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

Injury No.: 06-107465

Employee: Kent Spies

Employer: Altivity

Insurer: ACE American Insurance/Crawford & Company

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 section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated September 20, 2010. The award and decision of Administrative Law Judge Edwin J. Kohner, issued September 20, 2010, 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 9th day of February 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

Issued by DIVISION OF WORKERS' COMPENSATION

AWARD

Employee: Kent Spies

Injury No.: 06-107465

Dependents: N/A

Before the
Division of Workers' Compensation
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Employer: Altivity

Additional Party: Second Injury Fund

Insurer: ACE American Insurance/Crawford & Company

Hearing Date: August 11, 2010

Checked by: EJK/lsn

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: November 9, 2006
5. State location where accident occurred or occupational disease contracted: Franklin County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident happened or occupational disease contracted:
    The employee was adjusting stacks of cardboard when he felt pain in his left shoulder.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Parts of body injured by accident or occupational disease: Left shoulder
14. Nature and extent of any permanent disability: 30% permanent partial disability to the left shoulder
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? $1,505.40
17. Value necessary medical aid not furnished by employer/insurer? $16,611.53

18. Employee's average weekly wages: $966.83

19. Weekly compensation rate: $643.90/$376.55

20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:	$16,407.35
51 5/7 weeks of temporary total disability (or temporary partial disability)	$33,298.83
69.6 weeks of permanent partial disability from Employer	$26,207.88
Travel expenses commuting to medical providers	$ 207.18

22. Second Injury Fund liability: Yes

13.34 weeks of permanent partial disability from Second Injury Fund	$ 5,023.18
TOTAL:	$81,144.42

23. Future requirements awarded: None.

Each of said payments to begin immediately 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% which is awarded above as costs of recovery of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Mark Rudder, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Kent Spies Injury No.: 06-107465

Dependents: N/A

Employer: Altivity

Additional Party: Second Injury Fund

Insurer: ACE American Insurance/Crawford & Company

Before the
Division of Workers' Compensation
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Hearing Date: August 11, 2010 Checked by: EJK/lsn

This workers' compensation case raises several issues arising out of a work-related injury in which the claimant, a pressman at a printing firm, alleges that he injured his left shoulder while adjusting and moving a stack of cardboard. His employer has denied liability and paid only nominal benefits to date. The issues for determination are (1) Medical causation, (2) Liability for Past Medical Expenses, (3) Temporary Disability from December 6, 2006, to March 3, 2008, (4) Permanent disability, (5) Second Injury Fund liability, (6) mileage, and (7) Costs and Attorney Fees under Section 287.560, RSMo 1994. The evidence compels an award for the claimant for medical expenses, future medical care, temporary total disability benefits, and costs.

At the hearing, the claimant testified in person and the parties offered the following exhibits, all of which were received in evidence:

Employee's Exhibits:

A. Medical records from Select Physical Therapy.
B. Medical records from St. John's Mercy Corporate Health.
C. Medical records from Unity Corporate Health.
D. Medical records from Washington University Medical School, Orthopaedic Surgery, set 1 of 4.
E. Medical records from Washington University Medical School, Orthopaedic Surgery, set 2 of 4.
F. Medical records from Washington University Medical School, Orthopaedic Surgery, set 3 of 4.
G. Medical records from Washington University Medical School, Orthopaedic Surgery, set 4 of 4.
H. Medical records from Patients First Health Care set 1 of 2.
I. Medical records from SSM Rehab.
J. Medical records from St. Anthony's Medical Center.
K. Medical records from Tesson Heights Orthopaedic & Arthroscopic Associates.
L. Medical records from Patients First Health Care set 2 of 2.
M. Billing statement from Select Physical Therapy.
N. Lien statement – ACS Recovery Services.
O. Medical report from Dr. Raymond Cohen.
P. Medical report from Michael P. Nogalski.

Q. Supplemental report from Dr. Michael P. Nogalski.
R. Supplemental report from Dr. Michael P. Nogalski.

Employer/Insurer Exhibits:
1. Deposition of Dr. Michael Nogalski dated April 13, 2009
2. Photographs of the Employee re-enacting his accident of November 9, 2006

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident was alleged to have occurred in Missouri. Any markings on the exhibits were present when offered into evidence.

