

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

Injury No.: 08-122965

Employee: Thomas Skornia
Employer: American Mechanical, Inc.
Insurer: Secura Insurance
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 briefs and considered the whole record, the Commission finds that the award of the administrative law judge (ALJ) 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 ALJ dated December 13, 2011, as corrected below.

On page 11 of the ALJ's award under "4. Liability of the Second Injury Fund," the ALJ states that "All experts agree [employee] cannot return to the only vocation he has ever had: **ironworking.**" It is clear from the remainder of the award and the record as a whole that the ALJ incorrectly listed "ironworking" in this sentence instead of "sheet metal worker." Therefore, we find that the ALJ's award shall be corrected and the term "ironworking" shall be deleted from the aforementioned sentence and "sheet metal worker" shall be substituted in its place.

Based upon the foregoing, the award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued December 13, 2011, is affirmed, as corrected herein, and 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 6th day of June 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee:	Thomas Skornia	Injury No.: 08-122965
Dependents:	N/A	Before the
Employer:	American Mechanical Inc.	Division of Workers' Compensation
Additional Party:	Second Injury Fund	Department of Labor and Industrial Relations Of Missouri
Insurer:	Secura Insurance	Jefferson City, Missouri
Hearing Date:	September 1, 2011	Checked by: KOB:dwp

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: August 29, 2008
5. State location where accident occurred or occupational disease was contracted: Fenton, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant engaged in repetitive activities involving his left shoulder and arm.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Left Shoulder
14. Nature and extent of any permanent disability: 37 ½ % of the left shoulder; PTD due to combination
15. Compensation paid to-date for temporary disability: \$0
16. Value necessary medical aid paid to date by employer/insurer? \$650.49

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$1,422.55
- 19. Weekly compensation rate: \$772.53 / \$404.66
- 20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable:

87 weeks of permanent partial disability from Employer: \$35,205.42

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:
weekly differential (\$367.87) payable by SIF for 87 weeks beginning
October 27, 2009 and, thereafter, the weekly benefit of \$772.53 for Claimant's lifetime

TOTAL: INDETERMINATE

23. Future requirements awarded: Evaluation for surgery, and the surgical procedure, if necessary (as per Award).

Said payments to begin immediately and to be payable and be 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: Dean Christianson

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Thomas Skornia	Injury No.: 08-122965
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	American Mechanical Inc.	Department of Labor and Industrial Relations Of Missouri
Additional Party:	Second Injury Fund	
Insurer:	Secura Insurance	Jefferson City, Missouri
Hearing Date:	September 1, 2011	Checked by: KOB:dwp

PRELIMINARIES

The matter of Thomas Skornia (“Claimant”) proceeded to hearing to determine the compensation due Claimant on account of his August 29, 2008 work injury. Attorney Dean Christianson represented Claimant. Attorney Dennis Lassa represented American Mechanical, Inc. (“Employer”) and Secura Insurance Company (“Insurer”). Assistant Attorney General Carol Barnard represented the Second Injury Fund. The instant case, which involves an alleged occupational disease/injury to the left shoulder (the “Left Shoulder Case”), was tried concurrently with Injury No. 08-08-087731, which involves an undisputed injury to the right shoulder (the “Right Shoulder Case”).

The parties stipulated that on or about August 29, 2008, Claimant was working for Employer as a sheet metal worker, at which time he earned an average weekly wage of \$1,422.55, with corresponding rates of compensation of \$772.53 for total disability benefits and \$404.66 for permanent partial disability benefits. Employer paid no temporary total disability benefits, but did pay \$650.00 in medical benefits. Employment, notice, timeliness of the claim, and coverage of the Act are not at issue. The parties stipulated to the St. Louis Division of Workers’ Compensation as being the proper venue for this matter. The issues for determination are occupational disease arising out of and in the course of employment (raised by the Second Injury Fund only); the nature and extent of permanent disability; Employer’s liability for future medical care; liability of the Second Injury Fund; and dependency. Claimant seeks to recover permanent total disability (“PTD”) benefits.

