

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

Injury No.: 03-147616

Employee: David A. Trimmer
Employer: Johnson Controls, Inc.
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, heard the parties' arguments, and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

"Additional significant evidence" for modification of temporary awards

On February 17, 2011, an administrative law judge entered a temporary award in this matter allowing compensation to the employee. In that award, the administrative law judge considered the issue whether employee's claim herein is barred by the doctrine of res judicata in light of earlier proceedings in a claim designated as Injury No. 03-142166. The administrative law judge held that employee's claim is not barred by the doctrine of res judicata. On August 25, 2011, the Commission affirmed and adopted as its own the administrative law judge's temporary award.

At the hearing for a final award before the administrative law judge on December 17, 2013, employer did not present any additional evidence relevant to the issue whether employee's claim is barred by res judicata. Instead, employer offered only a rating report from Dr. Corey Trease. See *Transcript*, pages 26, 395. In his award following the hearing, the administrative law judge determined, once again, that employee's claim is not barred by res judicata. Employer appeals.

The Missouri courts have held that "modification of a temporary award requires 'additional significant evidence' not before the administrative law judge at the time of the original award." *Jennings v. Station Casino St. Charles*, 196 S.W.3d 552 (Mo. App. 2006). We are not unsympathetic to the difficulty, from a practical standpoint, of procuring evidence relevant to the issue whether res judicata should bar this claim, but we cannot overlook the holding in *Jennings*. Because employer did not present any additional evidence relevant to its argument that res judicata should bar this claim, we must follow *Jennings* and conclude that this claim is not barred by res judicata.

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Because we otherwise agree with the administrative law judge's findings, conclusions, and award as to the underlying issues of occupational disease, nature and extent of permanent disability, and employer's liability for future medical care, we affirm the award of the administrative law judge.

Conclusion

We affirm and adopt the award of the administrative law judge as supplemented herein.

The award and decision of Administrative Law Judge Robert B. Miner, issued March 14, 2014, is attached and incorporated by this reference.

We approve and affirm 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 22nd day of August 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

DISSENTING OPINION FILED

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: David A. Trimmer

DISSENTING OPINION

Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the Commission lacks statutory authority to enter an award of compensation in this case, because employee's claim for compensation constitutes nothing less than an impermissible attempt to reopen issues that were resolved in a final award.

Background

On May 17, 2004, employee filed with the Division of Workers' Compensation (Division) a claim for compensation alleging that he suffered a left shoulder injury arising out of and in the course of his employment for employer on September 9, 2003. The Division designated the claim as Injury No. 03-142166. The claim proceeded to a hearing, where the parties stipulated that the administrative law judge would hear evidence upon and resolve the following issues:

[W]hether or not the [employee] sustained an accident **or occupational disease** arising out of and in the course of his employment ...

Transcript, page 238 (emphasis added).

During the course of the hearing, employee presented evidence suggesting his left shoulder injury was the result of a fall on September 9, 2003. The employer, meanwhile, advanced evidence to undermine employee's credibility regarding the alleged fall, as well as medical records suggesting employee's left shoulder complaints came on gradually, rather than as the product of an accidental injury. Notably, despite having stipulated that the administrative law judge would consider and determine the issue, employee failed to present evidence sufficient to meet his burden of proving that his left shoulder injury was the product of an occupational disease.

On September 15, 2005, the administrative law judge issued an award concluding, in part, as follows:

[Employee] failed to meet his burden of proof that established he sustained an injury by accident or occupation [sic] arising out of his employment. [Employee's] Claim for Compensation is denied.

Transcript, page 157.

Employee filed an appeal to the Commission, which on June 19, 2006, affirmed and adopted as its own the award of the administrative law judge. Employee did not appeal the claim to the Missouri Court of Appeals. As a result, the Commission's award, concluding that employee did not meet his burden of proving he suffered a compensable left shoulder injury by accident or occupational disease, is final.

This claim

In light of the above described background, how is it that we are now presented with a new claim asking us to once again consider the issue whether employee suffered a left shoulder injury by occupational disease culminating on September 9, 2003? The

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answer begins with some unusual comments set forth in the administrative law judge's award of September 15, 2005, in Injury No. 03-142166, suggesting he believed that employee's claim might have been compensable if pled as an occupational disease, but that no benefits could be awarded, because employee had pled an accident:

This is a troublesome case because I suspect that the [employee's] injury to his left shoulder was the result of 30 years of hard physical labor performed for the employer. This should have been compensable. However, the [employee] has pled an alleged injury from a fall.¹

Transcript, page 162.

Taking the hint, employee procured an expert medical opinion from Dr. Fernando Egea, who opined that employee suffered a left shoulder injury by occupational disease. Employee then filed another claim for compensation with the Division. The Division assigned employee's claim a new injury number, and remarkably, two different administrative law judges and now this Commission have concluded that they possess statutory authority to revisit the issue whether an occupational disease caused employee's left shoulder injury, despite the fact that that issue was finally disposed of in the proceedings in Injury No. 03-142166.

Subsequent proceedings are void

Again, the parties stipulated at the hearing in Injury No. 03-142166 that the administrative law judge would consider and resolve the issue whether employee's left shoulder injury was the product of an occupational disease. "Stipulations are controlling and conclusive, and the courts are bound to enforce them." *Boyer v. Nat'l Express Co.*, 49 S.W.3d 700, 705 (Mo. App. 2001). Of course, "[a] stipulation should be interpreted in view of the result which the parties were attempting to accomplish." *Id.*

I acknowledge that employee's claim for compensation in Injury No. 03-142166 appears to allege an injury by accident. But at the hearing, the parties did not ask the administrative law judge to confine his determinations solely to the issue of accident, nor did employee's counsel make any indication on the record that employee wished to preserve the right to file, at a later date, a claim alleging the shoulder injury was caused by an occupational disease. Instead, she specifically agreed, when asked, that the administrative law judge had correctly recited the issues for trial. See *Transcript*, page 239.

It may have been that the administrative law judge simply made a mistake in reciting the issues; it may also have been that employee's counsel was simply not paying close enough attention to correct that mistake; and it may have been that the administrative law judge ultimately exceeded the scope of his authority in resolving the issue of occupational disease in his award.² If so, employee's recourse was to file an appeal with the Commission; he did

¹ I note that these comments suggest an apparent misapprehension of applicable law, in that the Missouri courts have never held that parties are bound by their "pleadings" in evidentiary proceedings under Chapter 287, and in fact have long held the opposite, see, e.g., *Groce v. Pyle*, 315 S.W.2d 482, 493 (Mo. App. 1958).

² Perhaps this case is best viewed as an example of the needless confusion and difficulty that results on appeal when (as often) parties and administrative law judges fail to make sure that the record at hearing includes a careful and precise statement of the disputed issues.

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so, and the Commission adopted the administrative law judge's award as its own, so employee's recourse was then with the Missouri Court of Appeals. But employee did not pursue that avenue. Instead, under the guise of a new claim for compensation, he seeks to relitigate before the Division and the Commission issues that were indisputably³ raised and disposed of in the earlier proceedings in Injury No. 03-142166.

But the courts have made clear that where "the time for appeal of the award [has] expired ... the Commission is without authority to further delineate the award or expound on its meaning." *Falk v. Barry, Inc.*, 158 S.W.3d 327, 328 (Mo. App. 2005). This is because "[a]n administrative tribunal is a creature of statute and exercises only that authority invested by legislative enactment." *Winberry v. Treasurer of Mo. as Custodian of the Second Injury Fund*, 258 S.W.3d 455 (Mo. App. 2008). Where an administrative agency acts without statutory authority to do so, the resulting "judgment" is void on its face. *State ex rel. Ryan v. Ryan*, 124 S.W.3d 512, 516 (Mo. Ct. App. 2004).

Stated simply, the majority's decision in this case stands for the proposition that workers' compensation litigants are entitled to a second bite of the apple in Missouri. An employee can file a claim, try his case, receive an award denying compensation but hinting at what evidence might have tipped the scales in his favor, go and procure that evidence, refile the claim, and receive a favorable award. I accept that in workers' compensation cases "[p]rocedural rights are considered as subsidiary and substantive rights are to be enforced at the sacrifice of procedural formality," *Loyd v. Ozark Electric Coop., Inc.*, 4 S.W.3d 579, 586 (Mo. App. 1999), but I am not persuaded that general principles of informality or liberal construction can elevate employee's claim for compensation beyond anything more than an impermissible attempt to collaterally attack the Commission's final award in Injury No. 03-142166.

Anyway, the determinative issue is not whether we should sacrifice employer's procedural rights in favor of employee's substantive right to compensation for (what I agree) appears to be a left shoulder injury sustained as a result of 30 years of lifting heavy batteries for employer. Instead, the threshold issue is simply whether this Commission has authority to reopen its award in Injury No. 03-142166 and revisit its conclusion therein that employee failed to meet his burden of proving he sustained a left shoulder injury by occupational disease. Because I find no such authority in the language of Chapter 287, and because the relevant case law states the Commission has no such authority, I believe the majority errs in affirming the award of compensation.

