

FINAL AWARD ALLOWING COMPENSATION  
(Modifying Award and Decision of Administrative Law Judge by Separate Opinion)

Injury No.: 02-109322

Employee: Rosalyn Strait  
Employer: Integram St. Louis Seating  
Insurer: Self-Insured  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

Date of Accident: August 3, 2002

Place and County of Accident: Franklin County, Missouri

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence and briefs, and we have considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the March 24, 2006, award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

#### Preliminaries

The administrative law judge concluded that employer/insurer stipulated as to medical and legal causation of employee's pulmonary condition; i.e. that employee's pulmonary condition was occupationally induced. The administrative law judge heard this matter to consider 1) the liability of employer for temporary total disability benefits, 2) the nature and extent of employee's permanent disability, and, 3) the liability of the Second Injury Fund for permanent total disability/enhanced permanent partial disability.

The administrative law judge found that employee suffered a forty-percent (40%) permanent partial disability of the body as a whole due to the primary injury. The administrative law judge concluded that employee's preexisting left upper extremity condition was a hindrance or obstacle to her employment and that the permanent partial disability attributable to the condition was 20% of the left upper extremity at the level of the wrist and that the disability met the threshold for imposition of Second Injury Fund liability. The administrative law judge concluded that the primary and preexisting conditions create a greater disability by a factor of fifteen percent (15%) over the simple sum of the two disabilities. The administrative law judge found the Second Injury Fund liable for 29.25 weeks of permanent partial disability.

Employee appealed to the Commission alleging the administrative law judge erred in concluding she is not permanently and totally disabled.

Employer/insurer invites us to review the administrative law judge's conclusion that employer/insurer stipulated as to medical and legal causation; i.e. that employee's pulmonary condition was occupationally induced. Employer/insurer also invites us to review the administrative law judge's award of future medical care. We decline employer/insurer's invitations because employer/insurer did not file an Application for Review preserving these issues for review.

#### Legal Principles

##### Permanent Total Disability

[T]he term "total disability" is "defined as the inability to return to any employment and not merely the

inability to return to the employment in which the employee was engaged at the time of the accident." *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 884 (Mo. App. 2001); § 287.020.7. "It does not require that the claimant be completely inactive or inert." *Sifferman v. Sears Roebuck and Co.*, 906 S.W.2d 823, 826 (Mo. App. 1995); see also *Brookman v. Henry Transp.*, 924 S.W.2d 286, 290 (Mo.App. 1996); *Reiner v. Treasurer, State of Missouri*, 837 S.W.2d 363, 367 (Mo.App. 1992).

"To determine if claimant is totally disabled, the central question is whether, in the ordinary course of business, any employer would reasonably be expected to hire claimant in his present physical condition." *Ransburg v. Great Plains Drilling*, 22 S.W.3d 726, 732 (Mo. App. 2000); see also *Massey v. Missouri Butcher & Cafe Supply*, 890 S.W.2d 761, 763 (Mo. App. 1995).

....

"The testimony of . . . lay witnesses as to facts within the realm of lay understanding can constitute substantial evidence of the nature, cause, and extent of the disability, especially when taken in connection with, or where supported by, some medical evidence." *Eimer v. Bd. of Police Comm'rs*, 895 S.W.2d 117, 120 (Mo.App. 1995); *Ransburg*, 22 S.W.3d at 732.

*Pavia v. Smitty's Supermarket*, 118 S.W.3d 228, 234 (Mo. App. 2003).

[T]he Commission does not have to make its decision only upon testimony from physicians; it can make its findings based on the entire evidence. *Smith*, 32 S.W.3d at 573; see *Eimer*, 895 S.W.2d at 120. "In determining the percentage of disability, the Commission is not bound by the percentage estimates of medical experts and it may consider all of the evidence, including the testimony of the employee and all reasonable inferences." *Eimer*, 895 S.W.2d at 120.

*Pavia*, 118 S.W.3d at 239<sup>[1]</sup>, citing *Smith v. Richardson Bros. Roofing*, 32 S.W.3d 568 (Mo. App. 2000).

### Second Injury Fund

Section 287.220 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." It matters not whether the previous disability is "from compensable injury or otherwise."

...

That portion of § 287.220 pertaining to permanent total disability is: " \* \* \* If the previous disability \* \* \* , and the last injury together result in total and permanent disability, the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable, is less than the compensation provided in this chapter for permanent total disability then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the second injury fund \* \* \* ."

*Stewart v. Johnson*, 398 S.W.2d 850, 853 (Mo. 1966).

