

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

Injury No.: 08-066921

Employee: Terry Williams
Employer: Bloomsdale Excavating/Heptacore (Settled)
Insurer: Zurich American Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 11, 2010. The award and decision of Administrative Law Judge Vicky Ruth, issued January 11, 2010, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 10th day of August 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Terry Williams

Injury No. 08-066921

Dependents: N/A

Employer : Bloomsdale Excavating,/Heptacore (settled)

Additional Party: Second Injury Fund

Insurer: Zurich American Insurance Company (settled)

Hearing Date: October 7, 2009

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

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: June 19, 2008.
5. State location where accident occurred or occupational disease was contracted: Callaway County, Missouri.
6. Was above employee in employ of one of the above alleged employers 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: The employee was pulling on a water pump when he felt his shoulder "pop."
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Part(s) of body injured by accident or occupational disease: Left shoulder.
14. Nature and extent of any permanent disability: See Award.
15. Compensation paid to-date for temporary disability: N/A.
16. Value necessary medical aid paid to date by employer/insurer? N/A.
17. Value necessary medical aid not furnished by employer/insurer? N/A.

Employee: Terry Williams

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18. Employee's average weekly wages: \$1,700 per week.
19. Weekly compensation rate: \$742.72 (TTD) and \$389.04 (PPD).
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable from the employer: N/A – employee settled against the employer/insurer.
22. Second Injury Fund liability: Yes.
23. Future Requirements Awarded: N/A – See Award.

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: Randall O. Barnes.

Employee: Terry Williams

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: Terry Williams

Injury No: 08-066921

Dependents: N/A

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer : Bloomsdale Excavating,/Heptacore (settled)

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

Additional Party: Second Injury Fund

Insurer: Zurich American Insurance Company

This case was tried on October 7, 2009, in Jefferson City, Missouri. The employee appeared in person and through counsel, Randall O. Barnes. The Second Injury Fund appeared through counsel, Julianne O'Bannon Germinder. Attorney Kristin Paulsmeyer observed the proceedings on behalf of Second Injury Fund. The claimant testified in person at the hearing, and by means of his deposition. Mr. Phillip Eldred testified in person at the hearing, while Dr. David Volarich and Mr. Tim Lalk testified by means of depositions. The parties submitted briefs on or about October 23, 2009.

STIPULATIONS

The parties stipulated to the following:

1. On or about June 19, 2008, the claimant, Terry Williams, was employed by the employer, Bloomsdale Excavating/Heptacore.
2. Both the employee and the employer were operating under and subject to the provisions of the Missouri Workers' Compensation Law.
3. The claimant suffered an accident arising out of and in the course of his employment on June 19, 2008.
4. At the time of the accident, the employer was insured through the Zurich North American Insurance Company.
5. Timely notice was provided to the employer, and a Claim for Compensation was filed within the time prescribed by law.
6. The Missouri Division of Workers' Compensation has jurisdiction, and venue in Calloway County is proper.
7. The claimant's average weekly wage on the date of the accident was \$1700, resulting in a compensation rate of \$742.72 for temporary total disability/permanent total disability and \$389.04 for permanent partial disability benefits.
8. The claimant and the employer/insurer entered into a Compromise for Lump Sum Settlement (CLSS), which was approved by an Administrative Law Judge on or about July 20, 2009. The CLSS provides for a lump sum payment of \$24,520.76, based on an approximate disability of 27.5% of the left shoulder.