STIPULATONS

The parties stipulated to the following:

1. Employer and Employee were operating under the provisions of the Missouri Workers' Compensation law on the alleged date of injury.
2. Employer's liability was fully insured by ACE American Insurance by and through Crawford & Company.
3. Employer had notice of the alleged injury and a claim for compensation was timely filed.
4. Employee's average weekly wage was $966.83 yielding a TTD rate of $643.90 and PPD rate of $376.55.
5. Employer has paid medical benefits in the amount of $1,505.40, and has paid no TTD benefits.

ISSUES

The parties stipulated the sole issues to be resolved are: (1) Medical Causation, (2) Temporary total disability benefits from 12/06/06 – 03/03/08, (3) Past medical expenses, (4) Permanent partial disability, and (5) Second Injury Fund liability.

SUMMARY OF FACTS

On November 9, 2006, the claimant, a pressman at a printing firm, was rearranging a 2200 to 2600 pound load of cardboard that was loaded on his machine. While trying to shift this load, the claimant was pushing and pulling on the load with both arms and experienced a sudden onset of pain in his left shoulder which felt like a "hot poker" had been stuck through his shoulder and an immediate inability to lift or use his left arm. The employer provided an ice pack and sent him to Dr. Charles Keefe the next day. Dr. Keefe treated him several times and eventually discharged him and released him to work regular work duties. See Exhibit B. On December 6, 2006, Dr. Keefe diagnosed strain of the left shoulder rotator cuff twenty-seven days post injury and not improving. See Exhibit B. Dr. Keefe's prognosis was:

> Patient's status is now to return to work regular duties. This is because I've been informed that the patient's left shoulder injury of 2003 was settled with the insurance company with maximum medical improvement. In a prior office visit,

> the patient had mentioned that the left shoulder had never returned to normal that he would have pain with certain activities. That being the case, the patient's status will resume the regular duties. I did tell the patient though that as he still has restricted movements with pain that he does need to see his primary care physician. In the interim, he is to use ice or heat whichever helps more. Use over the counter Tylenol or Ibuprofen whichever provides more relief. At this point, he is released. Permanency of this will be left up to those who assume his care. Causation is a bit murky because of the preexisting injury and the settlement between the patient and the insurance carrier. See Exhibit B, page 2.

The claimant testified that he did not return to work when Dr. Keefe released him, because he was physically unable to do the job. He testified this was due to his limited use of the left arm and severe pain that he was in at the time.

Shortly thereafter, the claimant consulted Dr. Rickmeyer, his family physician, who ordered an MRI. On December 12, 2006, the MRI revealed a massive tear of almost all tendons in the claimant's left shoulder. See Exhibit H.

On January 8, 2007, the claimant filed his claim for compensation with the Missouri Division of Workers' Compensation. On January 23, 2007, the employer filed its answer to the claim stating, "We, therefore, deny each and every, all and singular, of the allegations contained in said Claim."

Dr. Rickmeyer referred the claimant to a specialist, Dr. James Rotramel. Dr. Rotramel subsequently referred him to Dr. Yamaguchi. On June 19, 2007, a Limb Sonography revealed a massive full thickness tear of the left rotator cuff and a small full thickness tear of the supraspinatus tendon. See Exhibit D, page 39. On June 28, 2007, Dr. Yamaguchi performed an arthroscopic rotator cuff repair, open biceps tenodesis, and open subscapularis repair. See Exhibit D, page 70. Dr. Yamaguchi noted in his Operative Report that the location of this tear was separate and apart from the location of Mr. Spies prior left shoulder injury. See Exhibit D, page 71. On November 9, 2006, Dr. Yamaguchi opined that the claimant's work injury was the predominant factor necessitating the June 28, 2007, surgery. See Exhibit G, page 2. The claimant testified that this surgery improved the pain.

Dr. Cohen

Dr. Cohen examined the claimant on March 7, 2008, took a medical history, and reviewed the claimant's medical records. He diagnosed a large rotator cuff tear involving the supraspinatus and subscapularis tendon and biceps tear, status post surgical procedure for repair of the same with open biceps tenodesis, open subscapularis repair, and arthroscopic rotator cuff repair, chronic left shoulder pain, and inability to perform prior use of the left arm in heavy labor activity. See Exhibit O. He opined that the 2006 work-related accident was the prevailing factor in causing the injury and the need for subsequent medical treatment. See Exhibit O, pages 7 and 8. He opined that the claimant suffered a forty percent permanent partial disability to his left shoulder as a result of the accident in 2006. See Exhibit O. He also diagnosed a preexisting shoulder rotator cuff repair in 2003 with some occasional soreness and tightness. See Exhibit O.