To trigger the liability of the Second Injury Fund, an employee must have a pre-existing permanent partial disability, whether from a compensable injury or otherwise. Section 287.220.1; "The permanent disability pre-dating the injury in question must 'exist at the time the work-related injury was sustained and be of such seriousness as to constitute a hindrance or obstacle to employment or re-employment should the employee become unemployed.'" See also 287.220.1. To determine

whether a pre-existing partial disability constitutes a hindrance or obstacle to the employee's employment, "the Commission should focus on the potential that the pre-existing injury may combine with a future work related injury to result in a greater degree of disability than would have resulted if there was no such prior condition." Liability of the Second Injury Fund is triggered only "by a finding of the presence of an actual and measurable disability at the time the work injury is sustained."

*E. W. v. Kansas City, Missouri, School District*, 89 S.W.3d 527, 537 (Mo. App. 2002), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

A disability is considered "permanent" if it can be "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. 1997).

*Kerns v. Midwest Conveyor*, 126 S.W.3d 445, 451 (Mo. App. 2004).

## Discussion

Drs. Shen, Volarich and Hyers all testified they would defer to a vocational expert regarding employee's employability. The only vocational expert to offer an opinion in this matter was Mr. James England, a rehabilitation counselor with 31 years experience. Mr. England considered the employee's physical restrictions as described by Drs. Shen and Volarich relating to employee's need to work in an environment free of dust, fumes, chemicals, etc, as well as employee's physical restrictions as a result of the preexisting disability to her left upper extremity (assembly ability negated). Those restrictions limit employee to sedentary work in a clear-air environment. Mr. England then factored in limitations resultant from employee's pre-existing intellectual problems (low intelligence and academic deficiencies), which he believes are permanent. Mr. England believes that employee's intellectual deficits prevent her from functioning in jobs that require normal reading, writing, and the ability to handle paperwork. Mr. England's opinions that employee's intellectual problems are permanent and pre-existed the primary injury are supported by employee's high school transcripts that reveal she was receiving special education and by employee's testimony that she is currently limited to adding and subtracting and reading simple words.

Mr. England testified that he does not think employee is realistically employable in the open labor market. He simply does not believe there is an employer in the local open labor market who would reasonably be expected to hire employee.

[T]he Commission may not arbitrarily disregard and ignore competent, substantial and undisputed evidence of witnesses who are not shown by the record to have been impeached, and the Commission may not base their finding upon conjecture or their own mere personal opinion unsupported by sufficient competent evidence.

*Houston v. Roadway Express, Inc.*, 133 S.W.3d 173, 179 (Mo. App. 2004) citing *Corp v. Joplin Cement Co.*, 337 S.W.2d 252, 258 (Mo. banc 1960).

The opinion of Mr. England was undisputed. We also find it was unimpeached. The administrative law judge finds the vocational opinion of Mr. England wholly unpersuasive, largely because Mr. England explained that employee's test scores on the California Test of Mental Maturity put her in the mentally retarded range of intelligence and that individuals in this range of intelligence are limited to simple and repetitive tasks. The administrative law judge was so offended by Mr. England's word choice that he disregarded Mr. England's opinion.

The administrative law judge's criticism of Mr. England's testimony is misplaced. Mr. England was simply reciting his understanding of the intelligence testing results in clinical terms. In addition to reviewing the test scores, Mr. England performed his own assessment of employee's capabilities. Mr. England's testing found that employee was performing math at a 5<sup>th</sup> grade level and reading at a 6<sup>th</sup> grade level. Employee testified that she can read simple words such as in a recipe and she can add and subtract. The evidence on the whole record supports Mr. England's opinions regarding employee's intellectual capacity and the obstacles it poses to employment opportunities.

The administrative law judge goes on to state that employee's work history belies the notion that her cognitive capabilities would limit her to simple and repetitive tasks. He relies on employee's training to perform fifteen different jobs for employer and her occasional cashiering duties as proof that employee can perform beyond simple and repetitive tasks. The problem with the administrative law judge's conclusion is that there is no evidence to establish that any of the tasks employee has been called upon to perform were anything other than simple or repetitive. Employer's human resources manager described the jobs employee performed for employer: "For the most part they're simple. Some of them are repetitive. Some of them are not." Mr. England explained that cashiering jobs do not require more than the performance of simple and repetitive tasks because of the manner in which cash registers are programmed. Employee's description of various jobs she has performed in her work history all paint a picture of simple and/or repetitive jobs. We find that at the time of employee's work injury, her intellectual deficiencies were an actual and measurable disability and constituted a hindrance or obstacle to employment.

Based upon the credible testimony of Mr. England, we do not believe any employer would reasonably be expected to hire employee in her present physical condition. *Pavia*, 118 S.W.3d at 234. Employee is unable to compete in the open labor market. We accept Mr. England's testimony that employee's inability to compete is due to the disability she suffers from her work injury in combination with her pre-existing physical and intellectual deficits. The Second Injury Fund is liable to employee for permanent total disability benefits. See § 287.220 RSMo.

