

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

Injury No. 11-076995

Employee: Rhonda Sartin
Employer: Manpower, Inc. (Settled)
Insurer: Insurance Company of the State of PA (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ We have read the briefs, reviewed the evidence, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision reversing the September 25, 2014, award and decision of the administrative law judge.

Introduction

The parties asked the administrative law judge (ALJ) to resolve the following issues: (1) medical causation; (2) nature and extent of permanent partial disability; and (3) Second Injury Fund liability for permanent total disability.

The administrative law judge rendered the following findings and conclusions: (1) the September 7, 2011, injury was caused by employee's work activities; (2) employee suffered a 12.5% permanent partial disability from the last injury; and (3) awarded permanent total disability benefits from the Second Injury Fund.

The Second Injury Fund filed a timely Application for Review with the Commission, challenging the award of permanent partial disabilities against the Second Injury Fund. For the reasons set forth herein, we reverse the award of the administrative law judge.

Findings of Fact

Employee was 51 years old at the time of the primary injury on September 7, 2011. She is a high school graduate. Her work history includes working in the poultry industry as an eviscerator, hanger and farm worker, and twenty years in the shoe and boot industry where she primarily worked as a boot cleaner. Employee has no history of light duty or sedentary work.

Preexisting Conditions

In 2002, employee had surgery on both of her shoulders. On February 19, 2002, her left shoulder was operated on to repair a rotator cuff tear. Employee also suffered impingement syndrome in the left shoulder. On June 28, 2002, her right shoulder was operated on to repair a labral tear, anterior instability, and impingement syndrome. These injuries were related to her employment as a boot cleaner.

¹ All statutory references are to the Revised Statutes of Missouri (2014), unless otherwise indicated.

Employee: Rhonda Sartin

- 2 -

Employee returned to her job as a boot cleaner after these surgeries. She was paid a piece rate based on the number of boots she finished as opposed to an hourly rate. Before the surgeries, she was able to finish enough pieces to make a living. After the surgeries she was not able to finish enough pieces in a day to make a living, because she could not do the fast work with her hands and arms any longer. The motion and repetition caused inflammation into the palms of her hands up to the sides of her neck. Sometimes she would not be able to turn her head for two or three days. Her employer paid her minimum wage, because she was not able to complete enough pieces to earn a rate equivalent to minimum wage.

Employee left her job as a boot cleaner approximately one year after her shoulder surgeries because she was no longer able to make more than minimum wage. Employee sought work that involved more lifting and less handling of objects. Heavy lifting did not bother employee, and she initially took a job at IDF doing "excessively heavy work" without problems because the work was not repetitive.

Employee received an average of one cortisone injection a year to reduce inflammation and alleviate pain in her shoulders. Employee continues to have trouble with repetitive work with her hands and arms, and she is limited in her reaching and overhead movements.

Primary Injury

In September 2011, employee was working as a material handler/fabricator for EFCO. Employee was placed at EFCO by Manpower, Inc., a temporary placement service. As part of her duties, employee would lift heavy door and window frames. Some weighed between 38 and 42 pounds, while others weighed over 100 pounds and would require two people to lift.

On or about September 7, 2011, employee began to feel pain in her back near her spine when she breathed. In the weeks prior to the onset of pain, employee had been lifting frames by herself. After three to four days, the pain became so bad she could barely breathe. Employee went to the Emergency Room in Cassville, Missouri. Employee was diagnosed with a thoracic strain, given pain medication, and told to stay off work for two days.

When employee called to report this to her employer, she was told to see Dr. James Jordan that day. Because Dr. Jordan was not available that day, employee saw a nurse practitioner who told her to return to work. Employee returned to work the next morning to the same job at EFCO lifting dies by herself. Shortly thereafter, employee told her supervisor that she could not work any longer due to "horrible, excruciating pain."

Employee was eventually able to see Dr. Jordan. Dr. Jordan advised employee she should avoid heavy lifting and limit herself to light duty work but did not issue any restrictions. He released employee as having reached maximum medical improvement without permanent restrictions (MMI) on October 28, 2011. Dr. Jordan did recommend that employee return to a position where she could team lift, but EFCO discharged employee the same day she was released at MMI.