FINDINGS OF FACT

Claimant’s testimony

Claimant is a sixty year-old, right-handed man with a high school diploma. He has no other training, other than his apprenticeship as a sheet metal worker. He is not able to type on a keyboard, and does not know how to operate a computer. He has never been in the military. Claimant tried to start his own company, but proved to be a poor businessman, and his nerves

prevented him from selling insurance. He is currently taking prescription medications for high blood pressure and high cholesterol, along with over-the-counter medications for pain.

Claimant has been married to Sheila Skornia for the thirty-nine years (Exhibit I). They have two grown children together, though neither child was living with or dependent upon him on the date of this accident.

Claimant's vocational history consists primarily of sheet metal work for the last thirty years. Since he obtained his work through a union hiring hall, he worked for a variety of contractors. At the time of the accident, Claimant had been working for Employer for approximately five years. His work for Employer, as well as his past sheet metal work, required him to install ductwork weighing between 15 and 100 pounds, generally working overhead. He works with a variety of power tools and hand tools. He last worked on or about August 29, 2008, at which time he stopped working due to a surgical procedure on his right shoulder.

Claimant testified the injury in the Left Shoulder Case occurred over time, culminating on his last day of work: August 29, 2008. He attributed the development of symptoms in his left shoulder to the use of his hands and arms at work in lifting heavy ductwork while working overhead. Over time, he developed symptoms of pain and lost motion in his left shoulder. Dr. Emanuel also evaluated him for his left shoulder, but advised him not to undergo any further surgery because of the severity of the damage in the shoulder. Claimant therefore sought the opinion of another orthopedic surgeon, Dr. Yamaguchi. Dr. Yamaguchi ordered an MRI of the left shoulder and discussed surgical options, but Claimant decided not to proceed due to concerns that he might actually be worse following such procedure.

Claimant continues to have problems with his left shoulder that he relates to his years of working as a sheet metal worker. His left shoulder is actually more painful than the right shoulder, depending on which shoulder he favors. The pain is similar to that with the right shoulder, but it does not extend to the neck, as it does with the right shoulder. The range of motion in his left shoulder is a bit better than that of the right, as he can move it up and down. However, he still cannot lift a gallon of milk in front of him.

Claimant had pre-existing medical problems. The circumstances surrounding, related treatment and description of the effects of his April 9, 2008 right shoulder injury are set forth in the Award in Claimant's companion claim, the Right Shoulder Case (Injury No. 08-122965). He has lost of strength, cannot raise his arm completely, hold a gallon of milk out from his body, or move his neck fully.

In 2006, Dr. David Brown performed carpal tunnel syndrome surgery on his right wrist. He thereafter had lost strength in his right wrist, which made it more difficult for him to grip his tools and to push. After the April 2008 accident, he had to tie tools to his belt when working above ground, as he would sometimes drop his tools. He also has difficulty writing with a pen and paper because of his right hand complaints. His right hand and wrist were swollen at the time of the trial.

He was diagnosed with hypertension approximately thirty years ago. He was hospitalized for two to three days because of this. He currently has to take medication and watch his diet.

He has had back problems for some time, especially with heavy lifting. He has seen a chiropractor on several occasions and went to an emergency room. He said this sometimes affected his work.

Ten years ago, he had a left biceps rupture that was not repaired. He modified his work for the first year after the injury, and then he was much better. However, while he did not thereafter have any formal accommodations placed on his activities, his left arm would not extend as far away from his body as his right arm.

Medical Records/Expert Testimony

Primary Injuries

The records from Patient's First Health Care (Exhibit C) include a December of 2008 x-ray of Claimant's right hand, done due to pain, revealing some minor arthritic changes. An April 20, 2009 MRI of the left shoulder showed a full-thickness tear of the supraspinatus tendon with tendon retraction and mild to moderate loss of muscle bulk. It was thought to be a chronic tear. A degenerative tear of the superior and posterior labrum was also noted. Claimant was also diagnosed with a previous rupture of the biceps tendon, which was thought to now be stable.