I would enter an order vacating the earlier decisions in this matter as void *ab initio* and dismissing employee's claim for Injury No. 03-147616. Because the majority has determined otherwise, I respectfully dissent.

James G. Avery, Jr., Member

³ At oral arguments in this matter, employee's counsel conceded that the issue of occupational disease was properly before the administrative law judge in Injury No. 03-142166, by virtue of the above-quoted stipulation regarding the scope of the issues for trial.

AWARD

Employee: David A. Trimmer

Injury No.: 03-147616

Employer: Johnson Controls, Inc.

Additional Party: The Treasurer of the State of
Missouri as Custodian of the Second Injury Fund

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri

Insurer: Johnson Controls, Inc.

Hearing Date: December 17, 2013

Checked by: RBM

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: Cumulative through September 9, 2003.
5. State location where accident occurred or occupational disease was contracted: St. Joseph, Buchanan 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 occurred or occupational disease contracted: Employee repetitively lifted and moved batteries injuring his left upper extremity.

12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Left upper extremity.
14. Nature and extent of any permanent disability: 16% of the left upper extremity at the shoulder at the 232 week level.
15. Compensation paid to-date for temporary disability: \$21,175.00.
16. Value necessary medical aid paid to date by employer/insurer? \$44,951.68.
17. Value necessary medical aid not furnished by employer/insurer? N/A.
18. Employee's average weekly wages: \$993.83.
19. Weekly compensation rate: \$662.55 for temporary total disability and \$347.05 for permanent partial disability.
20. Method wages computation: By agreement of the parties.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: None.

No weeks of temporary total disability (or temporary partial disability).

37.12 weeks of permanent partial disability from Employer at the rate of \$347.05 per week, or \$12,882.50.

No weeks of disfigurement from Employer.

Employer is directed to authorize and furnish additional medical treatment to cure and relieve Claimant from the effects of his September 9, 2003 work injury, in accordance with section 287.140, RSMo.

22. Second Injury Fund liability: Not determined. The Second Injury Fund claim remains open.
23. Future requirements awarded: As awarded.

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

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee: David A. Trimmer

Injury No.: 03-147616

Employer: Johnson Controls, Inc.

Additional Party: The Treasurer of the State of
Missouri as Custodian of the Second Injury Fund

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri

Insurer: Johnson Controls, Inc.

Hearing Date: December 17, 2013

Checked by: RBM

PRELIMINARIES

A final hearing was held in this case on Employee's claim against Employer on December 17, 2013 in St. Joseph, Missouri. Employee, David A. Trimmer, appeared in person and by his attorney, David W. Whipple. Self-insured Employer, Johnson Controls, Inc., appeared by its attorney, Mark R. Bates. The Second Injury Fund is a party to this case but was not represented at the hearing since the parties agreed to bifurcate the Second Injury Fund claim. David W. Whipple requested an attorney's fee of 25% from all amounts awarded. It was agreed that post-hearing briefs would be due on January 14, 2014.

STIPULATIONS

At the time of the hearing, the parties stipulated to the following:

1. On or about September 9, 2003, David A. Trimmer ("Claimant") was an employee of Johnson Controls, Inc. ("Employer") and was working under the provisions of the Missouri Workers' Compensation Law.
2. On or about September 9, 2003, Employer was duly self-insured under the provisions of the Missouri Workers' Compensation Law.
3. Employer had notice of Claimant's alleged injury.
4. Claimant's Claim for Compensation was filed within the time allowed by law.
5. The rate of compensation for temporary total disability is \$662.55 per week and the rate of compensation for permanent partial disability is \$347.05 per week.

6. Employer has paid \$21,175.00 in temporary total disability at the rate of \$662.55 per week.

7. Employer has paid \$44,951.68 in medical aid.

ISSUES

The parties agreed that there are disputes on the following issues:

1. Is Claimant's claim barred by res judicata or collateral estoppel?
2. Did Claimant sustain an injury by occupational disease on or about September 9, 2003 arising out of and in the course of his employment for Employer?
3. What is the nature and extent of permanent partial disability, and what is Employer's liability for permanent partial disability benefits?
4. What is Employer's liability for future medical aid?

Claimant testified in person. In addition, Claimant offered the following exhibits which were admitted in evidence without objection:

- A—Transcript and Exhibits of 12/20/10 Temporary Hearing
- B—Orthopedic & Sports Medicine Center, Dr. Trease Records
- C—Athletic & Rehabilitation Center Records
- D—10/17/12 Report of Fernando M. Egea M.D.
- E—Temporary or Partial Award of ALJ Allen dated 2/17/11
- F—Temporary or Partial Award of LIRC dated 8/25/11 affirming award and decision of ALJ Allen

Employer offered Exhibit 1, report of Dr. Corey Trease dated July 25, 2012, which was admitted in evidence without objection.

Any objections not expressly ruled on during the hearing or in this award are now overruled. To the extent there are marks or highlights contained in the exhibits, those markings were made prior to being made part of this record, and were not placed thereon by the Administrative Law Judge.

The Post-Hearing Briefs have been considered.

Procedural History

Claimant filed a claim against Employer in Injury Number 03-142166 for an alleged injury on September 9, 2003 to his left shoulder from a fall at work. (Exhibit A, page 262). A hearing was held on August 10, 2005 before Administrative Law Judge Nelson Allen on Claimant's request for medical treatment in that case. Judge Allen issued a Final Award denying Employee's claim on September 15, 2005. (Exhibit A, pages 124-132). Judge Allen's Final Award was affirmed by the Labor and Industrial Relations Commission on June 19, 2006. (Exhibit A, page 124).

Claimant later filed a new claim against Employer in the case at hand. A temporary hearing was held in this case before Administrative Law Judge Nelson Allen on December 20, 2010. An issue in that hearing was whether Claimant sustained an injury by occupational disease arising out of and in the course of his employment. Judge Allen issued a Temporary or Partial Award in this case on February 17, 2011 that found Claimant had sustained a compensable injury to his left shoulder by occupational disease on September 9, 2003. (Exhibit E). Judge Allen ordered and directed Employer to provide Claimant "with such medical treatment, including surgery, that is reasonable and necessary to cure and relieve the condition caused by his occupational disease to his left shoulder." (Exhibit E, page 9). Judge Allen's Temporary or Partial Award was affirmed by the Labor and Industrial Relations Commission on August 25, 2011 (Exhibit F).

A final hearing was held in this case on Employee's claim against Employer on December 17, 2013.

Findings of Fact

Claimant has worked for Employer for thirty-nine years and continues to work for Employer. He has been a general line worker since he began working for Employer. He worked with automotive replacement batteries.

Claimant took batteries from a skid and stacked them on a line to run through a washer and dryer. The front of the line would be stack on. He picked up batteries and either lifted them onto the line or slid them onto the line. He picked up the batteries and set them or moved them on the line. The front of the line would be stack on.

Claimant was a group leader in September 2003. He floated up and down the line and made sure everything was running smoothly when he was group leader. There were fifty-four to sixty-six batteries on a skid. The batteries averaged 80 pounds in weight.

Claimant processed around 4,000 batteries on a daily basis. The number fluctuated between 3,600 and 4,500 per day. Claimant mostly did stacking off or stacking on. He

did 75% stacking off, 20% stacking on, and floated up and down the line the rest of the time. He had worked between twenty-five and twenty-eight years stacking on and stacking off the batteries prior to September 2003.

Claimant had normal aches and pains in his left shoulder prior to September 9, 2003. His left shoulder pain worsened over the years.

Claimant had a fall at work on September 9, 2003 and landed on his left shoulder. He felt pain in his shoulder after the fall. He reported the fall to Employer. Claimant believed that the problems that he suffered involving his left shoulder after the fall were substantially different than they were prior to the fall.

Claimant identified Exhibit G in Exhibit A (page 119), a copy of a report of injury dated September 9, 2003 that he submitted to Employer in connection with the December 20, 2010 hearing. He reported in that statement the cause of his September 9, 2003 injury as "stacking off." The question in the statement asking the "object, force, action or substance causing the injury/illness" is answered: "batteries." Exhibit G was also signed by Rochelle Reece, supervisor.

Claimant talked to Rochelle Reece about his shoulder complaints on September 9, 2003. Exhibit H in Exhibit A (page 120), notes that he reported his shoulder was hurting and when he was stacking off he heard a popping.

Claimant was asked the following questions and gave the following answers at the August 10, 2005 hearing (Exhibit A, pages 203-204):

Q. Describe what happened then, how you were actually injured.

A. I went to get the wafer board while there was a gap in the line and when I came back, one of the skids, when I went over it, when I went over it, I slipped, and I reached for a battery and that's when I fell.