Employee: Rhonda Sartin

- 3 -

After EFCO's termination, Manpower, Inc. placed employee in a light duty position with a charitable organization called Crosslines. In this position, employee was responsible for removing empty hangers from clothing racks and folding linens. Employee performed this work for a little more than a week. Employee testified that while the job was self-paced and not physically demanding, she was unable to perform the work because of pain radiating from the center of her spine all the way down to her fingertips. Employee has not worked since she left her employment at Crosslines.

Employee testified that after Dr. Jordan's release, she was getting "worse and worse." She sought treatment with Dr. Horace Peterson, who treated employee with manipulative therapy, anti-inflammatories, and pain medications. Employee's back did not improve, and Dr. Peterson advised employee her back would not improve any further. Dr. Peterson prescribed carbamazepine, hydrodone, and naproxen. Employee was not taking any of these medications prior to the September 2011 work injury. Since the 2011 injury she has received a cortisone injection approximately every six months. Employee has not received surgery or a surgical recommendation for her back.

Employee settled her claim against employer/insurer for the primary injury for permanent partial disability at a rate of 12.5% of the body as a whole.

Employee's current physical condition

At the hearing, employee described her current symptoms from the primary injury. She stated that she can barely turn her head due to neck soreness and stiffness and described pain from her shoulders across her back, pain in her hips, and a burning sensation in her knees. Employee has to lay down multiple times a day, between 20-30 minutes. She did not need to lay down during the day before her primary injury. Employee has difficulty sitting or standing for more than 30 minutes since the primary injury and has to alternate. She had no difficulty standing for long periods of time prior to the work injury, and was able to sit for longer periods of time. During the hearing, employee had to request a break so she could move around because she was having trouble concentrating on the questions she was being asked due to her pain and also expressed that she was in pain from sitting during a deposition.

Employee continues to take carbamazepine, hydrodone, and naproxen. The medication helps her pain and burning sensations "a little." Employee testified that the side effects from the carbamazepine include excessive fatigue and memory loss, and related that she will forget the names of well-known friends, where she placed items five minutes after she set them down, what she is trying to say by the end of a sentence, and she has trouble with reading comprehension. The hydrocodone makes employee drowsy and lethargic. Employee also has trouble sleeping due to pain, which makes it harder to function the next day. Employee did not have trouble sleeping before the 2011 injury. Employee does not lift more than 5 to 6 pounds since the injury, where before she was "lifting a lot of weight" at work.

Overall, employee stated that whereas she used to be "active and bouncy and [a] go-getter" before the 2011 injury, it is now hard to get out of a chair and she spends her

Employee: Rhonda Sartin

- 4 -

day watching television and playing on her phone and that on a typical day “I get out of bed and I do nothing.”

Expert Testimony

Dr. Mitchell Mullins

Dr. Mitchell Mullins evaluated employee at the request of her legal counsel on October 8, 2012, and authored a report expressing his findings. Dr. Mullins opined that the 2011 work injury resulted in an acute thoracic strain and secondary development of chronic myofascial pain syndrome. He noted that employee had a pre-existing condition that had required surgeries on both shoulders in 2002, and that this condition was a hindrance or obstacle to employment prior to her primary injury. At his deposition, Dr. Mullins stated that these were “pretty major surgeries” but “she seemed to recover from those fairly well.”

Dr. Mullins restricted employee’s frequent lifting to 10 pounds with nothing repetitive, 20 pounds occasionally, alternate sitting and standing to relieve pain or discomfort, and provided several postural and manipulative restrictions on employee. Dr. Mullins did not relate any of these restrictions to any particular condition. At his deposition, Dr. Mullins stated that all of employee’s medications and their side effects were attributable to employee’s primary injury.

Dr. Mullins provided permanent partial disability (PPD) ratings of 16% to the body as a whole for the last work injury to employee’s spine, 20% to the right shoulder for the preexisting condition, and 16% to the left shoulder for the preexisting condition. Dr. Mullins opined that “[t]he combination of [employee’s] impairments creates a substantially greater impairment in the total of each separate injury and [a] loading factor of 10% should be added.” Dr. Mullins also opined that employee was “incapable of competing in the manual labor market as she is and should be considered permanently disabled.”