On April 29, 2009, Claimant presented to his primary care physician for a thorough exam in support of his early retirement. Chronic problems included carpal tunnel syndrome, hemorrhoids, hypertension and bilateral rotator cuff injuries. Dr. Long noted:

[P]atient has very limited range of motion of the right shoulder. Did not bring his arm above the horizontal without help. He still has a positive supraspinatus test. Patient has more mobility of the left but also limited. Positive supraspinatus test. Crepitance with rotation. He has a previously operated right shoulder. Patient has limited dorsiflexion of his right wrist due to previous injury. He has had a non-repaired left biceps tear.

Dr. Long further noted, "[H]is rotator cuff injures both right and left...are pushing him into a disabled state...I do not believe he has the physical strength to continue on in the sheet metal or other construction trades."

Claimant treated for right shoulder pain following his April 9, 2008 accident at BarnesCare Fenton (Exhibit D). He received conservative treatment for a sprain until an MRI scan on June 6, 2008 revealed a full thickness rotator cuff tear of the supraspinatus, as well as osteoarthritis of the glenohumeral joint and acromioclavicular joint. An orthopedic consultation was recommended.

Claimant was referred for orthopedic consultation to James Emanuel, M.D. (Deposition Exhibit #2, attached to Trial Exhibit 2). On July 14, 2008, Dr. Emanuel diagnosed Claimant with subacromial bursitis with impingement, acromioclavicular joint arthritis, and possible partial

thickness rotator cuff tear. He administered an epidural steroid injection, diagnosed a complete tear of the rotator cuff, and recommended surgery. On August 29, 2008, Dr. Emanuel performed a right shoulder arthroscopy with arthroscopic rotator cuff repair; arthroscopic limited debridement of glenohumeral joint; arthroscopic subacromial decompression; and arthroscopic distal clavicle resection. The procedure was performed partially in an "open" manner, rather than being completely arthroscopic. Thereafter, Claimant entered an aggressive therapy program, during which Claimant complained of lost motion and tenderness in his right wrist. Dr. Emanuel suspected a navicular fracture. Claimant also continued to complain of symptoms in his right trapezius region, as well as his neck. Radiographic films showed significant degenerative disk disease, which Dr. Emanuel stated had nothing to do with the shoulder surgery, but may have been aggravated by his work injury. Another MRI performed on January 19, 2009 showed the possibility of a new tear in the rotator cuff.

On March 10, 2009, Claimant underwent a functional capacity exam at ProRehab, where he had also had physical therapy (Exhibit E). Validity testing showed that Claimant's effort was valid. It was recommended that Claimant be restricted to a light demand level when lifting overhead, but otherwise Claimant was employable on a full-time basis in the medium work level based on floor to shoulder lifting. Performance was limited due to cervical and right shoulder complaints.

Dr. Emanuel discharged Claimant on March 12, 2009, though he recommended a neurosurgical consultation based upon the continued neck complaints. He placed restrictions on Claimant of lifting no more than forty-five pounds occasionally from floor to waist, twenty-five pounds from the waist to the shoulder, and fifteen pounds overhead. He also could not carry more than forty pounds with both arms, and cannot push or pull more than 65 pounds. He did not believe Claimant was capable of returning to back to his work as a sheet metal worker.

Dr. Emanuel last saw Claimant on October 27, 2009, at which time he evaluated the left shoulder and diagnosed a complete left rotator cuff tear, AC joint arthritis, subacromial bursitis, a bone spur, tenosynovitis of the biceps, joint effusion and joint derangement. Dr. Emanuel stated, "The patient's diagnosis is most likely related to an occupational induced trauma secondary to repetitive work at shoulder height and above that the patient has performed over 30 years."

On July 21, 2009, Dr. Ken Yamaguchi (Exhibit F) diagnosed a chronic and massive left rotator cuff tear. He recommended an MRI and suggested the right shoulder probably also has a torn rotator cuff.