#### Award

We modify the award of the administrative law judge on the issue of Second Injury Fund liability for permanent total disability benefits. The Second Injury Fund is liable to employee for permanent total disability benefits. In all other respects, we affirm the award.

We direct the Second Injury Fund to pay to employee a weekly permanent total disability benefit in the amount of \$309.20 (649.32 – 340.12), the difference between employee's permanent partial disability rate and permanent total disability rate, for 160 weeks beginning July 20, 2004, the day after employee reached maximum medical improvement. Thereafter, the Second Injury Fund shall pay to employee \$649.32 per week for her permanent total disability benefit for the remainder of her lifetime, or until as modified by law.

The award and decision of Administrative Law Judge Kevin Dinwiddie, issued March 24, 2006, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

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 12<sup>th</sup> day of January 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

\_\_\_\_\_  
William F. Ringer

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
John J. Hickey, Member

Attest:

---

Secretary

## AWARD

Employee: Rosalyn Strait

Injury No. 02-109322

Dependents: N/A

Employer: Integram St. Louis Seating

Before the  
DIVISION OF WORKERS'  
COMPENSATION  
Department of Labor and Industrial

Additional Party:

Relations of Missouri  
State Treasurer, as Custodian of the Second Injury Fund  
Jefferson City, Missouri

Insurer: Self-Insured

Hearing Date: December 21, 2005; finally submitted February 1, 2006    Checked by: KD/Isn

### 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: 8/3/02
5. State location where accident occurred or occupational disease was contracted: Franklin County, MO
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? Self-Insured
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
Employee suffered an occupational asthma while working the "foam" side of the plant
12. Did accident or occupational disease cause death? N/A    Date of death?
13. Part(s) of body injured by accident or occupational disease: Pulmonary (body as a whole)
14. Nature and extent of any permanent disability: 40% permanent partial disability of the body as a whole
15. Compensation paid to-date for temporary disability: See Award
16. Value necessary medical aid paid to date by employer/insurer? \$6,363.49

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$1,007.00
- 19. Weekly compensation rate: \$649.32/\$340.12
- 20. Method wages computation: by agreement of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: N/A - See award as to future medical

76 and 2/7 weeks of temporary total disability at the rate of \$649.32 per week .....	\$49,533.84
160 weeks of permanent partial disability from Employer at \$340.12 per week .....	\$54,419.20

22. Second Injury Fund liability: Yes

29.25 weeks of permanent partial disability from Second Injury Fund at \$340.12 per week .....\$9,948.51

TOTAL: (EMPLOYER/INSURER HAVE A CREDIT FOR  
TEMPORARY TOTAL DISABILITY OVERPAYMENT OF \$41,461.21)

23. Future requirements awarded: Employer/Insurer to provide future medical care. See award.

Said payments to begin as of the date of this Award 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:

James G. Krispin

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Rosalyn Strait

Injury No: 02-109322

Before the  
DIVISION OF WORKERS'  
COMPENSATION  
Department of Labor and Industrial Relations of Missouri  
Jefferson City, Missouri

Dependents: N/A

Employer: Integram St. Louis Seating

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

Insurer: Self-Insured

Checked by: KD/LSN

The claimant, Ms. Rosalyn Strait; the self-insured employer, Integram St. Louis Seating; and the State Treasurer, as custodian of the Second Injury Fund, appeared at hearing and stipulated as to the issues and evidence to be presented at hearing with regard to the involved claim for compensation. By letter dated 12/27/05 and addressed to the administrative law judge post hearing in this matter, Mr. James G. Krispin, counsel for the employee, advised that by inadvertence the employee neglected to raise at hearing the issue as to future medical care. The employer and insurer objected to the reopening of the record to allow for the consideration of that issue. By agreement, on January 12, 2006, a telephone conference was held with the involved parties and with the administrative law judge. The status of the issue as to future medical care was held in abeyance, and the parties were advised to submit written argument as to the merits of reopening the record.

At hearing held on the matter on 12/21/05, the employer and the employee further disputed whether medical causation was at issue with respect to the claimant's complaints of ill-being and an exposure to a risk of injury at work. The employee argues that the employer stipulated to medical causation at hearing held prior to the issuance of the temporary or partial award in the matter. A ruling as to the issue of medical causation, and the objection of the employee as to those portions of the employer's exhibits bearing on medical causation, were held in abeyance pending the opportunity of the parties to submit written argument. The parties were, however, able to agree that the following issues are to be resolved at hearing:

Nature and extent of temporary total disability (employer asserts a credit for possible overpayment);  
Nature and extent of permanent disability; and  
Liability of the Second Injury Fund.