ISSUES

The parties agreed that the issues to be resolved by this proceeding are as follows:

1. Nature and extent of the injury.
2. Liability of the Second Injury Fund.

EXHIBITS

On behalf of the claimant, the following exhibits were entered into evidence without objection:

- | | |
|-----------|-----------------------------------|
| Exhibit 1 | CV of Dr. David Volarich. |
| Exhibit 2 | Report of Dr. David Volarich. |
| Exhibit 3 | Medical records. |
| Exhibit 4 | CV of Mr. Phillip Eldred. |
| Exhibit 5 | Report of Mr. Phillip Eldred. |
| Exhibit 6 | Deposition of Dr. David Volarich. |

On behalf of the employer/insurer, the following exhibits were admitted into evidence without objection:

- | | |
|-----------|--|
| Exhibit A | Deposition of Mr. Terry Williams (the claimant). |
| Exhibit B | Deposition of Mr. Tim Lalk. |

FINDINGS OF FACT

Based on the above exhibits and the testimony presented at the hearing, I make the following findings:

1. The claimant is a 62-year-old left-handed man. The claimant has a high school diploma and some hours of college or post-secondary credit. He does not possess any vocational licenses. He has attained scaffold construction certification and a safety certification, which enabled him to work at nuclear power plants. The majority of his working career since 1982 was spent at nuclear power plants throughout the United States. The claimant worked in these jobs through either the Laborers International Union of North America Local 662 in Jefferson City, or the Teamsters Union. The claimant also served two six-year stints in the Missouri National Guard, with the last one ending in 1992.
2. The claimant injured his left shoulder on June 19, 2008, while employed by the employer at the Callaway Nuclear Power Plant in Reform, Missouri. The injury occurred when he attempted to remove a water pump from an excavation hole by pulling on an attached rope. The claimant stated that he felt his left shoulder “pop,” and he felt immediate pain and weakness in it. The injury was immediately reported.

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3. The employer/insurer provided treatment for the claimant's left shoulder injury. A MRI, taken June 27, 2008, showed a large recurrent full thickness rotator cuff tear. Dr. Christopher Rothrock performed surgery on July 22, 2008, consisting a left shoulder arthroscopy, SLAP repair, and mini open full thickness rotator cuff repair.
4. The claimant continued treating with Dr. Rothrock and doing physical therapy until January 19, 2009. On that date, Dr. Rothrock released the claimant with final restrictions as follows: no lifting greater than 50 pounds occasionally, 25 pounds frequently, or 10 pounds constantly, and no overhead work or lifting. Dr. Rothrock gave the claimant a rating of 15% disability to his left shoulder; 5% of that was for the injury that pre-existed the primary injury.
5. Bloomsdale laid off the claimant on January 19, 2009, the date that he found to be at maximum medical improvement (MMI), as the company did not have any jobs that could accommodate his restrictions. The claimant has not worked since that day. After he was laid off, the claimant collected unemployment benefits from the state of Pennsylvania.
6. Although the claimant continues to go to the union hall on a daily basis to see if there are any jobs available for him, no jobs have been available to him. He indicated in his deposition that he stays at the union hall for about an hour and "visits."¹
7. The claimant testified that he has some numbness and tingling from his left shoulder down to his hands and fingers. He reports severe weakness in his left arm with the inability to reach behind him or use his arm away from his body laterally or overhead. He reports his shoulder pain as being, on his worst days, a 7 or 8 out of 10; on a regular or usual day the pain is a 4 out of 10. He testified that he has no problems standing, sitting, or walking.
8. Prior to June 19, 2008, the claimant suffered injuries to both his right and left shoulders. He testified that he first injured his left shoulder when he fell over a tent pole in the Gulf war in approximately 1990. He did not have any immediate treatment after that injury. However, Dr. William Quinn performed arthroscopic surgery on the claimant's left shoulder on June 22, 2004. The surgery consisted of a resection of the labral tear, arthroscopic decompression, and arthroscopic rotator cuff repair. The claimant spent the two months after the surgery off work and participating in physical therapy. On August 2, 2004, Dr. Quinn released the claimant from care. Although Dr. Quinn did not impose any restrictions on the claimant, he did note that he talked to the claimant about "the importance of avoiding any type of heavy lifting out away from his body."²
9. The claimant testified that he also had a pre-existing injury to his right shoulder. He testified that his right shoulder was bothering him shortly before he went to work for Bloomsdale (the employer), and that he saw Dr. Quinn for that right shoulder on May 21, 2008. Dr. Quinn's records indicate that the claimant probably had impingement in his right shoulder. As it was unclear whether the claimant had a torn rotator cuff tear, Dr. Quinn recommended that the claimant have an MRI. The claimant testified that he did not have an MRI or any other

¹ Second Injury Fund Exh. A, p. 73.