He opined that the claimant suffered a 40% permanent partial disability from the 2006 work-related accident in addition to the preexisting permanent partial disability.

Dr. Yamaguchi

Dr. Yamaguchi opined that the claimant's work injury of November 9, 2006 was the predominant factor causing the injury and the need for the subsequent medical treatment. See Exhibit G, page 2.

Dr. Nogalski

Dr. Nogalski examined the claimant and opined that the 2006 work-related accident was not the prevailing factor in causing the injury and that the prevailing factor causing the condition and disability was a chronic preexisting condition. He also opined that the prior injury from 2002, although at the left shoulder level, involved a different part of the shoulder when compared to the present injury. On December 10, 2008, Dr. Nogalski reported:

> There was noted to be a large rotator cuff tear involving the supraspinatus tendon. This would be in the previous area where he had a tear before (referring to the 2002 injury) and this issue apparently had been addressed surgically by Dr. Marcus in the past and a settlement received for this. …
>
> The predominant argument against his work being the prevailing factor is the chronic nature of these findings which strongly suggest that he had significant rotator cuff and bicipital tendinopathy. His mechanism, that of pushing on a load of cardboard, appears to be inconsistent with what I would consider reasonable for a tear in this setting especially when #1 there appeared to be some unhappiness about his change in work activities and #2, his findings at the time of surgery appeared to be chronic in this disputed matter. It is probable that his three conditions…are indeed chronic in nature. See Exhibit R.

He opined that the claimant suffered no additional permanent partial disability from the 2006 work-related accident beyond his preexisting disability. See Dr. Nogalski deposition, pages 9, 10.

MEDICAL CAUSATION

"The claimant in a workers' compensation case has the burden to prove all essential elements of her claim, including a causal connection between the injury and the job." Royal v. Advantica Rest. Group, Inc., 194 S.W.3d 371, 376 (Mo.App.W.D.2006) (citations and quotations omitted). "Determinations with regard to causation and work relatedness are questions of fact to be ruled upon by the Commission." Id. (citing Bloss v. Plastic Enters., 32 S.W.3d 666, 671 (Mo.App.W.D.2000)). Under the statute, "[a]n injury is clearly work-related if work was a substantial factor in the cause of the resulting medical condition or disability." § 287.020.2. On the other hand, "[a]n injury is not compensable merely because work was a triggering or precipitating factor." Id. "Awards for injuries 'triggered' or 'precipitated' by work are nonetheless proper *if* the employee shows the work is a 'substantial factor' in the cause of the

injury." "Thus, in determining whether a given injury is compensable, a 'work-related accident can be both a triggering event and a substantial factor.' Royal, 194 S.W.3d at 376 (quoting Bloss, 32 S.W.3d at 671).

"[T]he question of causation is one for medical testimony, without which a finding for claimant would be based upon mere conjecture and speculation and not on substantial evidence." Elliot v. Kansas City, Mo., Sch. Dist., 71 S.W.3d 652, 658 (Mo.App. W.D. 2002). Accordingly, where expert medical testimony is presented, "logic and common sense," or an ALJ's personal views of what is "unnatural," cannot provide a sufficient basis to decide the causation question, at least where the ALJ fails to account for the relevant medical testimony. Cf. Wright v. Sports Associated, Inc., 887 S.W.2d 596, 600 (Mo. banc 1994) ("The commission may not substitute an administrative law judge's opinion on the question of medical causation of a herniated disc for the uncontradicted testimony of a qualified medical expert."). Van Winkle v. Lewellens Professional Cleaning, Inc., 358 S.W.3d 889, 897, 898 (Mo.App. W.D. 2008).

Pertaining to the 2006 work-related accident, the claimant truthfully testified that while he was adjusting a load of cardboard on or about November 9, 2006, he suffered an onset of pain in his left shoulder in an area of the left shoulder that was different from the location of his 2002 left shoulder injury. The claimant had a prior left shoulder injury from 2002 that was settled for 27.5% of the left shoulder, which infers that the claimant had a 27.5% pre-existing permanent partial disability in the left shoulder. See Section 287.190.6(1), RSMo Supp. 2009.