When asked if employee could return to a manual labor job if the only injury she had were the last injury, Dr. Mullins testified that it was “very hard to say” and that he really could not say “one way or another.”

Phillip Eldred

Mr. Phillip Eldred, a certified rehabilitation counselor, also evaluated employee at the request of her legal counsel. This evaluation took place on March 12, 2013. Mr. Eldred interviewed employee, conducted vocational testing, and reviewed records documenting employee’s medical treatment.

Regarding employee’s preexisting shoulder problems, Mr. Eldred concluded that employee had an impairment “that was vocationally disturbing such as to constitute a hindrance or obstacle to employment before September 7, 2011.”

Regarding the primary injury, Mr. Eldred noted that employee was working before the injury without pain medications or accommodations. He noted that Dr. Jordan had placed no restrictions on employee, that Dr. Mullins’ restrictions put employee at the

Employee: Rhonda Sartin

- 5 -

“less than sedentary” level, and that Dr. Robert Paul had placed employee on light-to-sedentary restrictions.²

Adopting Dr. Mullins restrictions, Mr. Eldred concluded that it was “highly unlikely that any reasonable employer in the normal course of business would hire [employee] for competitive, gainful employment.” Mr. Eldred opined that employee was permanently and totally disabled due to a combination of her September 2011 back injury and her preexisting shoulder conditions. Regarding employee’s need to lay down, Mr. Eldred testified that this would depend on the timing and “the employer’s generosity or benevolence.” He noted that employee could not perform any of her past jobs, had no transferable skills to a sedentary level, and that her pain and narcotic usage would make vocational retraining difficult.

When asked “when a patient comes in with multiple injuries, do you ever just look at one injury in isolation in assessing their vocational potential,” Mr. Eldred stated “No, you look at the whole person.”

James England

Mr. James England, a certified rehabilitation counselor, was asked by the Second Injury Fund to assess employee’s employability.

Mr. England noted employee’s pre-existing shoulder condition limited her in reaching and overhead movements. He indicated that this condition could have been a hindrance or obstacle to employment before the primary injury, but noted that it had not prevented employee from working full time and that employee had not been placed on any permanent work restrictions for the preexisting shoulder condition.

Mr. England also noted that employee’s treating physicians placed no restrictions, and that under this lack of restrictions employee could return to her past work. If applying Dr. Paul’s and Dr. Mullin’s restrictions, employee could work at the sedentary to light level, but probably could not perform the full range of light-level labor. Mr. England opined that certain security jobs, cashier positions, customer service jobs, and sales work would fall within these restrictions if the employer would accommodate employee’s need to alternate sitting and standing.

Mr. England then noted that if employee’s subjective complaints of pain, only being able to lift five to six pounds, her inability to stand for more than fifteen minutes, and her need to lie down were all true, she was not capable of doing any work. None of these complaints were present prior to the September 2011 injury. Mr. England opined that, if true, these complaints would render her totally disabled, “regardless of whether she had even had any shoulder problems.” He also noted that employee’s description of herself as being “limited to the point where she can’t get through the day without laying down multiple times” would, in and of itself, preclude all forms of alternative employment.

² Their record does not include any report or testimony from Dr. Paul. In addition to the light-to-sedentary restrictions, Mr. Eldred noted that Dr. Paul provided a PPD rating of 13% of the body as a whole for employee’s back.

Employee: Rhonda Sartin

- 6 -

Nature and Extent of Disability

We find the employee's testimony credible. Employee testified, and we so find, that she suffers extreme fatigue and memory loss as a result of her use of carbamazepine and hydrodone. Employee did not take any pain medication prior to September 2011. Employee's fatigue is also caused by her inability to sleep at night due to pain, and employee had no trouble sleeping before the 2011 injury.

Employee also testified, and we so find, that she needs to lay down several times a day for 20 to 30 minutes. We also find persuasive the expert testimony of Mr. James England. Mr. England opined that employee's need to lay down multiple times would, in and of itself, preclude all forms of alternative employment. We agree.