² Claimant's Exh. 3, p. 39.

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treatment for the right shoulder. He does not recall his right shoulder bothering him when he worked at Bloomsdale. He testified that he currently experiences pain in his right shoulder, but it is not as severe as the pain associated with his left shoulder.

10. The claimant saw Dr. David Volarich for an Independent Medical Examination (IME) on March 3, 2009. Dr. Volarich imposed two sets of restrictions on the claimant: those referable to his condition before the June 19, 2008 work injury, and those referable to his condition after June 19, 2008. Dr. Volarich's restrictions pre-existing the primary injury are to avoid all overhead use of the left arm and prolonged use of the left arm away from the body; minimize pushing and pulling, do not handle weights greater than five to ten pounds with the left arm extended away from the body or overhead, handle weight with the left arm dependent. Dr. Volarich's restrictions following the primary injury are to avoid overhead use of the left arm and prolonged use of the left arm away from the body; minimize pushing and pulling; don't handle weights greater than one to three pounds with the left arm extended away from the body or overhead; no weights greater than five to ten pounds with the left arm alone.
11. Dr. Volarich rated the claimant's pre-existing left shoulder at 30% disability and his pre-existing right shoulder at 25% disability. Dr. Volarich rated the left shoulder at 45% disability due to the primary injury. Dr. Volarich opined that the claimant could probably work, but that he did not know exactly what jobs the claimant could do.³ In his report, he notes that "[if] vocational assessment is unable to identify a job for which [the claimant] is suited, then it is my opinion he is permanently and totally disabled as a direct result of the work related injury of 6/18/08 [sic] in combination with his preexisting medical conditions."⁴
12. The claimant has been taking prescription medications for anxiety and for high blood pressure since about 1984.
13. Mr. Phillip Eldred, a vocational rehabilitation counselor, testified at the hearing. Mr. Eldred opined that the claimant is not employable in the open labor market due to a combination of his pre-existing and primary injuries. Mr. Eldred found that the claimant lacked transferable skills for even a sedentary work level, and in conjunction with his age, lack of vocational skills, and inability to be retrained, this combination rendered the claimant unable to be employed in the open labor market. Although Mr. Eldred initially considered both the temporary and the final restrictions the claimant was placed under, he testified on cross examination that even if he considered only the less restrictive of the physical restrictions (those of Dr. Rothrock), that the claimant would still be unable to be employed in the open labor market. Mr. Eldred emphasized that the claimant's unemployability was the result of the combination of the physical restrictions and the claimant's age, lack of transferable skills, and his inability to be formally retrained. Mr. Eldred indicated that he considered register nurse Christine Hurt's restrictions from June 20, 2008, just two days after the primary

³ Claimant's Exh. 3, p. 43.

⁴ Claimant's Exh. 6, attached Exh. 3 – Independent Medical Examination Report, p. 7.

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injury.⁵ Mr. Eldred also considered Dr. Janet Elliot's restrictions from June 24, 1008, less than a week after the primary injury.⁶