Dr. Cohen, an examining physician, examined the claimant and opined that the 2006 work-related accident was the prevailing factor in causing the injury and the need for subsequent medical treatment. See Exhibit O, pages 7 and 8.

On the other hand, Dr. Nogalski, another qualified examining physician, opined that the 2006 work-related accident was not the prevailing factor in causing the injury and that the prevailing factor causing the condition and disability was a chronic preexisting condition. He also opined that the prior injury from 2002, although at the left shoulder level, involved a different part of the shoulder when compared to the present injury. On December 10, 2008, Dr. Nogalski reported:

> There was noted to be a large rotator cuff tear involving the supraspinatus tendon. This would be in the previous area where he had a tear before (referring to the 2002 injury) and this issue apparently had been addressed surgically by Dr. Marcus in the past and a settlement received for this. …
>
> The predominant argument against his work being the prevailing factor is the chronic nature of these findings which strongly suggest that he had significant rotator cuff and bicipital tendinopathy. His mechanism, that of pushing on a load of cardboard, appears to be inconsistent with what I would consider reasonable for a tear in this setting especially when #1 there appeared to be some unhappiness about his change in work activities and #2, his findings at the time of surgery appeared to be chronic in this disputed matter. It is probable that his three conditions…are indeed chronic in nature. See Exhibit R.

Dr. Yamaguchi, the operating surgeon, opined that the claimant's work injury of November 9, 2006, was the "predominant factor" causing the injury and the need for the subsequent medical treatment. See Exhibit G, page 2. On June 30, 2009, he reported:

> It is a very difficult question to answer. I was not the treating physician in 2003 and thus do not know exactly what the extent of his injuries were. I can say however, that the supraspinatus and anterior portion of the infraspinatus tendon tears appear to have been chronic. Therefore, he had had these tears for some time and they may have represented a lack of healing of his previous surgery. Alternatively, they may have represented tears that were present that reformed after his 2003 surgery but prior to his 2006 injury. His operative findings do support, however, that he **may** have had a recent injury most consistent with his episode in November of 2006. … It is my opinion that Mr. Spies work injury on November 9, 2006, was the predominant factor necessitating the surgery I performed on June 28, 2007. Prior to this injury, he was functioning well in [a] manual labor capacity. Following the injury he was substantially worse. There were elements of his surgery that suggest that although he had a chronic condition, it was substantially aggravated or increased by the injury of November 9, 2006. Many people have rotator cuff tears and function essentially normally with these tears. Once these tears enlarge, however, they can create a situation where previously well-functioning, but torn rotator cuff, can become totally dysfunctional. That is what I believe is the case with Mr. Spies. His new injury consisting of an increase in the size of his previous tear, as well as a new tear of the subscapularis and a potentially new tear of the biceps tendon substantially aggravated his preexisting condition to the point that a stable shoulder not requiring surgery then required surgery. See Exhibit G.

There is an internal consistency between the reports from Dr. Yamaguchi and the reports from Dr. Nogalski and Dr. Cohen. Namely, they agree that the claimant's left shoulder had chronic and pre-existing problems, including but not limited to tendon tears and a rotator cuff tear following the 2002 injury. Furthermore, they agree that the claimant experienced a sudden onset of pain on November 9, 2006. Finally, neither Dr. Yamaguchi nor Dr. Nogalski can state that the work-related incident of November 9, 2006, was "the prevailing factor" in causing the need for surgery or causing the need to miss work. However, Dr. Cohen opined that the claimant's 2006 work-related injury was the prevailing factor causing the claimant's medical condition and disability resulting from the 2006 accident. Dr. Yamaguchi's opinion that the question is hard to answer and has features of both preexisting conditions and the 2006 work-related injury is most candid and credible. His opinion that the work injury on November 9, 2006, was the predominant factor necessitating the surgery supports a finding that that accident was the prevailing factor causing the medical condition and the disability after the 2006 accident.

Based on the weight of the evidence, the claimant suffered an aggravation of his pre-existing shoulder problems, aggravating the chronic fraying of the infraspinatus tendon at a level different from the supraspinatus tendon that was injured in 2002 as a result of the 2006 work-related accident. The claimant carried his burden of proof that the incident of November 9, 2006 was "the prevailing factor" in causing this aggravation of his pre-existing problems of the left

shoulder.