The claimant, Ms. Strait, appeared at hearing and testified on her own behalf. Ms. Strait further submitted the deposition testimony of Anthony S. Shen, M.D.; David T. Volarich, D.O.; and of James M. England, Jr. The employer and insurer elicited the testimony of Mr. Joseph Laffleur, and submitted the deposition testimony of Robert M. Bruce, M.D.; Thomas Hyers, M.D.; and of John W. McKinney, M.D.

## EXHIBITS

Claimant's exhibits A, B, C, and D as offered in evidence at the hearing for temporary award in this matter are hereby acknowledged as being a part of the record. The following exhibits were offered at the hearing for a final award, and are received subject to the objections raised at that hearing:

### Claimant's Exhibits

- E. Deposition of Anthony S. Shen, M.D., taken on 6/23/05
- F. Deposition of Anthony S. Shen, M.D., taken on 12/15/05
- G. Deposition of David T. Volarich, taken on 6/29/05
- H. Deposition of James M. England, Jr., taken on 6/29/05
- I. Certified medical records of Pulmonary and Critical Care

Medicine, L.L.C.

J. Certified medical records of Midwest Special Surgery

K. Permanent High School Record

#### Employer and Insurer's Exhibits

1. Deposition of Robert M. Bruce, M.D., taken on 12/1/05
2. Deposition of Dr. Thomas Hyers, taken on 12/13/05
3. Deposition of John W. McKinney, M.D., taken on 12/15/05
4. Medical records of Dr. Glen Calvin

#### Second Injury Fund Exhibits

-  
None offered.

### FINDINGS OF FACT AND RULINGS OF LAW

Ms. Strait is the mother of four children, and she is currently keeping a home she shares with three sons. The claimant entered the working world at the age of thirteen, stocking shelves and dusting at a Ben Franklin. Ms. Strait had some difficulty in school, was enrolled in a special education program, and eventually left school in the ninth grade, at around age 15 or 16. Ms. Strait enrolled in a program to achieve her G.E.D., but did not pursue that degree.

Ms. Strait has had no other vocational or technical training. Claimant acknowledges that she left her home in Missouri and ran away to join her mother in Michigan, where claimant worked in restaurants. Ms. Strait acknowledges that her prior work history includes working part time at a Jack in the Box restaurant; at a Wal-Mart, where she would also do some cashier work at the Deli; and at Tradco, where she worked as a "helper", feeding metal into a machine. Ms. Strait notes that her past history includes a lengthy period where she was a stay at home mother to her children. Ms. Strait has never had a job that involved supervising other employees, and has never worked in an office environment.

Ms. Strait notes that she started out as a temporary part-time worker at Integram St. Louis Seating (hereinafter referred to as "employer"), and became a full time employee of employer in the year 2000. Ms. Strait acknowledges that prior to her employment with employer she was a cigarette smoker from the age of 15 or 16, and smoked up until being hospitalized after a car accident in 1987. Ms. Strait had no prior problems with her breathing or with the use of her voice prior to her employment with employer, and was able to do such activities as exercising in a gym and performing housework.

Claimant started out on the assembly side of the plant, using power tools, bending, lifting, and carrying seats being built for Chrysler vehicles. Ms. Strait was able to perform all the duties of her job in assembly without problems, working 8 to 10 hours a day, usually five days a week. Ms. Strait notes that she developed problems with her left wrist, had a carpal tunnel surgery, and was eventually released to return to her work in assembly.

Claimant was able to return to full duty in assembly, but in August of 2002 was able to make a switch to the day shift, where she worked on the "foam" side of the plant. Claimant began working the "cover loading" job, which involved taking material off of a mold by using a spray that would release the material from the mold. The assembly and foam operations were in two separate buildings that were joined by a connecting tunnel that generally remained open. The tunnel was large enough to accommodate the width of as many as three tow motors at one time.

Claimant used a spray gun to apply the releasing agent, identified by the doctors in their various depositions as the hydrocarbon naphtha. After a week or two on the cover loading job, claimant began to experience changes affecting her voice, and also began to suffer breathing problems. Claimant was referred to the plant physician, Dr. Bogner, and was eventually returned to the assembly side of the plant. Claimant recalls that after a couple of days her complaints worsened. Although some of the treating physicians may have been given a history of no ventilation at the involved job site, the testimony of Ms. Strait and of Mr. Laffleur persuades that there was a large vent over each spray area, and fans that would blow the spray away from the employee from behind, into the ventilation units above the molds.

Both Ms. Strait and Mr. Laffleur referred to the spray as a "mist" and whereas Ms. Strait referred to the spray as a cream color that she could see and taste in her mouth, Mr. Laffleur did not believe the spray had any color.

Claimant saw Drs. Calvin and Berson in August and September of 2002 (the records of Dr. Calvin are in evidence, Employer and Insurer's Exhibit No. 4; the records of Dr. Berson are not in evidence). Claimant suffered symptoms that compelled her to seek emergency room treatment on 10/6/02, and thereafter she had her initial visit with Dr. Anthony Shen, a specialist in pulmonary and critical care medicine.