Q. And was this skid one of them with the pebbles?

A. Yes.

Q. Okay. Did you drop the battery that you were picking up?

A. I let go of it. I don't remember - -

Q. Did you fall all the way to the ground?

A. Yes.

Q. What did you land on? What body part?

A. My neck and my left shoulder.

Q. Was it the back of your shoulder? Do you recall where you hit?

A. Right in here.

Q. Okay. That's the top of your shoulder?

A. Yes.

Q. Did you hit it on something or did you just hit it on the ground or -

-

A. Just the concrete.

Claimant was asked the following question and gave the following answer at the August 10, 2005 hearing (Exhibit A, page 208):

Q. Have you ever had any problem with your shoulder before that injury?

A. No.

Claimant was sent to Dr. Fretz at OHS by Employer after he reported his September 9, 2003 injury. He reported his complaints to Dr. Fretz. Claimant testified in a hearing in August 2005 in connection with Injury Number 03-142166 that he told Dr. Fretz that he injured his shoulder in a fall. (Exhibit A, page 224).

Claimant saw Dr. Fretz two times. Dr. Fretz told Claimant to go back to work and not do any stacking on for a few days. Employer did not take him off stacking work. Claimant's shoulder was still sore after he saw Dr. Fretz and returned to work.

Claimant saw Dr. Bronson in February 2004 for gout in his knees and to have a prescription renewed. Dr. Bronson asked Claimant if he was having any other problems and Claimant reported his shoulder. He told Dr. Bronson he could not get any relief for it. His shoulder seemed to be getting worse between September 2003 and February 2004. He testified at the August 2005 hearing that he told Dr. Bronson when he saw him on May 10, 2004 that his shoulder had been bothering him since he fell in September.

Dr. Bronson sent Claimant to Health South for therapy. The therapy did not really help. Dr. Bronson sent Claimant to Heartland for an MRI that showed a torn rotator cuff tear. Dr. Bronson sent Claimant to Dr. Bruce Smith.

Dr. Bruce Smith saw Claimant, reviewed an MRI, and said Claimant should have surgery. Dr. Smith said he would not do the surgery until he found out who was going to pay him for it. Claimant told Dr. Smith, as noted in Dr. Smith's report from May 2004, that he had a fall at work eight months prior and that the incident of pain and problems in his shoulder that Dr. Smith was seeing him for dated back to September 2003.

At the time of the December 20, 2010 temporary hearing in this case, Claimant was a group leader for the whole line. He controlled the flow of the line and worked on the line. Batteries ranging from 20 pounds to 120 pounds came down the line. He physically handled the batteries. He picked them up and took them off the line.

Claimant had not had surgery as of the time of the December 20, 2010 temporary hearing in this case. Claimant testified at the December 20, 2010 hearing that he still wanted to have surgery because he was not getting any better. He had pain at the top of the left shoulder at the base of the neck. He had pain most of the time. His pain was an eight to ten. He was still working at Employer.

Claimant was asked the following question and gave the following answer at the December 20, 2010 hearing (Exhibit A, page 41):

Q. But, again, was [*sic*] the problems that you suffered after the fall substantially different than it was prior to the fall involving your left shoulder?

A. I believe so.

Claimant was taking Aleve and Tylenol at the time of the December 2010 hearing. He usually took a sleeping pill to get to sleep. He had pain lifting his left arm. He was not able to lift his arm straight across his shoulder.

Employer provided Claimant with left shoulder treatment after the December 20, 2010 hearing. Claimant first saw Dr. Trease in August 2011. He had an MRI and Dr. Trease recommended surgery. Dr. Trease performed surgery to Claimant's left shoulder on January 16, 2012. Claimant missed a week or two of work after surgery, and then was on light duty for a time. He was paid temporary total disability compensation benefits.

Claimant had physical therapy for two to three months after surgery that helped a little.

Dr. Trease had Claimant do an FCE before he released Claimant. Some of the tests were difficult for him to perform. He had to pick up and carry plywood. It was hard to get the plywood over his shoulder.

Dr. Trease released Claimant to full duty on July 10, 2012. Dr. Trease did not put Claimant on any restrictions on the line.

Claimant's left shoulder was about the same after surgery as it was before surgery. He still had pain. His shoulder complaints in August 2011 were similar to his complaints in December 2010.

Claimant saw Dr. Trease one time after being released for complaints of pain. Dr. Trease offered Claimant cortisone shots. Dr. Trease told Claimant injections might fix him for a few weeks or might not. Dr. Trease told Claimant the shots probably would not do any good. Dr. Trease said there was nothing more that he could do other than offer the cortisone shots. Claimant did not receive injections.

At the time of the December 17, 2013 hearing in this case, Claimant worked on a line that is different than the line he worked on in December 2010. He was no longer a group leader on December 17, 2013. His job has changed in the last one and one-half years since he had surgery to his left shoulder. He mostly stacked off dummage at the time of the December 17, 2013 hearing. Dummage is in three sections of 60 pounds. He removed batteries and put them on pallets.

Working with dummage is like working with building blocks. Batteries are stacked in layers that weigh 120 pounds. Two people lift the layers of batteries. They stand on each side and put the batteries on a table. The table can be lowered between waist and chest high. The top layer is shoulder height. The highest level can be above the shoulder. It takes five minutes to complete a skid.

Claimant works a little above his shoulder every three to four minutes when he works the top layer. He still lifts batteries. He does not work much with 120 pound batteries.

Claimant is working his job full duty. He has been working full duty since he was released in July 2012.

Claimant's current complaints are that he cannot lift above his shoulder. He can lift to about the level of the top of his shoulder. His movement is worse than it was

before surgery. Over all, he has a little movement in his shoulder. Before the surgery, his left shoulder pain came and went. Since the surgery, he has pain all of the time. His pain is an eight at work and a four to five at home.

Claimant's work causes left shoulder pain, but he is able to do his job. He can occasionally get off the line for a couple of minutes when his shoulder bothers him.

Claimant takes Tylenol and ibuprofen regularly, every three to four hours, every day. He uses a pain cream rub for his shoulder down to his elbow four times a day that helps the pain. His shoulder bothers him and throbs quite a bit at home. He has burning pain at work, but not at home.

Claimant lies down and elevates his shoulder to relieve pain at home. His shoulder bothers him at night when he sleeps. He usually sleeps on his right side. He can only sleep for ten or fifteen minutes on his left side. He sometimes sleeps on his back and puts his left arm on a pillow.

Claimant usually takes three ibuprofens and a sleeping pill at night and gets three to four hours of sleep at a time. He gets up and takes a couple more ibuprofens and is awake every hour or so.

Claimant was born on September 30, 1951 and is 62 years old. He is right-handed.

Claimant takes no prescription pain medication. Claimant has not seen any other doctors for treatment. He saw Dr. Egea in 2012.

Claimant testified he wants and needs additional medical to help with the pain he is having.

I find Claimant's testimony to be credible.

Employer's Records

Employee's Statement of Injury (Exhibit A, page 116) is shown to be signed by Claimant and dated September 9, 2003. The date of injury is shown to be "9-9-03." Paragraph 19 states: "How did an injury/illness occur? Stacking off." Paragraph 20 states: "Object, force, action or substance causing injury/illness: Batteries." Paragraph 21 states: "Weight of object causing injury/illness: Varies."

An Investigation Report (Exhibit A, page 117) show's a date of injury of "9-9-03." The report is shown to be signed by Supervisor, Michelle Reece, on 9/9/03. The Supervisor's description of incident states:

David Trimmer came to me at 09:20 a.m. and reported that his shoulder was hurting, and when he was stacking off he heard a popping. I sent to see if Greg Kline was here. He wasn't. I asked him if he needed to go to the Med Clinic or if he wanted me to call Greg and see if he would come look at it. He declined and said he would wait and see if it felt any better. At the end of the shift he says it is feeling better and is ok.

Medical Evidence

Dr. David Fretz's note for date of service of October 27, 2003 (Exhibit A, page 47) states in part:

This 52-year-old male presents to OHS for the first time with a complaint of left shoulder pain. The pain began approximately one month ago. The pain came on gradually. There was no episode at work that clearly caused any injury. He does work in a heavy labor job stacking batteries. He does, however, specifically deny any injury or trauma to the left shoulder nor has he had any specific event that he could relay it [*sic*] to the beginning of his shoulder pain. He often times has pain at night. The patient has been doing his full normal job function. He has worked at JCI for 29 years. He works in the shipping department.

Dr. Fretz released Claimant to return to Employer on a modified duty, noting that "he should avoid heavy lifting for the next 10 days."

Dr. Wendell Bronson's February 20, 2004 note (Exhibit A, page 53) states in part: "David presents today. He has had no gout attacks now three years running. He injured his left shoulder last October." Dr. Bronson's diagnosis was in part, "left rotator cuff tendonitis with some restriction in range of motion." Dr. Bronson had Claimant take Aleve and get physical therapy.

A record of Dr. Bronson dated May 10, 2004 (Exhibit A, page 52) states in part:

Mr. Trimmer presents today. His left shoulder is hurting. It has been bothering him since he fell on it in September. I had seen him for the first time about it in February and sent him to physical therapy. It apparently hasn't improved any.