LIABILITY FOR PAST MEDICAL EXPENSES

The statutory duty for the employer is to provide such medical, surgical, chiropractic, and hospital treatment ... as may be reasonably required after the injury. Section 287.140.1, RSMo 1994.

> The intent of the statute is obvious. An employer is charged with the duty of providing the injured employee with medical care, but the employer is given control over the selection of a medical provider. It is only when the employer fails to do so that the employee is free to pick his own provider and assess those against his employer. However, the employer is held liable for medical treatment procured by the employee only when the employer has notice that the employee needs treatment, or a demand is made on the employer to furnish medical treatment, and the employer refuses or fails to provide the needed treatment. Blackwell v. Puritan-Bennett Corp., 901 S.W.2d 81, 85 (Mo.App. E.D. 1995).

The method of proving medical bills was set forth in Martin v. Mid-America Farmland, Inc., 769 S.W.2d 105 (Mo. banc 1989). In that case, the Missouri Supreme Court ordered that unpaid medical bills incurred by the claimant be paid by the employer where the claimant testified that her visits to the hospital and various doctors were the product of her fall and that the bills she received were the result of those visits.

> We believe that when such testimony accompanies the bills, which the employee identifies as being related to and are the product of her injury, and when the bills relate to the professional services rendered as shown by the medical records and evidence, a sufficient, factual basis exists for the Commission to award compensation. The employer, may, of course, challenge the reasonableness or fairness of these bills or may show that the medical expenses incurred were not related to the injury in question. Id. at 111, 112.

The claimant submitted medical bills and records showing that the total cost of medical, surgical, hospital, and physical therapy was $39,463.50 and that Mercy Health Plans paid $16,180.93 and the claimant paid $226.42. See Exhibits M, N. The claimant also submitted medical records from People First Health Clinic, Washington University School of Medicine, and Select Physical Therapy. See Exhibits A, D, E, F, G, H, and L. Based on the findings in the section on medical causation, the 2006 work-related accident was the prevailing factor or most important factor compelling the medical services for treatment of the claimant's shoulder condition. Dr. Yamaguchi opined that all of his treatment to the claimant's shoulder condition was reasonable and necessary and that the costs associated with the treatment were reasonable. Dr. Cohen testified that the physical therapy services were reasonable and customary and that $16,180.93 was reasonable and necessary for the charges listed on the schedule in Exhibit N. Based on Dr. Cohen's findings, the claimant is awarded $16,407.35 which is the sum of the $16,180.93 that Dr. Cohen found reasonable and customary charges and the claimant's out of pocket expenses of $226.42. Since the employer filed a general denial in its Answer to Claim for Compensation on January 23, 2007, any demand for the employer to provide these services

would have been a futile exercise and is unnecessary under the Missouri Workers' Compensation law.

TEMPORARY DISABILITY

When an employee is injured in an accident arising out of and in the course of his employment and is unable to work as a result of his or her injury, Section 287.170, RSMo 2000, sets forth the TTD benefits an employer must provide to the injured employee. Section 287.020.7, RSMo 2000, defines the term "total disability" as used in workers' compensation matters as meaning the "inability to return to any employment and not merely mean[ing the] inability to return to the employment in which the employee was engaged at the time of the accident." The test for entitlement to TTD "is not whether an employee is able to do some work, but whether the employee is able to compete in the open labor market under his physical condition." Thorsen v. Sachs Electric Co., 52 S.W.3d 611, 621 (Mo.App. W.D. 2001). Thus, TTD benefits are intended to cover the employee's healing period from a work-related accident until he or she can find employment or his condition has reached a level of maximum medical improvement. Id. Once further medical progress is no longer expected, a temporary award is no longer warranted. Id. The claimant bears the burden of proving his entitlement to TTD benefits by a reasonable probability. Id.

Temporary total disability benefits are intended to cover healing periods and are unwarranted beyond the point at which the employee is capable of returning to work. Brookman v. Henry Transp., 924 S.W.2d 286, 291 (Mo.App. E.D. 1996). Temporary awards are not intended to compensate the Employee after the condition has reached the point where further progress is not expected. Id.