Medical records from the office of Dr. Shen, Claimant's Exhibit I, reveal that from 10/9/02 to 5/28/03 Dr. Shen treated the claimant for what he believed to be a work-related occupational asthma. From October to May, Dr. Shen performed diagnostic evaluations, prescribed medications, and dictated when and to what extent the claimant would be allowed to return to work in the plant. On 5/28/03 Dr. Shen performed an examination of the claimant, concluded that she

should be permanently removed from the plant after having suffered an exacerbation of her asthma, and cautioned that claimant could anticipate a slow recovery.

Claimant also had an evaluation by Dr. John W. McKinney, an ear, nose, and throat specialist. On 1/24/03 Dr. McKinney met with Ms. Strait, took a history of complaint, and performed an examination with respect to the complaint of the claimant referable to her voice. Dr. McKinney concluded that the claimant's main problem was that the 15 muscles located within her larynx were too tight. He also found edema or swelling of ethmoid tissues believed to be secondary to throat clearing or to a history of reflux or indigestion. (Employer and Insurer's Exhibit No. 3, at. pages 8-11). Dr. McKinney further concluded that tight laryngeal musculature typically produces a hoarse voice, and concludes that the condition occurred "through her life experience". Dr. McKinney points to, in particular, stress; a family history of laryngeal cancer; a history of smoking; and a history of reflux. Dr. McKinney further does not believe that the claimant suffers any restrictions from an ENT standpoint on her ability to work.

Claimant continued to treat after she left the plant on a permanent basis in May of 2003, and continued to treat with Dr. Shen thereafter, with as many as eight visits with Dr. Shen from June to December of 2003. Dr. Shen concluded that the claimant's asthma was aggravated by reflux, and in time the claimant's condition improved to the point that in November of 2003 she was no longer taking the steroid known as Prednisone.

On January 21, 2004, Dr. Shen performed an examination and concluded that the claimant could be released to work in February to a job that was "free of odors, dust, fumes, irritants, physical exertion, and extreme temperatures". Claimant testified, however, that since May of 2003 she has not worked and has not sought employment, believing that she is not capable of employment, including any employment in an office setting.

The records of Dr. Shen further document ongoing treatment from his office into May of 2005, and the history in those records is consistent with the deposition testimony of Dr. Shen to the effect that Ms. Strait suffers from occasional exacerbation of her breathing problems, leading to the use of Prednisone until such time as her exacerbations are abated. Ms. Strait acknowledges that she went a period of four months, from May to September of 2005, without visiting Dr. Shen at his office. She further supposes that she has made a couple of visits to his office since September, noting that she will also call and talk to him at his office from time to time.

Ms. Strait relates that she does not have the air necessary to perform a job, and that her condition is aggravated from smells and odors that emanate from such things as carpeting. Ms. Strait notes that her condition is sensitive to temperature changes, and that sometimes she suffers from breathing shortness that she does not relate to any particular cause. Ms. Strait further notes that during episodes of lack of air, she will use an inhaler or nebulizer to deliver her medication, or will go to the emergency room for treatment if those two means do not work for her.

Ms. Strait acknowledged on cross-examination that subsequent to her left carpal tunnel release she has had some tingling and weakness in her left hand that has caused her some loss of grip strength, but did not prevent her from doing her work. Ms. Strait further acknowledges having had a right carpal tunnel surgery, but does not recall when she first began experiencing problems with that wrist. Claimant acknowledges that she suffers right hand cramping and pain, and that on an infrequent basis the symptoms in her right hand will wake her up at night.

## **MEDICAL CAUSATION AND INJURY BY OCCUPATIONAL DISEASE**

At hearing held on 3/31/04 with respect to the request for a temporary or partial award, the employer and employee stipulated that on or about the third day of August 2002, the claimant suffered an injury by occupational disease. The term 'occupational disease' includes both the concepts of medical and legal causation. Medical causation addresses the issue as to whether the disease at issue was caused by an exposure in the workplace, and legal causation addresses the issue as to whether the disease was shown to arise out of and in the course of employment as provided in subsection 2 and 3 of Section 287.020 RSMo, made applicable to occupational disease claims by operation of subsection 2 of Section 287.067 RSMo (the references are to the version of those sections that are applicable to injuries before August 28, 2005, both sections having been most recently amended by CCS/HCS/SS/SSC/SB 1 & 130.).

The question is whether the employer stipulated to both medical and legal causation in this matter when it stipulated that the claimant had suffered an injury by occupational disease.