Dr. Bronson's coded diagnosis on May 10, 2004 was: "1. Tendonitis of the left shoulder that is becoming partially frozen. There may be a partial rotator cuff tear here. 2. Shoulder pain." Dr. Bronson was going to schedule an MRI.

Dr. Smith's September 3, 2004 report (Exhibit A, page 191) states in part: "The story to me was that he fell at work eight months prior to seeing me, consistent with the MRI which showed a possible rotator cuff tear."

A deposition of Dr. Bruce Smith taken on May 18, 2009 is contained in Exhibit A at pages 158-192. Dr. Smith testified he examined Claimant and reviewed an MRI of Claimant's left shoulder that noted a small rotator cuff tear and maybe some labral abnormalities. (Exhibit A, page 165). Dr. Smith felt Claimant had an impingement syndrome and that the rotator cuff "might well have a tear." (Exhibit A, page 166). Dr. Smith felt Claimant needed to have shoulder arthroscope. (Exhibit A, page 167).

Dr. Smith testified that "a fall at work certainly could account for injury to the rotator cuff, a fall at work certainly could account for a labral tear as well, yes. A fall could cause all of those things, definitely." (Exhibit A, page 169).

Dr. Smith was asked the following question and gave the following answer Exhibit A, page 169:

Q. Did you determine that Mr. Trimmer's fall was a cause of his left shoulder injury?

A. That's the only information I have or had to account for his problems, yes."

Dr. Smith was asked the following questions and gave the following answers at Exhibit A, page 175:

Q. Is a traumatic injury the only way a rotator cuff tear can occur?

A. Absolutely not.

Q. Can a rotator cuff tear also occur by repetitive use of the arm?

A. Yes.

Q. If an individual has had a long history of repetitive use of the arm and the shoulder, that's something that could cause a rotator cuff tear?

A. Yes.

Dr. Corey Trease's August 25, 2011 Progress Note (Exhibit B) states Claimant was back for evaluation of his left shoulder. Claimant stated his shoulder was "still bothering quite a bit." Claimant reported trouble with overhead activities. Dr. Trease assessed left shoulder pain and recommended an MRI.

Dr. Trease's Operative Note dated January 16, 2012 states diagnoses of left shoulder type II SLAP and left shoulder rotator cuff tear. He performed diagnostic arthroscopy, left shoulder with extensive debridement and mini-open rotator cuff repair.

Dr. Trease's June 21, 2012 Progress note states in part:

SUBJECTIVE: He is now six months out from his surgery. He says that it really is not a whole lot better than it was at our last visit. He is still on accommodated duty at work. He is interested in whether he can go back to do his normal job.

PLAN: He does not seem to be making any headway with physical therapy, so I think he is essentially at maximal medical improvement. I would, however, recommend that we get a functional capacity evaluation to see what his functional capacity is, and whether or not he will be able to parallel his demands at work. Prescription was given for the FCE. I will see him back after this is performed and will make final determination for any permanent work restrictions or limitations.

A Functional Summary Report of Athletic & Rehabilitation Center dated June 26, 2012 (Exhibit C) states in part:

Essential Job Demands: Mr. Trimmer is employed by Johnson Controls as a Stack-On employee. Per the formal job description provided by Mr. Trimmer's employer the physical demands of his position are as follows: lift batteries weighing 28-67 lbs from vertical height of 33 inches to vertical height of 33 inches with occasional demand, lift and carry plywood weighing 50 lbs from vertical height of 33 inches to vertical heights of 12 to 36 inches for a distance of 25 feet with occasional demand, lift and carry handfuls of cables weighing 20 lbs from vertical height of 40 inches to vertical height of 20 inches with frequent demand, push and pull batteries weighing 30-35 lbs across plywood from vertical height of 33 inches to vertical height of 33 inches with a constant demand, and push batteries (20) weighing 54 lbs from vertical height of 43 inches to vertical height of

43 inches with occasional demand. According to the Dictionary of Occupational Titles this position of Stack-On employee would fall under the VERY HEAVY physical demand.

Results:

The overall impression of the test results is that Mr. Trimmer provided a Valid Effort.

Maximum weight achieved to waist height = B 68.5 lbs

The patient meets the material handling demands for a VERY HEAVY demand vocation, per the Dictionary of Occupational Titles. This is based on the constant push/pull of 30-35 lbs weighted box, not max lift.

The FCE states Claimant is able to safely perform the activities of his job.

Dr. Trease's July 10, 2012 Progress note states in part:

SUBJECTIVE: Here for followup of his functional capacity evaluation. He says that his motion seems to be about the same as it was when I last saw him. It does not seem to be improving.

PHYSICAL EXAMINATION:

Left arm: Flexion to approximately 106°. Abduction 150°. The extremity is neurologically intact.

RADIOGRAPHS: AFCE was reviewed. This demonstrates that he is paralleling his job demands for a very heavy demand vocation.

PLAN: I think I can let him go back to full unrestricted duty. He is able to meet the functional demands of his job, so I do not think there is any reason he cannot continue to do his current job indefinitely. I do not feel the need to restrict him in any way, so I will not leave him with any permanent work restrictions. If his care would like an impairment rating, I would be happy to do so. Follow up as needed.

Dr. Trease's July 25, 2012 report states:

According to the AMA Guidelines for Permanent Partial Disability, 4th Edition, and with consideration of both objective and subjective criteria, I would assign this patient a rating of 7% at the level of the left upper extremity.

I hereby certify my belief that, based upon all available information, this rating is truthful and accurate.

Evaluation of Dr. Fernando Egea of May 30, 2007

Dr. Fernando Egea's May 30, 2007 medical report addressed to Claimant's attorney (Exhibit A, pages 111 through 115) states in part: "I examined Mr. Trimmer today as per your request for an Independent Clinical Medical Evaluation and Disability Rating in regard to a work related injuries [*sic*] that happened in a progressive and accumulative manner culminating September 9, 2003 and while in a normal course and scope of his 30 years employment with Johnson Controls."

Dr. Egea's May 30, 2007 report notes that Claimant complained of pain in his left shoulder and that Claimant stated:

. . . that for some time prior to September 9, 2003 he noticed some discomfort in the shoulders, but mostly in the left one. This mostly happened after his work shift ended and he was at home. He though [*sic*] that it was because muscles tiredness caused by the type of work. He states that his task at work consisted in picking up batteries that weight [*sic*] 50lbs or over from a conveyor and stack them on a skid piled [*sic*] up in three layers. He states that on September 9, 2003 while he was doing his job, he slipped on some pebbles in his work area and fell. He noticed that the pain he had in his left shoulder intensified a little bit after the fall. He did not report this incident to his supervisor.

Dr. Egea's May 30, 2007 report sets forth the following conclusions:

It is my opinion, within a reasonable degree of medical certainty, that Mr. Trimmer sustained progressive and cumulative injuries to the left shoulder caused by the type of activity he does in his work with Johnson Control. This condition aggravated when he fell on September 9, 2003. He suffers from impingement syndrome and probably rotator cuff tear as per the MRI and clinically. He needs to have arthroscopic surgery in the left shoulder. I estimate it will cost \$15,000 to \$20,000 including rehabilitation. It is my opinion within an [*sic*] reasonable degree of medical certainty that as a result progressive and cumulative injury to the left shoulder while in the normal course and scope of his employment with Johnson Control Mr. trimmer suffers form [*sic*] a partial and permanent disability of 20% body as a whole.

Dr. Egea's deposition taken on November 19, 2009 is contained in Exhibit A, pages 113-157. Dr. Egea was asked the following questions and gave the following answers at pages 137-138:

Q. Did you form an opinion as to which of the – which of the causes, either the cumulative problems or the fall on September 9th, 2003, has created the need for the surgery you recommended?

A. Oh, no. It's sort of difficult to say. The type of work that he was doing already could cause the impingement syndrome as well as the tear and possible labral lesion, and the fall did make it worse, but I wouldn't – I wouldn't be able to make a distinction. I would not be able to say that the fall was the cause that required surgery or the progressive injury was the reason why the surgery.

Q. Okay.

A. Yeah. I wouldn't be able to distinguish one from the other.

Q. All right. Now, your opinion was that he had some problems with his shoulder that were due to repetitive trauma-type issues; is that correct?

A. That's correct, yeah.

Claimant told Dr. Egea that he was symptomatic before September 2003. (Exhibit A, page 144). Dr. Egea was asked the following questions and gave the following answers at pages 147-148:

Q. And with regards to a rotator cuff tear, what can cause a tear in the rotator cuff?

A. Any stretching of a muscle above the limits that the muscle can sustain. In other words, depending on the individual constitution, any stretching of the particular muscle, which is the supraspinatus muscle, beyond the amount of resistance that that muscle can – can tolerate, it will cause the tear. Stretching of the muscle, I mean by repetition motion, by pulling of the muscle, by a fall that injure the muscle, any – any – anything of that sort would cause the tear.