The claimant worked light duty from the date of accident, November 9, 2006, to the claimant's release by Dr. Keefe on December 6, 2006. On December 6, 2006, Dr. Keefe opined that the claimant can return to full duty work. However, the claimant did not return to work. Dr. Rickmeyer assumed the role of providing medical services and eventually referred the claimant to a shoulder surgeon. Although the Employee then came under the care and treatment of Dr. Rickmeyer, there is no indication that Dr. Rickmeyer took the claimant off work. Dr. Yamaguchi examined the claimant on June 4, 2007, and provided shoulder surgery on June 28, 2007. The claimant began working for a motorcycle dealer on February 22, 2008.

Dr. Keefe's finding that the claimant was temporarily unable to work due to the condition of his left shoulder from November 9, 2006, to December 6, 2006, appears to be consistent with the claimant's condition from the date of injury to Dr. Yamaguchi's surgery to repair the claimant's shoulder on June 28, 2007. Nothing changed during the period except for the willingness of the employer to provide medical treatment for the condition. It seems inescapable that the claimant was not able to work immediately after the surgery due to the condition of the claimant's shoulder. Dr. Yamaguchi examined the claimant on July 12, 2007, and opined that the claimant was not able to work. See Exhibit D. No further findings from the medical providers show any change in the claimant's work status. However, Dr. Yamaguchi reexamined the claimant on November 6, 2007, over eighteen weeks after the surgery and ordered continuation of the claimant's physical therapy. See Exhibit D. He offered no opinion whether the claimant was able to work or not able to work at that time. Using the same logic as employed

above, it seems reasonable to conclude that the claimant's total disability ended on that date. While off work slips may be helpful, the entire record helps to present additional evidence. Notwithstanding, it would have been helpful for the parties to examine witnesses on this issue.

Based on the evidence, the claimant is awarded 51 5/7 weeks of temporary total disability benefits covering a period from November 9, 2006, the date of injury, to November 6, 2007, the date of Dr. Yamaguchi's last examination.

MILEAGE

Section 287.140.1, RSMo Supp. 2009, provides, in part:

> When an employee is required to submit to medical examinations or necessary medical treatment at a place outside of the local or metropolitan area from the employee's principal place of employment, the employer or its insurer shall advance or reimburse the employee for all necessary and reasonable expenses; except that an injured employee who resides outside the state of Missouri and who is employed by an employer located in Missouri shall have the option of selecting the location of services provided in this section either at a location within one hundred miles of the injured employee's residence, place of injury or place of hire by the employer. The choice of provider within the location selected shall continue to be made by the employer. In case of a medical examination if a dispute arises as to what expenses shall be paid by the employer, the matter shall be presented to the legal advisor, the administrative law judge or the commission, who shall set the sum to be paid and same shall be paid by the employer prior to the medical examination. In no event, however, shall the employer or its insurer be required to pay transportation costs for a greater distance than two hundred fifty miles each way from place of treatment.

In this case, the claimant's principal place of employment was in Pacific, in Franklin County, Missouri. The claimant established that he traveled 767.34 miles to obtain medical services for his complex medical condition and that the services were reasonable and necessary for treatment of the condition. See Exhibit U. The custom in this field for some unknown reason is that mileage is to be compensated based on the rate used for state employees. The current rate for state employee mileage reimbursement is twenty-seven cents per mile according to the Missouri Office of Administration. The claimant is awarded $207.18 for travel expenses incurred from commuting to medical providers outside of the metropolitan area in which his principal place of employment is located.

PERMANENT DISABILITY

Workers' compensation awards for permanent partial disability are authorized pursuant to section 287.190. "The reason for [an] award of permanent partial disability benefits is to compensate an injured party for lost earnings." Rana v. Landstar TLC, 46 S.W.3d 614, 626 (Mo. App. W.D. 2001). The amount of compensation to be awarded for a PPD is determined pursuant to the "SCHEDULE OF LOSSES" found in section 287.190.1. "Permanent partial disability" is defined in section 287.190.6 as being permanent in nature and partial in degree. Further, "[a]n

actual loss of earnings is not an essential element of a claim for permanent partial disability." Id. A permanent partial disability can be awarded notwithstanding the fact the claimant returns to work, if the claimant's injury impairs his efficiency in the ordinary pursuits of life. Id. "[T]he Labor and Industrial Relations Commission has discretion as to the amount of the award and how it is to be calculated." Id. "It is the duty of the Commission to weigh that evidence as well as all the other testimony and reach its own conclusion as to the percentage of the disability suffered." Id. In a workers' compensation case in which an employee is seeking benefits for PPD, the employee has the burden of not only proving a work-related injury, but that the injury resulted in the disability claimed. Id.