Stipulations are controlling and conclusive, and the courts are bound to enforce them. Bock v. Broadway Ford Truck Sales, Inc., 55 S.W.3d 427, 436 (Mo.App. E.D. 2001), citing Space Walker, Inc. v. American Family, 954 S.W. 2d 420, 424 (Mo.App. E.D. 1997). A stipulation should be interpreted in view of the result which the parties were attempting to accomplish. Id.

Is there a question as to what the parties were intending to accomplish on 3/31/04 when they stipulated to injury by occupational disease? The employer had the opportunity to put on its proof at that time as to medical causation, but chose to not to offer any expert medical opinion on the issue. The only expert medical opinion put in evidence at the hearing on 3/31/04 was the deposition testimony of Dr. Shen taken on 2/11/04, marked and received as Claimant's Exhibit A. At page 15 and 16 of that deposition, when asked as to the diagnosis he had provided to the employer on a record entitled 'Certification of Health Care Provided', Dr. Shen replied "Okay. Occupational asthma". On cross examination by the

employer, Dr. Shen made it clear that he was aware that he was preparing reports for a workers' compensation case, and that he could not see the patient for work-related injuries "without the permission of the work comp" (Claimant's Exhibit A, at pp. 24-25). In response to a question as to placement of restrictions on physical activity, at p. 28, Dr. Shen responded, "Well, I simply said on 5/28 off work permanently. Something that she should have given to her employer. Off work permanently due to occupational asthma."

This fact finder concludes that the employer stipulated to medical and legal causation on 3/31/04 as to an occupational asthma when it stipulated to injury by occupational disease. The objection of the employee at hearing as to relevance is sustained as it relates to any expert medical opinion from Drs. Bruce and Hyers bearing on the issue of medical causation as to the claimant's pulmonary condition, Employer and Insurer's Exhibit Nos. 1 and 2 respectively. Parties need to take note that the relevance objection is sustained only as to medical causation opinions bearing on occupational asthma. For example, Dr. Shen, at page 9 of his deposition, Claimant's Exhibit A, noted that he deferred evaluation of voice hoarseness with Dr. McKinney, the ENT doctor. The medical causal opinion of Dr. McKinney as to an ear, nose, or throat complaint is deemed relevant given his particular expertise.

### **PERMANENT DISABILITY/LIABILITY OF THE SECOND INJURY FUND**

Drs. Thomas Hyers and Robert M. Bruce conclude that the claimant suffers from a mild persistent asthma. Dr. Hyers met with Ms. Strait on one occasion, on 11/12/02, to perform an occupational medicine exam. After his evaluation, he concluded that claimant "had upper and lower respiratory irritation associated with exposure to the "cover loading" product". Dr. Hyers was later asked to review additional records; provided a report as to his findings; and provided his deposition testimony as to such matters as diagnosis, causation, recommended restrictions, and need for treatment. (See Employer and Insurer's Exhibit No. 2).

Dr. Robert M. Bruce had the opportunity to examine Ms. Strait on August 17 and on September 9, 2004. Dr. Bruce likewise reviewed the medical records and offered his opinions as to diagnosis, causation, restrictions, and need for treatment, and also provided a disability rating based on impairment in lung function.

Dr. David T. Volarich met with Ms. Strait on 11/11/04 at the request of her counsel for the purpose of preparing an independent medical examination report. Dr. Volarich took a history from Ms. Strait, reviewed various medical records and reports, elicited complaints from Ms. Strait, performed a physical examination, and provided both a report and deposition testimony as to his findings and conclusions. (See Claimant's Exhibit G).

All the doctors to offer their expert medical opinions on the subject agree that the claimant suffers from asthma. The doctors also generally agree that in addition, Ms. Strait suffers from rhinitis and reflux. Dr. Shen concludes that the claimant suffers from a moderate to severe persistent asthma, but does not provide a rating or evaluation as to percent of impairment.

As to the severity of her asthma, Dr. Shen, the treating physician, who has had the opportunity to perform repeated testing and examination of Ms. Strait, is found to be the most persuasive of the various physicians to have offered an opinion. The testimony of Dr. Shen persuades that the claimant suffers exacerbations of her asthma that are prolonged and severe, and that the likelihood is that these exacerbations will continue into the future. Doctors Shen and Hyers persuade that the claimant will be unable to return to any work environment where she would be exposed to dust, chemicals, or fumes. Dr. Shen further persuades that the claimant would be capable of a sedentary employment where her physical exertion was limited, and where she would be free of fumes, dust, and chemicals that would trigger asthma symptoms.

Mr. James M. England Jr., a certified rehabilitation counselor, shared his expertise as to the prospects for Ms. Strait to find employment on the open labor market (See Claimant's Exhibit H). Mr. England met with Ms. Strait on 11/29/04; elicited from her a personal history and a work history; reviewed various medical records; and administered testing that suggested scoring at the fifth grade level in mathematics, and the sixth grade level on word recognition and reading comprehension.

