>40</sup>

**Issue 1: Whether claimant is permanently and totally disabled, or**

**Issue 2: Nature and extent of permanent partial disability or permanent total disability.**

**Issue 2: Second Injury Fund liability, if any.**

Claimant seeks an Award of permanent total disability against the Second Injury Fund. In the alternative, Claimant argues that if the Tribunal finds that she is permanently and totally disabled due to the last injury alone, then she is still entitled to permanent partial disability benefits against the Second Injury Fund.<sup>41</sup>

Under Missouri Workers' Compensation law, the claimant bears the burden of proving all essential elements of his or her workers' compensation claim.<sup>42</sup> Proof is made only by

<sup>38</sup> *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo. App. W.D. 1990); *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo. App. 2002).

<sup>39</sup> *Meilves v. Morris*, 422 S.W.2d 335, 399 (Mo. 1968).

<sup>40</sup> *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. W.D. 1974).

<sup>41</sup> If claimant is permanently and totally disabled due to the last injury alone, the Second Injury Fund bears no liability. *Roller v. Treasurer of the State of Mo.*, 935 S.W.2d 739, 742-743 (Mo.App. 1996).

<sup>42</sup> *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo.App. W.D. 1990); *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo. App. 2002).

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competent and substantial evidence, and may not rest on speculation.<sup>43</sup> Medical causation not within lay understanding or experience requires expert medical evidence.<sup>44</sup> When medical theories conflict, deciding which to accept is an issue reserved for the determination of the fact finder.<sup>45</sup>

In addition, the fact finder may accept only part of the testimony of a medical expert and reject the remainder of it.<sup>46</sup> Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony that it does not consider credible and accept as true the contrary testimony given by the other litigant's expert.<sup>47</sup>

Section 287.020.7, RSMo, provides that "total disability" is the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident.<sup>48</sup> The main factor in this determination is whether, in the ordinary course of business, any employer would reasonably be expected to employ the employee in this present physical condition and reasonably expect him to perform the duties of the work for which he was hired.<sup>49</sup> The test for permanent and total disability is whether the claimant would be able to compete in the open labor market.<sup>50</sup> When the claimant is disabled by a combination of the work-related event and pre-existing disabilities, the responsibility for benefits lies with the Second Injury Fund.<sup>51</sup> If the last injury in and of itself renders a claimant permanently and totally disabled, the Second Injury Fund has no liability and the employer is responsible for the entire compensation.<sup>52</sup>

In order to find permanent total disability against the Second Injury Fund, it is necessary that the employee suffer from a permanent partial disability as the result of the last compensable injury, and that the disability has combined with a prior permanent partial disability to result in total disability.<sup>53</sup>

Where a pre-existing permanent partial disability combines with a work-related permanent partial disability to cause permanent total disability, the Second Injury Fund is liable for compensation due the employee for the permanent total disability after the employer has paid the compensation due the employee for the disability resulting from the work-related injury.<sup>54</sup> In determining the extent of disability attributable to the employer and the Second Injury Fund, an administrative law judge must determine the extent of the compensable injury first.<sup>55</sup> If the compensable injury results in permanent total disability, no further inquiry into Second Injury

<sup>43</sup> *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo.App. W.D. 1974).

<sup>44</sup> *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596, 600 (Mo. banc 1994).

<sup>45</sup> *Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 977 (Mo.App. 1984).

<sup>46</sup> *Cole v. Best Motor Lines*, 303 S.W.2d 170, 174 (Mo.App. 1957).

<sup>47</sup> *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo.App. 1992); *Hutchinson v. Tri State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo. App. 1986).

<sup>48</sup> See also *Houston v. Roadway Express, Inc.*, 133 S.W.3d 173, 178 (Mo.App. S.D. 2004).

<sup>49</sup> *Reiner v. Treasurer of the State of Missouri*, 837 S.W.2d 363, 367 (Mo.App. 1992).

<sup>50</sup> *Id.*

<sup>51</sup> Section 287.200.1, RSMo.

<sup>52</sup> *Nance v. Treasurer of Missouri*, 85 S.W.3d 767 (Mo.App. W.D. 2003).

<sup>53</sup> Section 287.220.1, RSMo.; *Brown* at 482; *Anderson* at 576.

<sup>54</sup> *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 366 (Mo.App. 1992).

<sup>55</sup> *Roller v. Treasurer of the State of Mo.*, 935 S.W.2d 739, 742-743 (Mo.App. 1996).

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Fund liability is made.<sup>56</sup> Therefore, it is necessary that the employee's last injury be closely evaluated and scrutinized to determine if it alone results in permanent total disability and not permanent partial disability.