Q. Okay. So it can be caused by a traumatic event such as a fall?

A. That's correct.

Q. And, then, it can also be caused by repetitive use?

A. That's correct.

Q. Can heavy lifting cause a tear?

A. Yes.

Q. Is a tear – a rotator cuff tear, is that something that is just going to occur with – in somebody, just –

A. Just by age or by growing up or something?

Q. Yeah, either by age or just – is it something that can just happen to somebody?

A. No. No.

Q. There has to be some kind of event that causes a rotator cuff tear?

A. Exactly.

Q. And repetitive and heavy lifting is something that can cause a rotator cuff tear?

A. Yes, that's correct.

Dr. Egea was asked the following questions and gave the following answers at pages 149-50:

Q. Did he describe to you in any more depth about what his job entailed regarding stacking off of batteries?

A. All I remember from what I wrote is that he was picking up batteries, about 50 pounds, some of them, and putting them up and stacking them in a file, in place.

Q. And then –

A. But I don't recall exactly, but that's – that's the continuous motion he was doing.

Evaluation of Dr. Fernando Egea of October 17, 2012

Dr. Egea's October 17, 2012 report (Exhibit D) sets forth the following conclusions:

It is my opinion, within a reasonable degree of medical certainty that the injuries that the [sic] sustained at Johnson Controls September 9, 2003, where [sic] the direct, proximate and prevailing factor in causing a left rotator cuff tear and an impingement syndrome of the left shoulder, necessitating surgery. Surgery was performed on January 16, 2012.

I recommend he avoid frequent motion of the left shoulder and avoid lifting weights above left shoulder level.

It is my opinion within a reasonable degree of medical certainty that in the future he will require doctors follow up visits and medication for pain and muscle relaxants. I estimate a total of \$5,000 to \$6,000.

It is my opinion within a reasonable degree of medical certainty that the injuries that he sustained at Johnson Control, while in the normal course and scope of his employment September 9, 2003, cause a 18% permanent and partial disability to the left upper extremity at the shoulder level.

Additional Evidence

Claimant's Claim for Compensation against Employer in Injury Number 03-142166 (Exhibit A, page 262) states in paragraph 8: "Describe what the employee was doing and how the injury occurred. Slipped on small rocks from skids that were shipped in from another plant while stacking batteries."

A hearing was held on August 10, 2005 in Injury Number 03-142166. At the beginning of the hearing, "the parties agreed that the following issues shall be determined by today's [sic] hearing: One, whether or not the claimant sustained an accident or occupational disease arising out of and in the course of employment. . . ." (Exhibit A, page 197).

Administrative Law Judge Nelson Allen denied Claimant's claim in Injury Number 03-142166 in the Final Award Denying Compensation, as affirmed by the Labor and Industrial Relations Commission on June 19, 2006 (Exhibit A, pages 124-132). He noted at page 131 in his Award that there was no mention of a fall in Employee's Statement of Injury (Exhibit A, page 116) or in the Investigation Report (Exhibit A, page 117).

Judge Allen stated in the Award at pages 131-32:

Dr. Fretz wrote: 'There was no episode at work that clearly caused any injury. He does work in a heavy labor job stacking batteries. He does, however, specifically deny any injury or trauma to the left shoulder nor has he had any specific event that he could relate to the beginning of his shoulder pain.'

I do not believe that even an employer-oriented doctor, such as Dr. Fretz, would fabricate such a story without some factual basis.

This is a troublesome case because I suspect that the claimant's injury to his left shoulder was the result of 30 years of hard physical labor performed for the employer. This should have been compensable. However, the claimant has pled an alleged injury from a fall.

Because of the contradiction of the notes of Dr. Fretz, the claimant has failed to meet his burden of establishing that he sustained an accidental injury on September 9, 2003, arising out of his employment. Claimant's Claim for Compensation is denied.

Judge Allen found in his Temporary or Partial Award in Injury Number 03-147616 (Exhibit E) that Claimant had sustained an occupational disease to his left shoulder by his repetitive lifting and moving the heavy batteries.

Judge Allen also found in his Temporary or Partial Award that neither collateral estoppel nor res judicata is applicable to bar Claimant's claim in this case. Judge Allen found that Claimant's claim in this case for injury due to occupational disease is a separate and distinct claim from his original claim, relying on *Holaus v. William J. Zickell Company*, 958 S.W.2d 72,77 (Mo.App 1977). He stated *Holaus* made clear that a claim for occupational disease is separate and distinct from a claim for accidental injury.

Rulings of Law

Based on a comprehensive review of the substantial and competent evidence, the stipulations of the parties, and the application of the Workers' Compensation Law, I make the following Rulings of Law:

1. Is Claimant's claim barred by res judicata or collateral estoppel?

Employer argues Claimant's claim in this case should be barred by res judicata or collateral estoppel.

Prior to August 28, 2005, Section 287.800, RSMo¹ provided in part: "Law to be liberally construed.—All of the provisions of this chapter shall be liberally construed with a view to the public welfare. . . ." The fundamental purpose of the Workers' Compensation Law is to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment. The law is to be broadly and liberally interpreted with a view to the public interest, and is intended to extend its benefits to the largest possible class. Any doubt as to the right of an employee to compensation should be resolved in favor of the injured employee. *West v. Posten Const. Co.* 804 S.W.2d 743, 745-46 (Mo. 1991). Although all doubts should be resolved in favor of the employee and coverage in a workers' compensation proceeding, if an essential element of the claim is lacking, it must fail. *Thorsen v. Sachs Elec. Co.*, 52 S.W.3d 611, 618 (Mo.App.2001), *overruled in part on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 225 (Mo.banc 2003)²; *White v. Henderson Implement Co.*, 879 S.W.2d 575, 579 (Mo.App. 1994).

The Missouri Supreme Court in *King General Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints*, 821 S.W.2d 495 (Mo.banc 1991) stated at 501:

¹ All statutory references are to the Revised Statutes of Missouri 2000, unless otherwise noted. See *Lawson v. Ford Motor Co.*, 217 S.W.3d 345 (Mo.App. 2007) where the Eastern District Court of Appeals held that the 2005 amendments to Sections 287.020, RSMo and 287.067, RSMo do not apply retroactively. In a workers' compensation case, the statute in effect at the time of the injury is generally the applicable version. *Chouteau v. Netco Construction*, 132 S.W.3d 328, 336 (Mo.App. 2004); *Tillman v. Cam's Trucking Inc.*, 20 S.W.3d 579, 585-86 (Mo.App. 2000).

² Several cases are cited herein that were among many overruled by *Hampton* on an unrelated issue (*Id.* at 224-32). Such cases do not otherwise conflict with *Hampton* and are cited for legal principles unaffected thereby; thus *Hampton's* effect thereon will not be further noted.

For res judicata to adhere, “four identities” must occur: 1) identity of the thing sued for; 2) identity of the cause of action; 3) identity of the persons and parties to the action; and 4) identity of the quality of the person for or against whom the claim is made. *Norval v. Whitesell*, 605 S.W.2d 789, 790 (Mo. banc 1980). Unlike collateral estoppel, it applies not only to points and issues upon which the court was required by the pleadings and proof to form an opinion and pronounce judgment, but to every point properly belonging to the subject matter of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time. *Bover v. Long*, 676 S.W.2d 893, 895 (Mo.App.1984); *Huska v. Huska*, 721 S.W.2d 120, 121 (Mo.App.1987); *Terre Du Lac Association, Inc. v. Terre Du Lac, Inc.*, 737 S.W.2d 206, 212 (Mo.App.1987). Put otherwise, a party may not litigate an issue and then, upon an adverse verdict, revive the claim on cumulative grounds which could have been brought before the court in the first proceeding. *The Society for the Preservation of St. Louis Lodge # 20 v. Masonic Temple Association of St. Louis*, 692 S.W.2d 837, 839 (Mo.App.1988). Separate legal theories are not to be considered as separate claims, even if “the several legal theories depend on different shadings of the facts, or would emphasize different elements of the facts, or would call for different measures of liability or different kinds of relief.” *Siesta Manor, Inc. v. Community Federal Savings and Loan Association*, 716 S.W.2d 835, 839 (Mo.App.1986). The doctrine takes on the character of the rule against splitting a cause of action and it is aptly stated in *Burke v. Doerflinger*, 663 S.W.2d 405, 407 (Mo.App.1983):

Res judicata and splitting a cause of action are closely related because both are designed to prevent a multiplicity of lawsuits.

A cause of action which is single may not be split and filed or tried piecemeal, the penalty for which is that an adjudication on the merits in the first suit is a bar to a second suit. In general, the test for determining whether a cause of action is single and cannot be split is: 1) whether separate actions brought arise out of the same act, contract or transaction; 2) or whether the parties, subject matter and evidence necessary to sustain the claim are the same in both actions. The word “transaction” has a broad meaning. It has been defined as the aggregate of all the circumstances which constitute the foundation for a claim. It also includes all of the facts and circumstances out of which an injury arose. [Citations omitted].