Dr. Lange (Exhibit G) evaluated Claimant's cervical complaints on April 2, 2009. A cervical MRI scan showed significant multilevel degenerative changes. Electrical studies of Claimant's upper extremities showed prolonged latencies in the median nerves and chronic denervation of the right C7 innervated muscles.

Pre-existing injuries/conditions

The treatment records for the Right Shoulder Case are part of the record, and are more fully described in the Award in Injury No. 08-087731.

The records from Patient's First Health Care (Exhibit C) show that in 1999 Claimant complained of back pain. He was diagnosed with a low back strain which was being made worse by his occupation. Other records show that he was diagnosed with hypertension, as well as symptoms of fatigue. Treatment included medication for hypertension. He was diagnosed with right carpal tunnel in April 2006 following complaints of pain.

Claimant's records from the Division of Workers' Compensation show prior injuries. (Exhibit H). Claimant injured his back in 1992 and received chiropractic treatment. On May 12, 2006, he underwent a surgical right carpal tunnel release. The case was eventually settled for 18.8% of the right wrist.

Expert Testimony

Dr. Lichtenfeld testified that with respect to the Left Shoulder Case of August 29, 2008, Claimant had chronic left rotator cuff tear, tenosynovitis of the left biceps tendon, aggravation of pre-existing degenerative changes in the left shoulder, and bursitis. Dr. Lichtenfeld testified that the prevailing factor in causing these problems was the repetitive trauma that Claimant suffered in performing his job duties as journeyman sheet metal worker, which culminated on or about August 29, 2008. He said that Claimant sustained a 50% disability of the left shoulder, which combines with that from the right shoulder to create a greater overall disability.

With respect to restrictions from the August 29, 2008 injury, Dr. Lichtenfeld stated that Claimant should avoid operating any power tools with his left upper extremity and working with his arms outstretched or overhead. He should limit lifting to fifteen to twenty pounds on a one time basis and five to ten pounds on a repetitive basis. He should perform no lifting from the shoulder level overhead and avoid all repetitive tasks with his left upper extremity. He should also avoid working at heights, as well as on uneven and slick surfaces as well as pitched roofs and scaffolds. He should also avoid ascending and descending ladders and stairs.

With regard to further treatment for the August 29, 2008 accident, Dr. Lichtenfeld testified that Claimant would benefit from treatment with anti-inflammatory medication and muscle relaxers. He would also benefit from treatment with physical therapy. He thought Claimant should follow up with Dr. Yamaguchi to determine what further treatment would be necessary.

Dr. Lichtenfeld further testified that Claimant had pre-existing conditions which caused him to have pre-existing disabilities. He testified that those conditions are:

- 1) Hypertension. Due to this diagnosis, Claimant has a 12.5% permanent partial disability of the person as a whole. Dr. Lichtenfeld testified that Claimant has hypertensive changes in his eyes in the form of arteriosclerosis, an enlarged heart causing easier fatigue and shortness of breath with exertion.
- 2) Right carpal tunnel syndrome. Due to this diagnosis, Claimant has a 32.5% permanent partial disability of the right wrist. Dr. Lichtenfeld testified that Claimant has

thenar atrophy in his right palm, a weaker grip strength on the right side with a 50% loss of strength, and some lost motion in the wrist.

3) Chronic cervical spine strain. Due to this diagnosis, Claimant has a 25% permanent partial disability of the person as a whole. Dr. Lichtenfeld testified that Claimant has a difference in the reflexes and strength of his triceps, which correlates with a diagnosis of a C7 radiculopathy

Dr. Lichtenfeld further testified that Claimant's pre-existing disabilities combined with the disabilities of the two workplace injuries to create a greater overall disability than the simple sum of the disabilities combined, such that they create a significant obstacle and or hindrance to Claimant obtaining employment and/or re-employment. He also stated that "taking into consideration the patient's educational background and vocational history, as well as the injuries caused by his work in April 2008 and which culminated in August [2008], in combination with his pre-existing medical conditions, Mr. Skornia is totally and permanently disabled as he is unable to compete on the open labor market". He specifically found Claimant is not permanently and totally disabled due to the last injury to the left shoulder alone, and that the last injury to the left shoulder developed over several years.