In a workers' compensation case, in which the employee is seeking benefits for PPD, the employee has the burden of proving, inter alia, that his or her work-related injury caused the disability claimed. Rana, 46 S.W.3d at 629. As to the employee's burden of proof with respect to the cause of the disability in a case where there is evidence of a pre-existing condition, the employee can show entitlement to PPD benefits, without any reduction for the pre-existing condition, by showing that it was non-disabling and that the "injury cause[d] the condition to escalate to the level of [a] disability." Id. See also, Lawton v. Trans World Airlines, Inc., 885 S.W.2d 768, 771 (Mo. App. 1994) (holding that there is no apportionment for pre-existing non-disabling arthritic condition aggravated by work-related injury); Indelicato v. Mo. Baptist Hosp., 690 S.W.2d 183, 186-87 (Mo. App. 1985) (holding that there was no apportionment for pre-existing degenerative back condition, which was asymptomatic prior to the work-related accident and may never have been symptomatic except for the accident). To satisfy this burden, the employee must present substantial evidence from which the Commission can "determine that the claimant's preexisting condition did not constitute an impediment to performance of claimant's duties." Rana, 46 S.W.3d at 629. Thus, the law is, as the appellant contends, that a reduction in a PPD rating cannot be based on a finding of a pre-existing non-disabling condition, but requires a finding of a pre-existing disabling condition. Id. at 629, 630. The issue is the extent of the appellant's disability that was caused by such injuries. Id. at 630.

Dr. Cohen examined the claimant on March 7, 2008, took a medical history, and reviewed the claimant’s medical records. He diagnosed a large rotator cuff tear involving the supraspinatus and subscapularis tendon and biceps tear, status post surgical procedure for repair of the same with open biceps tenodesis, open subscapularis repair, and arthroscopic rotator cuff repair, chronic left shoulder pain, and inability to perform prior use of the left arm in heavy labor activity. See Exhibit O. He opined that the 2006 work-related accident was the prevailing factor in causing the injury and the need for subsequent medical treatment. See Exhibit O, pages 7 and 8. He opined that the claimant suffered a forty percent permanent partial disability to his left shoulder as a result of the accident in 2006. See Exhibit O. He also diagnosed a preexisting shoulder rotator cuff repair in 2003 with some occasional soreness and tightness. See Exhibit O. He opined that the claimant suffered a 40% permanent partial disability from the 2006 work-related accident in addition to the preexisting permanent partial disability.

Dr. Nogalski examined the claimant and opined that the claimant suffered no additional permanent partial disability from the 2006 work-related accident beyond his preexisting disability. See Dr. Nogalski deposition, pages 9, 10.

Based on the evidence, the claimant suffered a 30% permanent partial disability to his right shoulder as a result of the work-related accident in addition to a 27 ½% preexisting partial disability to his right shoulder.

SECOND INJURY FUND

To recover against the Second Injury Fund based upon two permanent partial disabilities, the claimant must prove the following:

> 1. The existence of a permanent partial disability preexisting the present injury of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed. Section 287.220.1, RSMo 1994; Leutzinger v. Treasurer, 895 S.W.2d 591, 593 (Mo.App. E.D. 1995).
>
> 2. The extent of the permanent partial disability existing before the compensable injury. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).
>
> 3. The extent of permanent partial disability resulting from the compensable injury. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).
>
> 4. The extent of the overall permanent disability resulting from a combination of the two permanent partial disabilities. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).
>
> 5. The disability caused by the combination of the two permanent partial disabilities is greater than that which would have resulted from the preexisting disability plus the disability from the last injury, considered alone. Searcy v. McDonnell Douglas Aircraft, 894 S.W.2d 173, 177 (Mo.App. E.D. 1995).
>
> 6. In cases arising after August 27, 1993, the extent of both the preexisting permanent partial disability and the subsequent compensable injury must equal a minimum of fifty weeks of disability to "a body as a whole" or fifteen percent of a major extremity unless they combine to result in total and permanent disability. Section 287.220.1, RSMo 1994; Leutzinger, supra.