The Court in *Terre Du Lac Ass'n, Inc. v. Terre Du Lac, Inc.*, 737 S.W.2d 206 (Mo.App. 1987) states at 212:

The doctrine of res judicata provides that, where two actions are on the same cause of action, the earlier judgment is conclusive not only as to matters actually determined in the prior action, but also as to other matters which could properly have been raised and determined therein. *Castle v. Tracy*, 463 S.W.2d 777, 780 (Mo.1971). Where a second action is upon a claim, demand, or cause of action, different from a prior action, the judgment in the first action does not operate as an estoppel as to matters not litigated in the former action. *Id.* In order for a party to be barred under traditional res judicata, the cause of action in the new litigation must be identical to the earlier cause of action. *Oberle v. Monia*, 690 S.W.2d 840, 842 (Mo.App.1985).

The Court in *Reidelberger v. Hussman Refrigerator Co.*, 135 S.W.3d 431 (Mo.App. 2004) states at 433:

The doctrine of collateral estoppel, or issue preclusion, bars the relitigation of the same issue in a later case if each of the following elements are satisfied: (1) the issue decided in the earlier adjudication was identical to the issue presented in the present action; (2) the earlier adjudication resulted in judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; and the party against whom collateral estoppel is asserted had an opportunity to litigate the issue in the prior adjudication. *Neurological Medicine, Inc. v. General American Life Ins. Co.*, 921 S.W.2d 64, 68 (Mo.App. E.D.1996).

The *King* Court also stated at 821 S.W.2d 501:

Collateral estoppel only pertains to those issues which were necessarily and unambiguously decided, *Green v. Montgomery Ward & Company, Inc.*, 775 S.W.2d 162, 164 (Mo.App.1989), and King had neither pleaded nor proved a third-party beneficiary contract against RLDS.

Employer argues that included within the doctrine of res judicata is the principle that the earlier judgment is conclusive not only as to matters actually determined in the prior action, but also as to other matters which could have been properly raised and determined therein. *King General Contractors, Inc. v. Reorganized Church of Jesus*

Christ of Latter-day Saints, 821 S.W. 2d 495, 501 (Mo. en banc 1991). However a crucial component of the doctrine of res judicata in this regard is that the two actions must be on the same cause of action. *Terre Du Lac Assoc., Inc. v. Terre Du Lac, Inc.*, 737 S.W. 2d 206, 212 (Mo. App. 1987).

It is this component of res judicata that is the reason why res judicata is not applicable in the case at hand. While the parties are the same and the dates of injury are the same, the two claims are not the same. They are distinct, different, and separate claims which require different evidence to establish. Claimant's first claim tried before this Court was presented as an accidental injury pursuant to section 287.120, RSMo. In this claim presently before the Court, Claimant has alleged an occupational disease, which is a distinct, different, and separate claim pursuant to RSMo. §287.063 and §287.067. *Holaus v. William J. Zickell Company*, 958 S.W. 2d 72, 77 (Mo. App. 1997). Because they are not the same cause of action, Claimant was not required to raise his current claim with his original claim.

I find and conclude that Claimant's claims in Injury Number 03-142166 and Injury Number 03-147616 are different and not identical. I find and conclude that the evidence necessary to sustain the claims is not the same in both actions.

Judge Allen found in his award in Injury Number 03-142166 that Claimant failed to meet his burden of establishing that he sustained an accidental injury on September 9, 2003 arising out of his employment. Judge Allen did not determine in Injury Number 03-142166 whether Claimant had sustained an occupational disease to his left shoulder by his repetitive lifting and moving the heavy batteries.

I find and conclude that Claimant's occupational disease claim was not submitted for determination in Injury Number 03-142166, and was not determined in Injury Number 03-142166. I find and conclude that the issue of occupational disease was not submitted for determination in Injury Number 03-142166, and was not determined in Injury Number 03-142166.

I find and conclude that Claimant's claim in this case, Injury Number: 03-147616, is not barred by res judicata or collateral estoppel.

2. Did Claimant sustain an injury by occupational disease on or about September 9, 2003 arising out of and in the course of his employment for Employer?

The claimant in a workers' compensation proceeding has the burden of proving all elements of the claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 912 (Mo.App. 2008); *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo.App. 1997). The quantum of proof is

reasonable probability. *Thorsen*, 52 S.W.3d at 618; *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo.App. 1995); *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 199 (Mo.App. 1990). "Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." *Thorsen*, 52 S.W.3d at 620; *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 329 (Mo.App 1986); *Fischer*, 793 S.W.2d at 198. Such proof is made only by competent and substantial evidence. It may not rest on speculation. *Griggs v. A. B. Chance Company*, 503 S.W.2d 697, 703 (Mo.App. 1974). Expert testimony may be required where there are complicated medical issues. *Goleman v. MCI Transporters*, 844 S.W.2d 463, 466 (Mo.App. 1992). "Medical causation of injuries which are not within common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause." *Thorsen*, 52 S.W.3d at 618; *Brundige v. Boehringer Ingelheim*, 812 S.W.2d 200, 202 (Mo.App 1991).

Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *Kelley v. Banta & Stude Constr. Co. Inc.*, 1 S.W.3d 43, 48 (Mo.App. 1999); *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo.App. 1992); *Hutchinson v. Tri-State Motor Transit Co.*, 721 S.W.2d 158, 162 (Mo.App. 1986). The Commission's decision will generally be upheld if it is consistent with either of two conflicting medical opinions. *Smith v. Donco Const.*, 182 S.W.3d 693, 701 (Mo.App. 2006). The acceptance or rejection of medical evidence is for the Commission. *Smith*, 182 S.W.3d at 701; *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 263 (Mo.App. 2004). The testimony of Claimant or other lay witnesses as to facts within the realm of lay understanding can constitute substantial evidence of the nature, cause, and extent of disability when taken in connection with or where supported by some medical evidence. *Pruteanu v. Electro Core, Inc.*, 847 S.W.2d 203, 206 (Mo.App. 1993), 29; *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 367 (Mo.App 1992); *Fischer*, 793 S.W.2d at 199. The trier of facts may also disbelieve the testimony of a witness even if no contradictory or impeaching testimony appears. *Hutchinson*, 721 S.W.2d at 161-2; *Barrett v. Bentzinger Brothers, Inc.*, 595 S.W.2d 441, 443 (Mo.App. 1980). The testimony of the employee may be believed or disbelieved even if uncontradicted. *Weeks v. Maple Lawn Nursing Home*, 848 S.W.2d 515, 516 (Mo.App. 1993).

Section 287.020.2, RSMo requires that the injury be "clearly work related" for it to be compensable. Section 287.020, RSMo provides:

2. The word 'accident' as used in this chapter shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. An injury is

compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor.

3. (1) In this chapter the term 'injury' is hereby defined to be an injury which has arisen out of and in the course of employment. The injury must be incidental to and not independent of the relation of employer and employee. Ordinary, gradual deterioration or progressive degeneration of the body caused by aging shall not be compensable, except where the deterioration or degeneration follows as an incident of employment.

(2) An injury shall be deemed to arise out of and in the course of the employment only if:

- (a) It is reasonably apparent, upon consideration of all the circumstances, that the employment is a substantial factor in causing the injury; and
- (b) It can be seen to have followed as a natural incident of the work; and
- (c) It can be fairly traced to the employment as a proximate cause; and
- (d) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

Occupational diseases are compensable under the Missouri Workers' Compensation Act. The statute requires that the condition be an "identifiable disease arising with or without human fault and in the course of the employment." Section 287.067.1, RSMo. For an injury to be compensable under the Act, the work performed must have been a substantial factor in causing the medical condition or disability. *Kent v. Goodyear Tire and Rubber Company*, 147 S.W.3d 865, 867-68 (Mo.App 2004).

An employee's claim for compensation due to an occupational disease is to be determined under Section 287.067.1, RSMo. It defines occupational disease as:

. . . an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

Section 287.067.2, RSMo, provides that an occupational disease is compensable "if it is clearly work related and meets the requirements of an injury which is compensable as provided in subsections 2 and 3 of section 287.020."

Claimant must present substantial and competent evidence that he or she has contracted an occupationally induced disease rather than an ordinary disease of life. The Courts have stated that the determinative inquiry involves two considerations: "(1) whether there was an exposure to the disease which was greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee's job which is common to all jobs of that sort." *Polavarapu v. General Motors Corp.*, 897 S.W.2d 63, 65 (Mo.App. 1995); *Dawson v. Associated Elec.*, 885 S.W.2d 712, 716 (Mo.App. 1994); *Hayes v. Hudson Foods, Inc.*, 818 S.W.2d 296, 300 (Mo.App. 1991); *Prater v. Thorngate, Ltd.*, 761 S.W.2d 226, 230 (Mo.App. 1988); *Sellers v. Trans World Airlines, Inc.*, 752 S.W.2d 413, 415 (Mo.App. 1988); *Jackson v. Risby Pallet and Lumber Co.*, 736 S.W.2d 575, 578 (Mo.App. 1987).