We find employee is permanently and totally disabled due to the memory loss, fatigue caused by her medications and lack of sleep, and because of her need to lay down multiple times a day. Employee testified that she did not take these medications, had no trouble sleeping, and did not have to lay down during the day prior to the September 2011 injury. Consequently, we find employee permanently and totally disabled based on the 2011 injury considered in isolation.

Conclusions of Law

Section 287.220.1 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there has been previous disability." The statute requires us to first determine the compensation liability of the employer for the last injury, considered alone. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003). If employee is permanently and totally disabled due to the last injury considered in isolation, the Fund has no liability. *Id.* Though employee settled its claim with employer for a permanent partial disability in the amount of 12.5% of the body as whole, the Second Injury Fund was not a party to this settlement, and remained free to litigate issues conceded by employer. *Hoven v. Second Injury Fund*, 414 S.W.3d 676, 680 (Mo. App. 2013).

The administrative law judge concluded that employee suffered a 12.5% permanent partial disability from the last injury. The ALJ relied on the reports and testimony of Dr. Mullins and Mr. Eldred to reach this result, and did not mention Mr. England beyond a note that his report and a transcript of his deposition were entered into evidence. We disagree, and find Mr. England's opinions and testimony to be more persuasive. We note that Dr. Mullins and Mr. Eldred did not appear to consider employee's last injury in isolation. Dr. Mullins stated he could not say "one way or another" if employee would be able to work if she had received the September 2011 back injury alone. When asked if he would ever "look at one injury in isolation in assessing their vocational potential," Mr. Eldred stated "[n]o, you look at the whole person."

We have found that the September 2011 work injury, considered in isolation, causes employee to need to lie down multiple times per day. We have credited the testimony from Mr. England that this precludes employee from competing in the open labor market. We also believe the memory loss and fatigue described by employee, which are side effects of medication she began after the 2011 work injury, would also preclude employee

Employee: Rhonda Sartin

- 7 -

from competing in the open labor market. It follows that employee is permanently and totally disabled owing to the effects of the work injury considered alone.

We conclude the Second Injury Fund is not liable for permanent total disability benefits.

Award

We reverse the administrative law judge's award of compensation against the Second Injury Fund. We deny compensation in this matter.

The award and decision of Administrative Law Judge Karen Wells Fisher, issued September 25, 2014, is attached hereto solely for reference.

Given at Jefferson City, State of Missouri, this 14th day of May 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

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

Attest:

Secretary

Employee: Rhonda Sartin

DISSENTING OPINION

Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I am convinced that the decision of the administrative law judge awarding permanent total disability benefits from the Second Injury Fund was correct, and should be affirmed.

I agree with the majority to the extent that I am convinced employee is permanently and totally disabled. Employee had a pre-existing disabling condition in both of her shoulders. In 2002, she had surgeries to repair damage in each of her shoulders. After these surgeries, employee attempted to return to her job cleaning boots but was no longer able to keep up the pace required by employer due to her shoulder conditions. Employee then went to work processing chickens, but again found the pain in her shoulders did not allow her to continue the work and she required frequent cortisone shots. Employee testified that any kind of repetitive work with her hands, or that required her to reach out, caused her significant pain and caused swelling in her hands up to her neck. This kind of work would often cause her to be unable to move her head. However, employee never had any problems lifting between her shoulder surgeries and her work accident on September 7, 2011.

Employee lifted and moved window and door frames at an assignment provided by employer Manpower, Inc., a temporary placement service. She initially had help lifting these frames, but was then switched to an assignment where she had to lift frames by herself. At some point around September 7, 2011, employee began to feel pain when she took a breath. This pain intensified over the next several days and she was eventually forced to seek treatment in the emergency room. She was diagnosed with a thoracic strain at the emergency room. Later, Dr. Mitchell Mullins diagnosed employee with an acute thoracic strain and myofascial pain syndrome developed as a result of the work accident.

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there has been previous disability." For the Fund to be liable for permanent total disability benefits, employee must establish that: (1) she suffered from a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with a prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007).