The suggestion that the asthma suffered by Ms. Strait is so disabling by itself as to render the claimant unemployable on the open labor market is not found persuasive. Drs. Bruce, Hyers, and Shen all are specialists in pulmonary medicine, and all came to the conclusion that the claimant would be capable of working in a clean environment that was free of dust, fumes, chemicals and extreme temperature changes.

Clearly the asthma suffered by Ms. Strait is seriously disabling, but it is amenable to treatment, and has never progressed to the point where the claimant was in need of hospitalization. The test for permanent total disability is whether, given the claimant's situation and condition, he is competent to compete in the open labor market. Laturno v. Carnahan, 640 S.W.2d 470, 472 (Mo.App. 1982). This test measures the worker's prospects for returning to employment. Patchin v. National Supermarkets, Inc., 738 S.W.2d 166, 167 (Mo.App. 1987). Total disability means the inability to return to any reasonable employment; it does not require that the employee be completely inactive or inert. Brown v. Treasurer of Missouri, 795 S.W.2d 479, 483 (Mo.App. 1990). The question is whether in the ordinary course of business an employer would reasonably be expected to hire the claimant in his present physical condition, reasonably expecting him to perform the work for which he is hired. Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919, 922 (Mo.App. 1982). Claimant has failed to persuade that the involved work injury alone has rendered her unable to compete for employment on the open labor market.

The testimony of Ms. Strait persuades that her asthma has caused her to more easily become fatigued, and that her physical endurance has been compromised. The testimony of Ms. Strait, as supported by the findings of Dr. Shen, suggests that her symptoms wax and wane, according to the times when she suffers exacerbations that require a more aggressive treatment regimen, such as the use of the systemic steroid Prednisone. From all of the evidence, claimant is found to have suffered a work related permanent partial disability equivalent to 40% of the body as a whole, referable to the lungs. At the stipulated rate of \$340.12 per week, the amount due for permanent partial disability is for 160 weeks, or \$54,419.20.

The conclusion of Mr. England, and his opinion to suggest that the claimant is unable to compete for employment on the open labor market, simply is not found persuasive by this fact finder. For one, Mr. England relies on intelligence testing from documents not in evidence to conclude that test scores place Ms. Strait in a mentally retarded range of intelligence that would limit her to simple and repetitive tasks. To his credit, Mr. England acknowledges that test scores from the testing that he administered cause him to some extent to question the aforementioned intelligence test score. More importantly, this fact finder had the opportunity to observe the demeanor of Ms. Strait and her cognitive function during what most certainly had to be a stressful hour or so while giving her testimony in court, and the suggestion that the claimant suffers from a condition that could be fairly characterized as a "retardation" is, frankly, offensive. Further, the claimant's work history belies the notion that her cognitive capabilities would limit her to simple and repetitive tasks. Most recently, claimant worked at Integram, and was obliged to learn as many as fifteen different jobs that the employees could be called upon to perform. Ms. Strait also has a history of working as a cashier at both a fast food restaurant and from time to time while working in the deli section of a Wal-Mart. This history belies the notion that the claimant would necessarily be limited to simple tasks on the basis of considerations of intelligence alone. The history further belies the notion that low intelligence has constituted a hindrance or obstacle to her employment, or constitutes a preexisting disability under the act to the extent that the Second Injury Fund would be deemed liable.

Dr. Volarich provides a series of limitations that he would prescribe with respect to the use of the claimant's left upper extremity post her surgeries for carpal tunnel syndrome, Guyon's canal stenosis, and ganglion cyst. Dr. Volarich further states that he believes the claimant suffers from a permanent partial disability of the left wrist that constitutes a hindrance or obstacle to employment, and that the left wrist injury and disability referable to her asthma combine to create a disability that is greater than the simple sum of the disabilities when added together. Ms. Strait testified that after her left carpal tunnel surgery she was able to return to her employment, and was able to fulfill all of the functions of her employment on both the assembly and foam sides of the plant. In the course of her direct examination Ms. Strait made no complaint as to the use of her left upper extremity, but during cross-examination from the employer and insurer she acknowledged that she had some loss of grip strength that would cause her to drop small objects.

Second Injury Fund liability is triggered when the preexisting injury is a hindrance or obstacle to employment or to obtaining reemployment. "If the Second Injury Fund is to fulfill its acknowledged purpose, 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." Wuebbing v. West County Drywall, 898 S.W.2d 615, 620 (Mo.App. E.D. 1995).