In proving up a work-related occupational disease, "[a] claimant's medical expert must establish the probability that the disease was caused by conditions in the work place." *Smith v. Donco Const.*, 182 S.W.3d 693, 701 (Mo.App. 2006) (citing *Brundige v. Boehringer Ingelheim*, 812 S.W.2d 200, 202 (Mo.App. 1991) (quoting *Sheehan v. Springfield Seed & Floral, Inc.*, 733 S.W.2d 795, 797) (Mo.App. 1987)); *Dawson*, 885 S.W.2d at 716. There must be medical evidence of a direct causal connection between the conditions under which the work is performed and the occupational disease. *Coloney v. Accurate Superior Scale Co.*, 952 S.W.2d 755 (Mo.App. 1997); *Dawson*, 885 S.W.2d at 716; *Sheehan v. Springfield Seed & Floral, Inc.*, 733 S.W.2d 795, 797 (Mo.App. 1987); *Estes v. Noranda Aluminum, Inc.*, 574 S.W.2d 34, 38 (Mo.App. 1978). Even where the causes of the disease are indeterminate, a single medical opinion relating the disease to the job is sufficient to support a decision for the employee. *Dawson*, 885 S.W.2d at 716; *Prater v. Thorngate, Ltd.*, 761 S.W.2d 226, 230 (Mo.App. 1988).

The cause of an employee's medical condition need not be a single traumatic event. An employee may obtain compensation pursuant to The Workers' Compensation Law for gradual and progressive medical conditions which result from repeated or constant exposure to hazards encountered by the employee in the workplace. *Smith v. Climate Engineering*, 939 S.W.2d 429 (Mo.App. 1996); *Rector v. City of Springfield*, 820 S.W.2d 639 (Mo.App. 1991). Diseases resulting from the chronic traumata of repetitive occupational body movements qualify for compensation if they cause an employee to sustain a loss of earning capacity. *Collins v. Neevel Luggage Manufacturing Company*, 481 S.W.2d 548, 555 (Mo.App. 1972); *Coloney*, 952 S.W.2d at 759.

In claims for compensation for medical conditions associated with repetitive activities, a claimant must prove: 1) the injury arose out of and in the course of employment; 2) causation from job-related activities; and 3) nature and extent of disability. *Kintz v. Schnucks Markets, Inc.*, 889 S.W.2d 121, 124 (Mo.App. 1994). Manipulations and flexions, iterated and reiterated within a concentrated time, are unusual conditions, and if they inhere in an employment task being performed by an employee, they expose the employee who performs them to a risk not shared by the public generally and to which the employee would not have been exposed outside of employment, and thus qualify for compensation pursuant to The Law. *Collins*, 481 S.W.2d at 555.

Section 287.020.2, RSMo requires that the injury be "clearly work related" for it to be compensable. An injury is clearly work related "if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor." *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo. 1999). Injuries which are triggered or precipitated by work may nevertheless be compensable if the work is found to be a "substantial factor" in causing the injury. *Kasl*, 984 S.W.2d at 853; *Cahall v. Cahall*, 963 S.W.2d 368, 372 (Mo. App. 1998). A substantial factor does not have to be the primary or most significant causative factor. *Bloss v. Plastic Enterprises*, 32 S.W.3d 666, 671 (Mo. App. 2000); *Cahall*, 963 S.W.2d at 372. An accident may be both a triggering event and a substantial factor in causing an injury. Further, there is no "bright-line test or minimum percentage set out in the Workers' Compensation Law defining 'substantial factor.'" *Cahall*, 963 S.W.2d at 372.

Claimant had worked for more than twenty-five years stacking on and stacking off the batteries prior to September 2003. He repetitively used his upper extremities in his work. He processed around 4,000 batteries on a daily basis. The batteries averaged 80 pounds in weight. He repetitively picked up and moved batteries with his left upper extremity. Claimant had normal aches and pains in his shoulder prior to September 9, 2003. His left shoulder pain worsened over the years.

Claimant identified a copy of a report of injury dated September 9, 2003 that he submitted to Employer in connection with the December 20, 2010 hearing. (Exhibit A, page 116). He reported in that statement the cause of his September 9, 2003 injury as "stacking off." The question in the statement asking the "object, force, action or substance causing the injury/illness" is answered: "batteries." This report of injury was also signed by Rochelle Reece, supervisor. This report of injury did not mention a fall.

Claimant reported to Employer on September 9, 2003 in an Investigation Report (Exhibit A, page 117) that his shoulder was hurting, and when he was stacking off he heard a popping. This Investigation Report did not mention a fall.

Claimant had a fall on September 9, 2003. He did not see a doctor for his left shoulder after September 9, 2003 until October 27, 2003 when he saw Dr. Fretz.

Dr. Fretz noted there was no episode at work and that Claimant had not had any specific event. Dr. Fretz's October 27, 2003 note states Claimant's left shoulder

pain began approximately one month ago. The pain came on gradually. There was no episode at work that clearly caused any injury. He does work in a heavy labor job stacking batteries. He does, however, specifically deny any injury or trauma to the left shoulder nor has he had any specific event that he could relay it [*sic*] to the beginning of his shoulder pain.

I find this statement of Dr. Fretz to be credible.

Dr. Smith testified that "a fall at work certainly could account for injury to the rotator cuff, a fall at work certainly could account for a labral tear as well." Dr. Smith was asked in his deposition if he determined that Claimant's fall was a cause of his left shoulder injury. He answered, "That's the only information I have or had to account for his problems, yes." I find this opinion is not credible. Dr. Smith did not address the nature of the heavy repetitive work Claimant had performed for many years for Employer before he saw Claimant in September 2004.

Dr. Smith also testified a traumatic injury is not the only way a rotator cuff tear can occur. He testified a rotator cuff tear also occur by repetitive use of the arm and a long history of repetitive use of the arm and the shoulder is something that could cause a rotator cuff tear.

Dr. Egea's May 30, 2007 report notes Claimant's task at work consisted in picking up batteries that weighed 50lbs or over from a conveyor and stacking them on a skid. His report also notes Claimant stated that on September 9, 2003 while he was doing his job, he slipped on some pebbles in his work area, fell, and noticed that the pain he had in his left shoulder intensified a little bit after the fall.

Dr. Egea's May 30, 2007 report states:

It is my opinion, within a reasonable degree of medical certainty, that Mr. Trimmer sustained progressive and cumulative injuries to the left shoulder caused by the type of activity he does in his work with Johnson Control. This condition aggravated when he fell on September 9, 2003. He suffers from impingement syndrome and

probably rotator cuff tear as per the MRI and clinically. He needs to have arthroscopic surgery in the left shoulder.

I find these opinions of Dr. Egea are credible.

Dr. Egea testified Claimant had some problems with his shoulder that were due to repetitive trauma-type issues. I find this opinion is credible.

Dr. Egea testified that stretching a muscle that could cause a tear can be caused by a traumatic event such as a fall, by repetitive use, and by heavy lifting. He stated repetitive and heavy lifting is something that can cause a rotator cuff tear. I find these opinions of Dr. Egea are credible.

Dr. Egea stated in his October 17, 2012 report:

It is my opinion, within a reasonable degree of medical certainty that the injuries that the [sic] sustained at Johnson Controls September 9, 2003, where [sic] the direct, proximate and prevailing factor in causing a left rotator cuff tear and an impingement syndrome of the left shoulder, necessitating surgery. Surgery was performed on January 16, 2012.

I find these opinions of Dr. Egea are credible.

This case is governed by the provisions of the pre-2005 amendments to the Missouri Workers' Compensation Law. Claimant does not need to prove that work was the prevailing factor in causing his injury and disability, only that work was a substantial factor. Based on the competent and substantial evidence and the application of The Missouri Workers' Compensation Law, I find and conclude that Claimant has met his burden to prove that he sustained a injury to his left shoulder by occupational disease from repetitive use of his left upper extremity that was clearly work related, and that his work for Employer was a substantial factor in causing his left shoulder injury and resulting disability. I find and conclude that he sustained a compensable occupational disease through September 9, 2003 that resulted in injury to his left shoulder, and the need for medical treatment for his left shoulder, including surgery, and in permanent partial disability. I find and conclude that Claimant was exposed to a risk that was greater than and different from that which affects the public generally. I find and conclude that the conclusions of Dr. Egea regarding causation are credible and prove the probability that Claimant sustained an occupational disease that was caused by conditions in Claimant's workplace.

I find and conclude that the competent and substantial evidence supports the conclusion that Claimant's repetitive lifting and moving batteries for Employer through September 9, 2003 was a substantial factor in causing injury to Claimant's left shoulder and disability. I find and conclude that Claimant sustained a compensable injury to his left shoulder by occupational disease through September 9, 2003 arising out of and in the course of his employment for Employer.

3. What is the nature and extent of Claimant's permanent partial disability and what is Employer's liability for permanent partial disability benefits?