Dr. James Emanuel was the authorized treating physician who testified by deposition at the request of Employer/Insurer. He performed surgery in the Right Shoulder Case and opined Claimant has ongoing disability of 10% of the right shoulder due to the accident of April 9, 2008. He placed permanent restrictions of Claimant of 45 pounds lifting from floor to waist, 25 pounds from waist to shoulder, and fifteen pounds above shoulder level. Thereafter he reviewed an MRI of the left shoulder which showed a full thickness massive tear of the rotator cuff involving the supraspinatus tendon with retraction and moderate loss of the muscle bulk, along with delamination and partial tearing of the infraspinatus tendon and degenerative changes. He testified that the left shoulder problems were caused by Claimant's years of work as a sheet metal worker. He placed restrictions on Claimant's left shoulder of fifteen pounds from floor to waist, five pounds from waist to shoulder, and no lifting overhead. He said that it was very possible that Claimant will need to have surgery on his left shoulder in the future. He rated the disability on the left shoulder at 15%.

J. Stephen Dolan, a vocational rehabilitation counselor, evaluated Claimant at the request of Claimant's counsel. He met with Claimant, performed testing, reviewed medical records, and wrote a report. He noted that Claimant was unable to operate a computer due to lack of knowledge and ongoing symptoms in his right hand. Claimant tested below average in reading, writing and math skills, and would not be attractive to employers because of his age and because he has done nothing other than manual labor all his life. He said that Claimant has had an excellent work record, which would be impressive to employers, but he does not have any skills that do not involve using his upper extremities with force. He also said that Claimant's past work as a union member would be a "red flag" to employers because he would be paid far less than he would make in a union job, which usually results in dissatisfaction. He said that Claimant has no education that would be of benefit to him in getting a job that meets his restrictions. He said that there are jobs that Claimant can "hypothetically" perform, but that he would be in competition with people who can use both hands. He said "in today's labor market

where employers have a great deal of choice about who they hire, there's simply no reason to hire somebody who can't use both hands when you could hire somebody who can use both hands unless they have some sort of special skill that's important to you, which Mr. Skornia would not have". He said that Claimant would not be eligible for retraining programs because there is no reasonable expectation that he would be able to get back to work, due to his hands, aptitude and age. He therefore concluded that Claimant is unable to compete for work in the open labor market.

James England, also a vocational rehabilitation counselor, evaluated Claimant at the request of Employer / Insurer. He testified Claimant had a very stable work history, but did not have any transferable skills outside of the sheet metal field. He found Claimant to be at the high school level in reading, and the tenth grade level in math. He did not test reading comprehension. He said that Claimant's age places him in the advanced age category of workers under the U.S. Department of Labor guidelines. He said that Claimant could not return to sheet metal work based upon his work restrictions, but that Dr. Emanuel's restrictions would allow him to do a variety of light duty entry-level work. This means that he could work in retail sales, or as a courier, cashier, office cleaner, or things of this sort. On the other hand, Dr. Lichtenfeld's restrictions would limit him to a security job or alarm monitor.