Employee presented expert medical testimony from Dr. Mullins who opined that employee is disabled due to a combination of the primary injury to employee's back. Employee also presented testimony from Phillip Eldred, a vocational expert, who opined that employee is unemployable based on a combination of the primary injury and employee's preexisting conditions. Additionally, after the September 2011 work injury, employee returned to work at an assignment that did not require any lifting, but was unable to work more than ten days because of the pain caused by reaching for hangers on a shelf and folding linens with her hands.

Employee: Rhonda Sartin

- 2 -

Employee has 35 years of work history, all of which require physical labor in some degree. She has no history of any management jobs, any office jobs, or any sedentary work at all. Employee can no longer lift more than 5-6 pounds because of the primary injury to her back, and she cannot do repetitive work with her hands or that requires reaching because of her preexisting shoulder condition. For these reasons, Dr. Mullins and Mr. Eldred credibly testified employee was permanently and totally disabled as a result of the combination of the primary injury and employee's preexisting conditions. I agree, and believe these facts present a classic case for Second Injury Fund liability.

For these reasons, I disagree with the majority's decision finding the Second Injury Fund is not liable for any benefits. I find that employee met her burden under § 287.220 RSMo of establishing that she is permanently and totally disabled due to a combination of the primary injury and her preexisting disabling conditions. I would therefore affirm the decision of the administrative law judge awarding permanent total disability benefits from the Second Injury Fund.

Because the majority has determined otherwise, I respectfully dissent.

Curtis E. Chick, Jr., Member

AWARD

Employee: Rhonda Sartin

Injury No. 11-076995

Dependents: N/A

Employer: Manpower, Inc.

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Additional Party: Second Injury Fund

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Insurer: Insurance Company of the State of PA

Hearing Date: August 6, 2014

Checked by:

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury compensable under Chapter 287? Yes.
3. Was there an accident under the Law? Yes.
4. Date of accident: September 7, 2011
5. Location where accident occurred: EFCO Manufacturing, 1000 County Rd, Monett, Missouri.
6. Was above employee in employ of above employer at time of alleged accident? Yes
7. Did employer receive proper notice? Yes.
8. Did accident 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: Employee was lifting and moving industrial window dyes weighing 30-120 pounds 200 to 300 times per day over a three week period when she injured her low back.
12. Did accident cause death? No.
13. Parts of body injured by accident: Employee's low back and body as a whole.
14. Nature and extent of any permanent disability from current injury: 12.5% to the body as a whole at the low back.
15. Nature and extent of any permanent disability which existed prior to the current injury: 20% to the right shoulder and 16% to the left shoulder.
16. Compensation paid to-date for temporary disability: not at issue

Employee: Rhonda Sartin

Injury No. 11-076995

17. Value of necessary medical aide paid to date by employer/insurer: not at issue
18. Value of medical aide not furnished by employer/insurer: not at issue
19. Employee's average weekly wages: \$398.09
20. Weekly compensation rate: \$265.39
21. Method wages computation: by stipulation of the parties.

COMPENSATION PAYABLE

22. Amount of compensation payable: Primary claim is settled.
TOTAL: See Second Injury Fund liability.
23. Second Injury Fund liability:
 - a. \$265.39 per week from October 28, 2011, through the date of hearing, August 6, 2014, a period of 144 and 5/7 weeks, in the sum of \$38,405.76.
 - b. \$265.39 per week as permanent total disability benefits for the life of Claimant.

The compensation awarded to the claimant shall be subject to a lien of 25 percent of all payments in favor of Claimant's attorney, Bryan Musgrave, for necessary legal services rendered to the claimant.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Rhonda Sartin

Injury No. 11-076995

Dependents: N/A

Employer: Manpower, Inc.

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Additional Party: Second Injury Fund

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Insurer: Insurance Company of the State of PA

Hearing Date: August 6, 2014

Checked by:

AWARD

A final hearing was held on August 6, 2014, before Administrative Law Judge Karen Fisher. Attorney Bryan Musgrave represented Rhonda Sartin (Claimant). Assistant Attorney General Stephen Freeland represented the Second Injury Fund. The primary claim against the Employer and its Insurer was previously settled.