14. As part of the evaluation by Mr. Eldred, the claimant was administered the Wide Range Achievement Test (WRAT-3), the PTI Oral Directions Test (ODT), and the Purdue Pegboard Test. The WRAT-3 is a test of basic academic skills in reading recognition, spelling, and arithmetic. Mr. Eldred indicates that the claimant's scores on the WRAT-3 show that he is functioning at the high school grade level in reading recognition; at the eighth grade level in spelling; and at the sixth grade level in arithmetic. On the PTI Oral Directions Test, the claimant's score was equivalent to the thirtieth to fortieth percentiles compared to Vocational Rehabilitation Clients. According to Mr. Eldred, this would tend to show a low ability to concentrate and listen to verbal directions. The Purdue Pegboard test is a test of dexterity used in the selection of employees for industrial jobs, such as assembly, packing, and operation of certain machines and other manual jobs. Mr. Eldred noted that the claimant's scores on this test were low; the claimant's scores ranged from the 8th percentile to the 13th percentile.
15. Mr. Tim Lalk, vocational rehabilitation counselor, found that based on the medical records that he had reviewed, the claimant was employable in the open labor market in a number of identified jobs.⁷ Mr. Lalk indicates that he took into account both the final restrictions imposed by Dr. Rothrock and Dr. Volarich. Mr. Lalk opined that the claimant could work in jobs that are unskilled, entry-type positions that are at or near the sedentary level of physical exertion. According to Mr. Lalk, the claimant's age would not prevent him from attaining these positions as they are often filled by people of a similar age.⁸

CONCLUSIONS OF LAW

Based upon the findings of fact, I find the following:

Under Missouri workers' compensation law, the claimant bears the burden of proving all essential elements of his or her workers' compensation claim.⁹ Proof is made only by competent and substantial evidence, and may not rest on speculation.¹⁰ Medical causation not within lay understanding or experience requires expert medical evidence.¹¹ When medical theories conflict, deciding which to accept is an issue reserved for the determination of the fact finder.¹²

In addition, the fact finder may accept only part of the testimony of a medical expert and reject the remainder of it.¹³ Where there are conflicting medical opinions, the fact finder may

⁵ Claimant's Exh. 5, p. 11.

⁶ *Id.*

⁷ SIF Exh. B, p. 26.

⁸ SIF Exh. B, pp. 30-31.

⁹ *Id.*; *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo. App. 2002).

¹⁰ *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. W.D. 1974).

¹¹ *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596, 600 (Mo. banc 1994).

¹² *Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 977 (Mo. App. 1984).

¹³ *Cole v. Best Motor Lines*, 303 S.W.2d 170, 174 (Mo. App. 1957).

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reject all or part of one party's expert testimony that it does not consider credible and accept as true the contrary testimony given by the other litigant's expert.¹⁴

Issues 1 and 2: Nature and extent of the injury/liability of the Second Injury Fund.

Employee seeks an Award of permanent total disability against the Second Injury Fund. The term "total disability" in Section 287.020, RSMo, means 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. The test for permanent total disability is the claimant's ability to compete in the open labor market.¹⁵ The critical question is whether an employer could reasonably be expected to hire the claimant, considering his present physical condition, and reasonably expect him to successfully perform the work.¹⁶ An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled.¹⁷

The test for finding the Second Injury Fund liable for permanent total disability is set forth in section 287.220.1, RSMo. The first question that must be addressed is whether the employee is permanently and totally disabled. If the employee is permanently and totally disabled, then the Second Injury Fund is only liable for permanent total disability benefits if the permanent disability was caused by a combination of the preexisting injuries and conditions and the employee's last injury (in this case, the injury of June 19, 2008). Under Section 287.220.1, the preexisting injuries must also have constituted a hindrance or obstacle to the employee's employment or re-employment.

As noted above, the claimant sustained an accident arising out of an in the course of his employment with Bloomsdale Excavating/Heptacore on June 19, 2008. The June 2008 accident caused new injuries to the claimant's left shoulder, which necessitated surgery. The June 19, 2008 accident was the prevailing factor in the claimant's left shoulder injury, his need for surgery, and his resultant disability. I find that as a result of the June 19, 2008 accident, the claimant sustained a permanent partial disability of 27.5% of the left upper extremity at the level of the shoulder. I also find that prior to June 19, 2008, the claimant had a 20% permanent partial disability of the left upper extremity at the level of the shoulder, and that this injury constituted a hindrance or obstacle to employment or re-employment. In addition, I find that prior to June 19, 2008, the claimant had a 13% permanent partial disability of the right upper extremity at the level of the shoulder, and that this injury constituted a hindrance or obstacle to employment or re-employment.