FINDINGS OF FACT AND RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

1. Arising Out of and in the Course of Employment/Causation.

Section 287.120.1, RSMo 2005, provides workers' compensation where an injured worker shows that his injury was caused by an accident "arising out of and in the course of his employment." An accident arises out of the employment relationship "when there is a casual connection between the conditions under which the work is required to be performed and the resulting injury." *Abel By and Through Abel v. Mike Russell's Standard Service* 924 S.W.2d 502, 503 (Mo.,1996)(citations omitted). An injury occurs "in the course of" employment "if the injury occurs within the period of employment at a place where the employee reasonably may be fulfilling the duties of employment." *Shinn v. General Binding Corp.*, 789 S.W.2d 230, 232 (Mo.App.1990). Claimant must also establish, generally through expert testimony, the probability that the claimed occupational disease was caused by conditions in the work place. *Selby v. Trans World Airlines, Inc.*, 831 S.W.2d 221, 223 (Mo. App. W.D. 1992); *Brundige v. Boehringer Ingelheim*, 812 S.W.2d 200, 202 (Mo. App. 1991). Claimant must prove "a direct causal connection between the conditions under which the work is performed and the occupational disease." *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo. App. 1992); *Sellers v. Trans World Airlines, Inc.*, 752 S.W.2d 413, 415 (Mo. App. 1988); *Estes v. Noranda Aluminum, Inc.*, 574 S.W.2d 34, 38 (Mo. App. 1978). Claimant's left shoulder injury is an occupational disease. The credible evidence establishes the injury in the Left Shoulder Case arose as a result of the conditions under which the work was required to be performed, and a time and place Claimant was reasonably expected to fulfill his duties. Dr. Emmanuel noted "[t]he patient's

diagnosis is most likely related to an occupational induced trauma secondary to repetitive work at shoulder height and above that the patient has performed over 30 years.”¹ The Left Shoulder Case arose out of and in the course of employment.

I also find the Second Injury Fund liability is not absolved from liability when the primary injury is an occupational disease. The Second Injury Fund correctly asserts, as is stated in §287.220, that it’s liability may be triggered in cases where there is a compensable primary, or last *INJURY*(emphasis added). Because 287.020.5 provides in relevant part, “The term[] "injury" ... shall in no case except as specifically provided in this chapter be construed to include occupational disease in any form,” the Second Injury Fund would have this court deny liability. However, §287.067.3 specifically provides, “An *injury* due to repetitive motion is recognized as an occupational disease for purposes of this chapter.” Thus, the Second Injury Fund argument is without merit.

2. Future Medical Care.

Claimant seeks future medical care for his left shoulder. Section 287.140.1 RSMo requires that the employer provide “such medical, surgical, chiropractic and hospital treatment ... as may reasonably be required ... to cure and relieve [the employee] from the effects of the injury.” This has been held to mean that the worker is entitled to treatment that gives comfort or relieves even though restoration to soundness [a cure] is beyond avail. *Bowers v. Highland Dairy Co.*, 132 S.W.3d 260, 266 (Mo. App. 2004); *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo. App. 1996). The employee must prove beyond speculation and by competent and substantial evidence that his or her work related injury is in need of treatment. *Williams v. A.B. Chance Co.*, 676 S.W.2d 1 (Mo. App. 1984). However, conclusive evidence is not required. It is sufficient if employee shows by reasonable probability that he or she is in need of additional medical treatment. *Bowers*, 132 S.W.3d at 270.

There is a dispute among the experts as to the need for future treatment. Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. *Hawkins v. Emerson Electric Co.*, 676 S.W.2d 872, 877 (Mo. App. 1984). Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *George v. Shop ' N Save Warehouse Foods Inc.*, 855 S.W.2d 460, 462 (Mo. App. E.D. 1993); *Hutchinson v. Tri-State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo. App. 1986).

I find Employer is liable to provide future medical treatment on the left shoulder in the form of evaluation for potential surgery. Dr. Emanuel, the treating surgeon, indicated no additional treatment was necessary. However, Dr. Yamaguchi, a shoulder specialist, offered surgery. Dr. Lichtenfeld recommended a definitive evaluation should be performed by Dr. Yamaguchi, which included review of the 2009 studies. I find Claimant should follow up with Dr. Yamaguchi to determine what further treatment would be necessary. If such further surgery

¹ This finding was made on October 27, 2009, Claimant’s last visit to the treating physician, Dr. Emanuel. I find this to be the date of maximum medical improvement (“MMI”).

is necessary, and Claimant elects to proceed, Employer shall provide the treatment as provided by law.