STIPULATIONS

The parties stipulated that Rhonda Sartin sustained an injury to her back within the course and scope of employment with the Employer on or about September 7, 2011. The injury occurred in Monett, Missouri; and venue was waived and stipulated to by the parties who agreed to hold the evidentiary hearing in Jasper County, Joplin, Missouri. The claim against Employer was settled for 12.5% percent of the body as a whole attributed to the low back. Employee's average weekly wage was \$398.09, yielding a compensation rate of \$265.39 for both permanent partial disability and permanent total disability. The parties stipulated that the claimant reached maximum medical improvement on October 28, 2011.

Issues

Medical causation of primary injury, nature and extent of permanent partial disability for the primary injury, and Second Injury Fund liability for permanent total disability.

Exhibits

The claimant testified on his own behalf as well as offered the following exhibits, which were admitted into evidence:

- A. Certified Medical Records of Claimant
- B. Deposition of Dr. Mitchell Mullins dated June 10, 2013 with exhibits
- C. Deposition of Phillip Eldred dated June 27, 2013 with exhibits

The following exhibits were admitted on behalf of the Second Injury Fund:

- 1. Deposition of James England dated February 11, 2014 with exhibits

Employee: Rhonda Sartin

Injury No. 11-076995

Findings of Fact

Rhonda Sartin injured her back on September 7, 2011, where she worked for approximately seven months as material handler at EFCO in Monett Missouri, through her employment at Manpower. She lifted and moved industrial window frames which weighed anywhere from 30 to 120 pounds each. She would stand at an angle over a cart bending down and sideways to lift 20 foot dyes onto the rollers. She lifted and moved approximately 300-400 per shift, working initially with a partner, but for the three weeks prior to the injury she worked alone, which resulted in an injury to her back. Claimant was initially seen by a nurse practitioner and followed up with Dr. James Jordon complaining of worsening symptoms. X-rays were taken. Claimant underwent physical therapy. On October 28, 2011, she was released by Dr. Jordon from care as having reached maximum medical improvement from her acute thoracic strain and he indicated that her preexisting scoliosis was the prevailing factor of her continued pain and inability to lift at work. However, Dr. Jordon called EFCO and requested she be put on a less strenuous job, at which point EFCO terminated her. Following treatment and release with Dr. Jordan, Claimant sought treatment on her own from Dr. Horace Peterson in early 2012. She received manipulative therapy and medications, including Zoloft and Neurontin, and later Tegretol when Neurontin was not tolerated by claimant. Dr. Peterson diagnosed her with a myofascial pain syndrome. Claimant was sent by Manpower to work at Crosslines as a garment sorter, which she did through November 11, 2011, after which time she could not continue due to her prior bilateral shoulder conditions being exacerbated due to handling and above shoulder, repetitive work. She has not worked since that time. Despite her prior shoulder injuries, claimant was able to use her back for heavy lifting prior to the primary injury. However, she is now unable to do heavy lifting and has not returned to her pre-injury level of functioning and physical condition.

Claimant has a 12th grade education, having received her high school diploma from Wheaton High School in Wheaton, Missouri. Claimant previously worked in the poultry industry as an eviscerator, poultry hanger, and farm worker. She worked in the shoe and boot industry doing repetitive type work for Justin Boots for 20 years. She left Justin Boots primarily due to the work-related torn rotator cuffs to her left and right shoulders. These were surgically repaired.

As a result of the chronic pain in both shoulders claimant cannot do repetitive work, the strength in her shoulders is diminished, and she left prior employment due to being unable to do repetitive work that required shoulder use. Claimant also has physical limitations in that she is unable to lift or carry greater than 10 pounds frequently and can perform no repetitive lifting and only 20 pounds occasionally. Claimant continues to make daily accommodations for the injury to her back. She must periodically alternate between sitting and standing to relieve pain in the low back. She is restricted from pushing or pulling in the upper extremities. She is restricted to never climbing ramps, poles, ladders, ropes, or scaffolds, and she may only occasionally crouch or bend forward with the legs and spine. Her manipulative reaching in all directions is limited, she may only occasionally reach and no overhead reaching.