To analyze the impact of the 1993 amendment to the law, the courts have focused on the purposes and policies furthered by the statute:

> The proper focus of the inquiry as to the nature of the prior disability is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition. That potential is what gives rise to prospective employers' incentive to discriminate. Thus, if the Second Injury Fund is to serve

> its acknowledged purpose, "previous disability" should be interpreted to mean a previously existing condition that a cautious employer could reasonably perceive as having the potential to combine with a work-related injury so as to produce a greater degree of disability than would occur in the absence of such condition. A condition satisfying this standard would, in the absence of a Second Injury Fund, constitute a hindrance or obstacle to employment or reemployment if the employee became unemployed. Wuebbeling v. West County Drywall, 898 S.W.2d 615, 620 (Mo.App. E.D. 1995).

Section 287.220.1 contains four distinct steps in calculating the compensation due an employee, and from what source, in cases involving permanent disability: (1) The employer's liability is considered in isolation - "the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability;" (2) Next, the degree or percentage of the employee's disability attributable to all injuries existing at the time of the accident is considered; (3) The degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the combined disability; and (4) The balance becomes the responsibility of the Second Injury Fund. Nance v. Treasurer of Missouri, 85 S.W.3d 767, 772 (Mo.App. W.D. 2002).

Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. Sanders v. St. Clair Corp., 943 S.W.2d 12, 16 (Mo.App. S.D. 1997). A disability is “permanent” if “shown to be of indefinite duration in recovery or substantial improvement is not expected.” Tiller v. 166 Auto Auction, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997).

In this case, the claimant suffered a 30% permanent partial disability to his left shoulder as a result of this work incident as discussed above. In addition, the claimant had a preexisting permanent partial disability to his right shoulder. Both disabilities constitute a hindrance or obstacle to employment or reemployment if the employee became unemployed. The claimant’s overall disability from a combination of the two individual permanent partial disabilities exceeds the simple sum of the individual disabilities. See Dr. Cohen deposition, page 21. Based on the evidence, the claimant’s overall disability from the combination of the two individual permanent partial disabilities exceeds the simple sum of the individual disabilities by 10% percent. Therefore, the claimant is awarded an additional 13.34 weeks of permanent partial disability from the Second Injury Fund.

Costs

Section 287.560, RSMo 2000, provides, inter alia, as follows:

> The division, any administrative law judge thereof or the commission, shall have power to issue process, subpoena witnesses, administer oaths, examine books and papers, and require the production thereof, and to cause the deposition of any witness to be taken and the costs thereof paid as other costs under this chapter. Any party shall be entitled to process to compel the attendance of witnesses and the production of books and papers, and at his own cost to take and

> use depositions in like manner as in civil cases in the circuit court. ... Each witness shall receive the fees and mileage prescribed by law in civil cases, but the same shall not be allowed as costs to the party in whose behalf the witness was summoned unless the persons before the hearing is had shall certify that the testimony of the witness was necessary. All costs under this section shall be approved by the division and paid out of the state treasury from the fund for the support of the Missouri division of workers' compensation; provided, however, that if the division or commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them...

The courts have set forth the standard for determination.

> The record unequivocally demonstrates that the employer has offered absolutely no ground, reasonable or otherwise, for its refusal to pay the … benefits it clearly owed. The record also reflects that no basis for such a refusal could be offered, for the statute is clear and the facts supporting the obligation are uncontested. Stillwell v. Universal Const. Co., 922 S.W.2d 448, 457 (Mo.App. W.D. 1996).

Certainly, the evidence in this case shows that the defense compelled the claimant to strictly show each and every element necessary to prevail. In addition, the employer, the insurer, and the Second Injury Fund defended on the basis of Dr. Nogalski's medical opinion that the 2006 work-related accident was not the prevailing factor causing the claimant's medical condition and permanent partial disability. However, the claimant proved its case essentially with depositions that the defense participated in and that were available to the defense well before the hearing. Dr. Nogalski is a qualified shoulder and knee surgeon with impressive curriculum vitae. See Exhibit 1. His expert credentials were neither challenged nor impeached. While the defense did not prevail, it cannot be reasonably found that the employer, insurer, or the Second Injury Fund defended the case without any reasonable ground. Further, the claimant offered no proof of expenses, such as witness fees or transcription expenses. Claimant's request for costs is denied.

Made by: /s/ EDWIN J. KOHNER
EDWIN J. KOHNER
Administrative Law Judge
Division of Workers' Compensation

This award is dated and attested to this 20th day of September, 2010.

/s/ Naomi L. Pearson
Naomi L. Pearson
Division of Workers' Compensation