Claimant has failed to persuade that the combination of preexisting permanent disability and permanent disability referable to her last work injury have rendered her unable to compete for employment on the open labor market. The testimony of Ms. Strait and the expert medical opinion of Dr. Volarich persuade that the claimant suffers from a preexisting permanent partial disability of the left upper extremity that meets the threshold for triggering Second Injury Fund liability. Claimant is found to suffer from a permanent partial disability from the combined two disabilities that is substantially greater than that created by the occupational asthma alone. Claimant is found to have suffered a preexisting permanent partial disability equivalent to 20% of the left upper extremity, referable to her carpal tunnel syndrome. The two disabilities are found to create a greater disability by a factor of 15% over and above the simple sum of the two disabilities when added together. The amount due from the Second Injury Fund is for  $(175 \times .20 = 35 \text{ weeks}) + (400 \times .40 = 160 \text{ weeks}) = 195 \text{ weeks}$   $\times .15 = 29.25 \text{ weeks}$ . At the stipulated rate of \$340.12 per week, the amount due from the Second Injury Fund is \$9,948.51.

### **TEMPORARY TOTAL DISABILITY/CREDIT FOR OVERPAYMENT**

The parties stipulated at hearing that the employer and insurer had paid temporary total disability benefits from 5/28/03 through 12/26/05, and that the total amount paid was \$90,995.05.

Section 287.020.7 defines "total disability" as the "inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident". "Temporary total disability" is a judicial creation that is defined by case law and not by statute. See Herring v. Yellow Freight System, Inc., 914 S.W.2d 816, 820 (Mo.App 1995). Temporary total disability awards are owed until the claimant can find employment or the condition has reached the point of maximum medical progress. Vinson v. Curators of Univ. of Missouri, 822 S.W.2d 504, 508 (Mo.App. 1991) In determining whether an employee is totally disabled, the main issue is whether any employer,

in the usual course of business, would reasonably be expected to employ the employee in the employee's present physical condition. Brookman v. Henry Transp., 924 S.W.2d 286, 290 (Mo.App. 1996). A number of cases have acknowledged that a claimant can be totally disabled even if able to perform sporadic or light duty work. Minnick v. South Metro Fire Protection Dist., 926 S.W.2d 906, 909 (Mo.App. 1996); Gordon v. Tri-State Motor Transit Co., 908 S.W.2d 849 (Mo.App. 1995). "A nonexclusive list of other factors relevant to a claimant's employability on the open labor market includes the anticipated length of time until the claimant's condition has reached the point of maximum medical progress, the nature of the continuing course of treatment, and whether there is a reasonable expectation that the claimant will return to the claimant's former employment." Cooper v. Medical Center of Independence, 955 S.W.2d 570, 576 (Mo.App. W.D. 1997).

The most persuasive expert medical opinion as to when the claimant had reached the point of maximum medical progress is that of Dr. Volarich. As of the date of his examination, 11/11/04, Dr. Volarich had the benefit of the claimant's entire treatment and complaint history to that point, including the history of exacerbation leading to further prescription of prednisone by Dr. Shen in October of 2004. The employee suffered a temporary and total disability that was payable by the employer and insurer from 5/28/03 through 11/11/04. The claimant was unable to work for 76 and 2/7 weeks. At the rate of \$649.32 per week, the amount due for temporary total disability is \$49,533.84. The employer and insurer have a credit for an overpayment of \$90,995.05 paid less the \$49,533.84 owed, resulting in an overpayment of \$41,461.21.

### **FUTURE MEDICAL CARE**

To refuse the employee the benefit of future medical care in this matter would be the ultimate championship of form over substance. The employee neglected to identify future medical as an issue to be resolved in advance of taking testimony in the matter on 12/21/05. All of the doctors agree that the claimant is in need of ongoing care as a result of her asthmatic condition. The real issue, as revealed in the employer's brief in the matter, is medical causation. The employer does not dispute the fact that the claimant is in need of further medical care for her asthmatic condition. Rather, the employer argues that they are not obliged to provide further treatment under 287.140 RSMo because the asthmatic condition is not work related.

Four doctors testified and were asked to provide an evaluation of the pulmonary condition (Drs. Hyers, Bruce, Shen, and Volarich). Four doctors found the claimant in need of further treatment to cure or relieve of the effects of her asthma. The employer has previously stipulated to injury by occupational disease, and is precluded by that stipulation from arguing that the asthmatic condition was not work related. The proof is unassailable that the claimant is in need of future medical care to cure and relieve her of the effects of her injury, per Section 287.140 RSMo. The employer and insurer are to provide further medical care consistent with the medical opinions of Dr. Shen, the treating physician, as expressed concerning her pulmonary condition.

This award is subject to a lien in favor of James G. Krispin, Attorney at Law, in the amount of 25% thereof for necessary legal services rendered.

This award is subject to interest as provided by law.

Date: March 24, 2006

Made by: /s/ KEVIN DINWIDDIE  
KEVIN DINWIDDIE  
Administrative Law Judge  
Division of Workers' Compensation

A true copy: Attest:

/s/ PATRICIA "PAT" SECREST  
PATRICIA "PAT" SECREST  
Director