Claimant said she has not returned to work since her failed return to work attempt the week following her injury. Claimant continues to treat with over the counter medication,

Employee: Rhonda Sartin

Injury No. 11-076995

narcotic medication, and anti-inflammatory medication from her family doctor for the back injury.

Claimant testified that there are activities of daily living which she was able to perform prior to the primary injury which she is now unable to perform, including carrying out trash, sweeping, mopping, anything that requires lifting. Her daily activities now include waking up at approximately 10:00-11:00 am and making breakfast or lunch, watching TV or movies most of the day, making supper or playing games on her phone then going to bed at approximately 1:00 am. Claimant testified that her injuries and medications limit her sleep.

Expert Testimony

Dr. Mitchell Mullins - for Claimant

Dr. Mullins examined Claimant on October 8, 2012, approximately 1 year and one month after her work accident. Dr. Mullins he opined that the Claimant had significant interference with her daily living and activities, that Claimant had pain with extreme range of motion. He opined that Claimant has permanent physical limitations in that she is unable lift or carry greater than 10 pounds frequently and can perform no repetitive lifting and only 20 pounds occasionally. She must periodically alternate between sitting and standing to relieve pain in the low back. She is restricted from pushing or pulling in the upper extremities. She is restricted to never climbing ramps, poles, ladders, ropes, or scaffolds, and she may only occasionally crouch or bend forward with the legs and spine. Her manipulative reaching in all directions is limited, she may only occasionally reach and no overhead reaching.

Dr. Mullins testified by deposition that Claimant had disability from the current injury of 16% to the body as a whole at the thoracic spine/back, for which he took into account the development of acute myofascial pain syndrome to the cervical, thoracic and lumbar spine. Employee settled her claim against the Employer/Insurer for the primary injury for 12.5% to the body as a whole.

Dr. Mullins also opined that the Employee's disabilities which existed prior to the current injury are 20% to the right shoulder due to a prior on the job injury and 16% to the left shoulder due to a prior on the job injury. He indicated that the preexisting conditions were a hindrance or obstacle to employment. He opined that the combination of all of the disabilities was greater than the simple sum of each separate injury and that there was a loading factor to be added. Moreover, he opined that claimant is likely permanently and totally disabled as a result of the combination of the current injury and the preexisting disabilities, and that she would be unable to return to the manual labor market.

Phillip Eldred, C.R.C. - for Claimant

Mr. Eldred interviewed and evaluated Claimant on March 12, 2013. He reviewed medical records, depositions, administered various tests and gave expert opinion from a vocational standpoint. Mr. Eldred concluded that, based upon claimants physical and activity restrictions, Claimant had pre-existing conditions with her shoulders that were a hindrance or obstacle to employment, that Claimant was unable to perform any of her past work, that claimant

Employee: Rhonda Sartin

Injury No. 11-076995

was highly unlikely to find competitive gainful employment with any reasonable employer in the normal course of business, that claimant did not have any transferable jobs for sedentary work level even if she could perform sedentary work. He further opined that claimant would have problems with any formal training program due to constant pain and use of narcotic pain medication. He concluded and opined that Rhonda Sartin is permanently and totally disabled as a result of her combined pre-existing and primary injury of September 7, 2011.

Conclusions

To establish Second Injury Fund liability, Claimant must show "either that (1) a preexisting permanent partial disability combined with a disability from a subsequent injury to create permanent and total disability or (2) the two disabilities combined to result in a greater disability than that which would have resulted from the last injury by itself." *Gasson v. Liebengood*, 134 S.W.3d 75, 79 (Mo. App.W.D.2004).