The determination of the degree of disability sustained by an injured employee is not strictly a medical question. *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 284 (Mo.App. 1997); *Cardwell*, 249 S.W.3d at 908 (Mo.App. 2008); *Sellers v. Trans World Airlines, Inc.*, 776 S.W.2d 502, 505 (Mo.App. 1989). While the nature of the injury and its severity and permanence are medical questions, the impact that the injury has upon the employee's ability to work involves factors, which are both medical and nonmedical. Accordingly, the Courts have repeatedly held that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission. *Sharp v. New Mac Elec. Co-op*, 92 S.W.3d 351, 354 (Mo.App. 2003); *Elliott v. Kansas City, Mo., School District*, 71 S.W.3d 652, 656 (Mo.App. 2002); *Sellers*, 776 S.W.2d at 505; *Quinlan v. Incarnate Word Hospital*, 714 S.W.2d 237, 238 (Mo. App. 1985); *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983); *Barrett v. Bentzinger Bros.*, 595 S.W.2d 441, 443 (Mo.App. 1980); *McAdams v. Seven-Up Bottling Works*, 429 S.W.2d 284, 289 (Mo.App. 1968). The fact-finding body is not bound by or restricted to the specific percentages of disability suggested or stated by the medical experts. *Cardwell*, 249 S.W.3d at 908; *Lane v. G & M Statuary, Inc.*, 156 S.W.3d 498, 505 (Mo.App. 2005); *Sharp*, 92 S.W.3d at 354; *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 885 (Mo.App. 2001); *Landers*, 963 S.W.2d at 284; *Sellers*, 776 S.W.2d at 505; *Quinlan*, 714 S.W.2d at 238; *Banner*, 663 S.W.2d at 773. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences in arriving at the percentage of disability. *Cardwell*, 249 S.W.3d at 908; *Fogelsong v. Banquet Foods Corporation*, 526 S.W.2d 886, 892 (Mo.App. 1975).

The finding of disability may exceed the percentage testified to by the medical experts. *Quinlan*, 714 S.W.2d at 238; *McAdams*, 429 S.W.2d at 289. The Commission "is free to find a disability rating higher or lower than that expressed in medical testimony." *Jones v. Jefferson City School Dist.*, 801 S.W.2d 486, 490 (Mo.App. 1990); *Sellers*, 776 S.W.2d at 505. The Court in *Sellers* noted that "[t]his is due to the fact that determination of the degree of disability is not solely a medical question. The nature and permanence of the injury is a medical question, however, 'the impact of that injury upon the employee's ability to work involves considerations which are not exclusively medical in nature.'" *Sellers*, 776 S.W.2d at 505. The uncontradicted testimony of a medical

expert concerning the extent of disability may even be disbelieved. *Gilley v. Raskas Dairy*, 903 S.W.2d 656, 658 (Mo.App. 1995); *Jones*, 801 S.W.2d at 490.

Claimant had left shoulder arthroscopy with extensive debridement and mini-open rotator cuff repair on January 16, 2012. He cannot lift above his shoulder. His movement is worse than it was before surgery. Before the surgery, his left shoulder pain came and went. Since the surgery, his pain is constant. He takes over-the-counter pain medication daily for his left shoulder pain. His left shoulder pain bothers him at night when he sleeps.

Dr. Trease assigned a rating of 7% at the level of the left upper extremity based on the AMA Guidelines for Permanent Partial Disability, 4th Edition. I find this opinion is not credible.

Dr. Egea assessed a 18% permanent partial disability of Claimant's left upper extremity at the shoulder level. I find this opinion is not credible.

Based on the competent and substantial evidence and the application of the Workers' Compensation Law, I find and conclude that as a result of Claimant's September 9, 2003 compensable work injury, Claimant has sustained 16% permanent partial disability of the left upper extremity at the 232 week level, or 37.12 weeks of compensation. I award Claimant 37.12 weeks of permanent partial disability from Employer at the rate of \$347.05 per week, which amounts to \$12,882.50.

4. *Liability for Additional Medical Aid*

Claimant is requesting an award of future medical aid. Section 287.140, RSMo requires that the employer/insurer provide "such medical, surgical, chiropractic, and hospital treatment ... as may reasonably be required ... to cure and relieve [the employee] from the effects of the injury." This has been held to mean that the worker is entitled to treatment that gives comfort or relieves even though restoration to soundness [a cure] is beyond avail. *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 266 (Mo.App. 2004). Medical aid is a component of the compensation due an injured worker under Section 287.140.1, RSMo. *Bowers*, 132 S.W.3d at 266; *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo.App. 1996).

The employee must prove beyond speculation and by competent and substantial evidence that his or her work related injury is in need of treatment. *Williams v. A.B. Chance Co.*, 676 S.W.2d 1 (Mo.App. 1984). Conclusive evidence is not required. *Farmer v. Advanced Circuitry Division of Litton*, 257 S.W.3d 192, 197 (Mo. App. 2008); *Bowers*, 132 S.W.3d at 270; *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 283 (Mo.App. 1997).

It is sufficient if Claimant shows by reasonable probability that he or she is in need of additional medical treatment. *Tillotson v. St. Joseph Medical Center*, 347 S.W.3d 511, 524 (Mo.App. 2011); *Farmer*, 257 S.W.3d at 197; *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 53 (Mo. App. 2007); *Bowers*, 132 S.W.3d at 270; *Mathia*, 929 S.W.2d at 277; *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo.App. 1995); *Sifferman v. Sears, Roebuck and Co.*, 906 S.W.2d 823, 828 (Mo.App. 1995). “Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt.” *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 329 (Mo.App. 1986); *Sifferman* at 828. Section 287.140.1, RSMo does not require that the medical evidence identify particular procedures or treatments to be performed or administered. *Tillotson*, 347 S.W.3d 525; *Forshee v. Landmark Excavating & Equipment*, 165 S.W.3d 533, 538 (Mo. App. 2005); *Talley v. Runny Meade Estates, Ltd.*, 831 S.W.2d 692, 695 (Mo.App. 1992); *Bradshaw v. Brown Shoe Co.*, 660 S.W.2d 390, 394 (Mo.App. 1983).

The type of treatment authorized can be for relief from the effects of the injury even if the condition is not expected to improve. *Farmer*, 257 S.W.3d at 197; *Bowers*, 132 S.W.3d at 266; *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo.banc 2003). Future medical care must flow from the accident, via evidence of a medical causal relationship between the condition and the compensable injury, if the employer is to be held responsible. *Bowers v. Hiland Dairy Co.*, 188 S.W.3d 79, 83 (Mo.App. 2006). Once it is determined that there has been a compensable accident, a claimant need only prove that the need for treatment and medication flow from the work injury. *Id*; *Tillotson*, 47 S.W.3d 519.

Medical aid may be required even though it merely relieves the employee’s suffering and does not cure it, or restore the employee to soundness after an injury or occupational disease. *Mathia*, 929 S.W.2d at 277; *Stephens v. Crane Trucking, Incorporated*, 446 S.W.2d 772, 782 (Mo. 1969); *Brollier v. Van Alstine*, 236 Mo.App. 1233, 163 S.W.2d 109, 115 (1942).

Claimant has continued to have left shoulder complaints since the January 2012 left shoulder surgery. Since the surgery, he has pain all of the time. His pain is eight at work and a four to five at home. His work causes pain. He takes Tylenol and ibuprofen regularly, every three to four hours, every day. He uses a pain cream rub for his shoulder down to his elbow four times a day that helps the pain. He usually takes three ibuprofens and a sleeping pill at night and gets three to four hours of sleep at a time. He gets up and takes more ibuprofen and is awake every hour or so. He wants additional medical to help with the pain he is having.

Dr. Egea stated in his October 17, 2012 report: "It is my opinion within a reasonable degree of medical certainty that in the future he will require doctors follow up visits and medication for pain and muscle relaxants." I find this opinion is credible.

Dr. Trease's June 21, 2012 note states in part: ". . . I think he is essentially at maximum medical improvement." I find this opinion to be credible. I find Claimant is at maximum medical improvement. However, Claimant having reached maximum medical improvement does not negate a need for additional medical treatment. As noted earlier, the type of treatment authorized can be for relief from the effects of the injury even if the condition is not expected to improve.

Based on competent and substantial evidence and the application of the Missouri Workers' Compensation Law, I find Claimant will need future medical aid to cure and relieve him from the effects of his September 9, 2003 work injury.

Employer is directed to authorize and furnish additional medical treatment to cure and relieve Claimant from the effects of his September 9, 2003 work injury in accordance with section 287.140, RSMo.

Claimant's claim against the Second Injury Fund was not determined and remains open.

Attorney's Fees

Claimant's attorney is entitled to a fair and reasonable fee in accordance with Section 287.260, RSMo. An attorney's fee may be based on all parts of an award, including the award of medical expenses. *Page v. Green*, 758 S.W.2d 173, 176 (Mo.App. 1988). During the hearing, and in Claimant's presence, Claimant's attorney requested a fee of 25% of all benefits to be awarded. Claimant did not object to that request. I find Claimant's attorney is entitled to and is awarded an attorney's fee of 25% of all amounts awarded for necessary legal services rendered to Claimant. The compensation awarded to 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 Claimant: David W. Whipple.

Made by: s/sRobert B. Miner
Robert B. Miner
Administrative Law Judge
Division of Workers' Compensation