Various factors have been considered by courts attempting to determine whether or not an employee is permanently totally disabled. It is not necessary that an injured employee be rendered, or remain, wholly or completely inactive, inert or helpless in order to be entitled to receive compensation for permanent total disability.<sup>57</sup> An employee's ability or inability to perform simple physical tasks such as sitting,<sup>58</sup> bending, twisting,<sup>59</sup> and walking<sup>60</sup> may prove that the employee is permanently totally disabled. An employee's age may also be taken into consideration.<sup>61</sup>

On May 30, 2009, Claimant sustained a compensable injury to her left shoulder. This injury occurred during the course and scope of her employment with the employer. I find that as a result of the May 2009 injury, Claimant sustained a permanent partial disability (PPD) of 25% of the left shoulder. Claimant also has several pre-existing disabilities. On March 17, 2009, Claimant sustained a work-related injury to her low back; this injury resulted in PPD of 5% of the body as a whole referable to the back. In addition, Claimant had PPD of 7.5% of the body as a whole for a back condition that pre-existed the May 2009 work injury (the primary injury). Claimant also had a PPD of 32.5% of the right knee.

Claimant argues that she is permanently and totally disabled due to the combination of her primary (May 2009) work injury to her left shoulder in combination with her March 2009 work injury to her back and her other pre-existing conditions to her back and her right knee. The Second Injury Fund suggests that Claimant is not permanently and totally disabled, or in the alternative, that she is permanently and totally disabled due to her work injury and her pre-existing conditions, combined with her subsequent injuries and/or deterioration of her pre-existing conditions.

After considering all of the evidence, I find that Claimant is permanently and totally disabled and that she is permanently and totally disabled due to the combination of her primary injury (May 2009) to her left shoulder in combination with her pre-existing conditions (which include her March 2009 injury to her back and her pre-existing conditions or injuries to her back and her right knee). In making this determination, I find the opinions of Dr. Volarich and Mr. Weimholt to be credible and persuasive on this issue. I will note, however, that I have not relied upon Mr. Weimholt's opinion regarding an employee's ability to work only part-time and

<sup>56</sup> *Id.*

<sup>57</sup> *Maddux v. Kansas City Public Service Co.*, 100 S.W.2d 535 (Mo. 1936); *Grgic v. P & G Const.*, 904 S.W.2d 464 (Mo.App. E.D. 1995); *Julian v. Consumers Markets, Inc.*, 882 S.W.2d 274 (Mo.App. S.D. 1994); *Groce v. Pyle*, 315 S.W.2d 482 (Mo.App. 1958).

<sup>58</sup> *Brown v. Treasurer of Missouri*, 795 S.W.2d 479 (Mo.App. E.D. 1990).

<sup>59</sup> *Sprung v. Interior Const. Service*, 752 S.W.2d 354 (Mo.App. E.D. 1988).

<sup>60</sup> *Keener v. Wilcox Elec. Inc.*, 884 S.W.2d 744 (Mo.App. W.D. 1994).

<sup>61</sup> *Tiller v. 166 Auto Auction*, 941 S.W.2d 863 (Mo.App. S.D. 1997); *Reves v. Kindell's Mercantile Co., Inc.* 793 S.W.2d 917 (Mo.App. S.D. 1990). See also *Kowalski v. M-G Metals and Sales, Inc.*, 631 S.W.2d 919 (Mo.App. S.D. 1982).

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the effect this has on the employee's ability to compete in the open labor market.<sup>62</sup> I do not adopt Mr. Weimholt's apparent belief that an employee who can only work part-time is not employable in the open labor market. Nevertheless, I find that *this* claimant, based on her primary injury **in combination** with her pre-existing injuries, her work restrictions and limitations, along with her age, her past work history and her limited skill set, render her permanently and totally disabled. I also specifically find that Claimant was a credible and convincing witness. Since the permanent and total disability is the result of a combination of Claimant's primary and pre-existing disabilities, the Second Injury Fund is therefore liable for payment of permanent total disability benefits.

Having established the responsibility of the Second Injury Fund for permanent total disability exposure under this claim, there is yet the issue regarding the amount and timing of the payments under the statute. The parties agreed that Claimant reached maximum medical improvement on December 29, 2010. Claimant and the employer/insurer settled the primary injury for permanent partial disability of 25% of the left shoulder, which represents 58 weeks of disability. Thus, the liability of the employer/insurer for permanent partial disability commences on December 30, 2010, and continues through February 9, 2012. I find the Second Injury Fund is liable for weekly payments of \$180.00, beginning February 10, 2012, and continuing for Claimant's lifetime or until modified pursuant to statute. Since Claimant's rates for permanent partial disability and permanent total disability are the same, there is no rate differential.

Any pending objections not expressly ruled on in this Award are overruled.

This Award is subject to a lien in the amount of 25% of the payments hereunder in favor of R. L. Veit for necessary legal services rendered to Claimant.

Made by: Vicky Ruth  
Vicky Ruth  
Administrative Law Judge  
Division of Workers' Compensation

I certify that on 10/23/14,  
I delivered a copy of the foregoing award  
to the parties to the case. A complete  
record of the method of delivery and date  
of service upon each party is retained with  
the executed award in the Division's case file.

By: CP



<sup>62</sup> In his deposition, Dr. Weimholt testified that he believes that employment in the open labor market would include the expectation that an employee is able to work full-time, which he suggested was generally 34 to 40 hours per week.