Causation and Disability from Last Injury

In assessing Permanent Total Disability against the Second Injury Fund, § 287.200.1 RSMo, does not require Claimant to distinguish each disability and assign a separate percentage for each of several preexisting disabilities. *Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 635 (Mo. App. E.D. 2007). Rather, Claimant must establish the extent of the permanent partial disability resulting from the last injury only, and prove that the combination of the last injury and the preexisting disabilities resulted in permanent total disability. *Id.* Thus, in determining whether the Second Injury Fund has liability for Permanent Total Disability, the Administrative Law Judge first determines the degree of disability from the last injury. *Feld v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 208 S.W.3d 230, 233 (Mo. App. E.D. 2006). Dr. Mullins opined that Claimant had a 16 percent Permanent Partial Disability from the 2011 back injury. Additionally, Claimant settled her claim for the 2011 back injury for 12.5% to the body as a whole. While not binding against the Second Injury Fund, Claimant's settlement with Employer is relevant in establishing the percentage of disability. *Conley v. Treasurer of Missouri*, 999 S.W.2d 269 (Mo. App. E.D. 1999), overruled on other grounds by *Hampton v. Big Boy Steel Erectors*, 121 S.W.3d 220 (Mo. App. E.D. 2003). The treating doctor released Claimant at MMI with permanent restrictions. Additional restrictions were developed as Claimant received medical care for her myofascial pain syndrome. Reviewing all of the evidence, I conclude that there is substantial evidence to conclude that the injury of September 7, 2011 was caused by Claimant's work activities and that same resulted in an injury as defined by under the Law. I further conclude that Claimant was not permanently and totally disabled from the last accident and injury alone, but only suffered a 12.5 percent Permanent Partial Disability from the last injury.

Liability for Permanent Total Disability

Permanent total disability means an employee is unable to compete in the open labor market. *Forshee v. Landmark Excavating and Equip.*, 165 S.W.3d 533,537 (Mo. App. E.D. 2005). "The critical question is whether an employer could reasonably be expected to hire the claimant, considering his present physical condition, and reasonably expect him/her to successfully perform the work." *Id.* In this instance, Claimant had a failed attempted return to work. Claimant testified that she was physically unable to perform her job duties. Following her

Employee: Rhonda Sartin

Injury No. 11-076995

release from medical care, Claimant was placed on permanent physical restrictions by the treating physician. Claimant testified that she is unable to perform the physical requirements of her last job due to her back injury. Claimant testified that she is unable to return to any of the previous occupations she held because of the her preexisting impairments which caused her to leave those vocations originally. Based upon Claimants testimony, which was uncontroverted and I find to be credible, she has a limited work history, and each job that she has held has required a minimum level of physical activity and demand. She has never been promoted while working or moved to a supervisory or managerial position. She has never held a sedentary job. Claimant testified that she needs to lie down for much of the day and move about constantly to relieve her back pain.

The record does not suggest that Claimant's preexisting conditions worsened after she had reached maximum medical improvement from the last injury. The preexisting disability necessary to trigger Second Injury Fund liability is permanent partial disability existing at the time the work-related injury was sustained and based on the evidence I find that Claimant's preexisting disabilities did exist at the time of the work-related injury and that they were a hindrance to employment or re-employment. Section 287.220.1 RSMo. The evidence in this case does substantiate a finding that Claimant is permanently and totally disabled as a result of a combination of the preexisting disabilities and the last work-related injury. I find more persuasive the opinions of Dr. Mullins and Phillip Eldred as well as the Claimant's testimony, and I conclude that the combination of her disabilities are a hindrance or obstacle to employment or re-employment and that Claimant is permanently and totally disabled, and that such permanent and total disability began when Claimant reached maximum medical improvement on October 28, 2011. I conclude that Claimant has been permanently and totally disabled since that time. The Treasurer of the State of Missouri, as Custodian of the Second Injury Fund is hereby ordered to pay to Claimant the sum of \$265.39 per week from October 28, 2011, through the date of hearing, August 6, 2014, a period of 144 and 5/7 weeks, in the sum of \$38,405.76. Thereafter, the Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, is hereby ordered to pay to Claimant the sum of \$265.39 per week for the remainder of Claimant's lifetime as provided by law.

Claimant's attorney, Bryan Musgrave, has requested approval of an attorney fee of 25% of the amount of any award. Claimant attorney's fee is hereby approved. This award is subject to a lien in favor of Attorney Bryan N. Musgrave in the amount of 25 percent of all amounts awarded herein.

Made by: _____

Karen Wells Fisher
Administrative Law Judge
Division of Workers' Compensation
Signed 9/15/14