3. Nature and Extend of Permanent Partial Disability.

Claimant seeks to recover permanent partial disability benefits from Employer in the Left Shoulder Case. The [finder of fact] can consider all of the evidence in arriving at a percentage rating for the claimant's permanent partial disability...[and]is not bound by the percentage estimates of medical experts because the “degree of disability is not solely a medical question. *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 284 (Mo.App. E.D.1997)(citations omitted). The determination of a specific amount or percentage of disability awarded to a claimant is a finding of fact within the unique province of the [finder of fact]. *Id.*

Claimant testified credibly that his left shoulder is actually worse than his right. While there is no neck pain, the symptoms on the left are otherwise very similar to the right. He has limitations of motion and with lifting. The experts have restricted the use of the left upper extremity. The ratings on the left shoulder range from 15% to 50% PPD.

Based on the substantial and competent evidence of record, including Claimant’s testimony, the medical records, and the expert opinions, I find Claimant sustained permanent partial disability of the left shoulder equivalent to 37 ½ % of the left shoulder, or 87 weeks of permanent partial disability benefits. The disability is of a partial nature, as there is no credible evidence the left shoulder injury and disability alone are totally disabling. Employer is liable for 87 weeks of permanent partial disability benefits.

4. Liability of the Second Injury Fund.

Claimant seeks to recover permanent total disability benefits from the Second Injury Fund based on the combination of his primary and preexisting disabilities. In order for the claimant to be entitled to recover permanent total disability benefits from the Second Injury Fund, he must prove that the last injury, combined with his pre-existing permanent partial disabilities, result in permanent total disability. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo.App. E.D.2008)(citations omitted). “The test for permanent total disability is the worker's ability to compete in the open labor market in that it measures the worker's potential for returning to employment.” *Id.*, citing *Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 635 (Mo.App. E.D.2007). The primary inquiry is whether an employer can reasonably be expected to hire the claimant, given his present physical condition, and reasonably expect the claimant to successfully perform the work. *Id.*

The substantial and competent evidence establishes Claimant is permanently and totally disabled, and unable to compete in the open labor market. Claimant testified credibly about his complaints and limitations. Although he is has some noteworthy abilities, such as being able to play golf on a regular basis, that does not equate to employability. The medical evidence supports Claimant’s position, and the restrictions are limiting. All experts agree Claimant cannot return to the only vocation he has ever had: ironworking. Dr. Long noted, “[H]is rotator cuff injures both right and left...are pushing him into a disabled state...I do not believe he has the

physical strength to continue on in the sheet metal or other construction trades.” Dr. Lichtenfeld found Claimant totally disabled due to a combination of disabilities. J. Stephen Dolan concluded Claimant simply does not have the skills to make up for his physical limitations, and cannot compete in the open labor market. Mr. England agreed sheet metal work was impossible, but though he could work as a courier, cashier, or office cleaner. I find the opinions of Dr. Lichtenfeld and Mr. Dolan to be most credible. Overall, taking into consideration all of the evidence, I find Claimant has met his burden of establishing he is permanently and totally disabled due to a combination of primary and preexisting disabilities. The Second Injury Fund is liable for the permanent total disability beginning October 27, 2009, the date of MMI, once Employer’s liability is exhausted (see page 2 for calculations).

5. Dependency.

Without making any ruling as to the applicability of *Schoemehl v. Treasurer of Missouri*, 217 S.W.3d 900 (Mo. banc 2007), I find to Sheila Skornia was Claimant’s only dependant on the date of the primary injury.

CONCLUSION

Employer and Insurer are liable to Claimant for 87 weeks of PPD benefits, and future medical treatment as outlined in this award. The Second Injury Fund shall pay PTD benefits at the differential rate for 87 weeks, beginning October 27, 2009, and thereafter at the full rate, for Claimant’s life, as provided by law.

Attorney Dean Christianson shall have a lien of 25%.

Date: _____

Made by: _____

KARLA OGRODNIK BORESI
Administrative Law Judge
Division of Workers' Compensation