There is medical and vocational evidence that addresses whether the claimant in this case is permanently and totally disabled. Dr. Volarich imposed two sets of restrictions on the claimant: those referable to his condition before the June 19, 2008 work injury, and those

¹⁴ *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, 163 (Mo. App. 1986).

¹⁵ *Sutton v. Vee Jay Cement Contracting Co.*, 37 S.W.3d 803, 811 (Mo.App. ED. 2000). See also *Forshee v. Landmark Excavating and Equipment*, 165 S.W.3d 533, 537 (Mo. App. E.D. 2005).

¹⁶ *Sutton v. Vee Jay Cement Contracting Co.*, 37 S.W.3d 803, 811 (Mo.App. ED. 2000). See also *Reiner v. Treasurer of the State of Missouri*, 837 S.W.2d 363, 367 (Mo. App. 1992).

¹⁷ *Brown v. Treasurer of State of Missouri*, 795 S.W.2d 479, 483 (Mo. App. 1990).

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referable to his condition after June 19, 2008. Both sets of restrictions impose significant limitations on the claimant's use of his arm.¹⁸ Dr. Volarich rated the claimant's pre-existing left shoulder at 30% disability and his pre-existing right shoulder at 25% disability. Dr. Volarich rated the left shoulder at 45% disability due to the primary injury. Dr. Volarich "[if] vocational assessment is unable to identify a job for which [the claimant] is suited, then it is my opinion he is permanently and totally disabled as a direct result of the work related injury of 6/18/08 [sic] in combination with his preexisting medical conditions."¹⁹

Mr. Phillip Eldred, a vocational rehabilitation counselor, testified credibly at the hearing. Mr. Eldred opined that the claimant is not employable in the open labor market due to a combination of his pre-existing and primary injuries. Mr. Eldred found that the claimant lacked transferable skills for even a sedentary work level, and in conjunction with his age, lack of vocational skills, and inability to be retrained, this combination rendered the claimant unable to be employed in the open labor market. Although Mr. Eldred initially considered both the temporary and the final restrictions the claimant was placed under, he testified on cross examination that even if he considered only the less restrictive of the physical restrictions (those of Dr. Rothrock), that the claimant would still be unable to be employed in the open labor market. Mr. Eldred emphasized that the claimant's unemployability was the result of the combination of the physical restrictions and the claimant's age, lack of transferable skills, and his inability to be formally retrained. For example, the claimant's scores on the tests administered during Mr. Edred's evaluation demonstrate that the claimant has difficulty following oral directions; that his arithmetic ability is at the sixth grade level; and that his spelling ability is equivalent to that of an eighth grader. The claimant also scored quite poorly on the test that measures manual dexterity.

Mr. Tim Lalk, also a vocational rehabilitation counselor, found that based on the medical records that he had reviewed, the claimant was employable in the open labor market in a number of identified jobs.²⁰ Mr. Lalk indicates that he took into account both the final restrictions imposed by Dr. Rothrock and Dr. Volarich. Mr. Lalk opined that the claimant could work in jobs that are more unskilled, entry-type positions that are at or near the sedentary level of physical exertion. According to Mr. Lalk, the claimant's age would not prevent him from attaining these positions as they are often filled by people of a similar age.²¹

In this case, I find the opinions of Mr. Eldred to be more persuasive than those of Mr. Lalk. I also find that, consistent with the opinions of Mr. Eldred and Dr. Volarich, the claimant is now unable to compete in the open market for employment, and that he is permanently and totally disabled. I find that the June 19, 2008 injury, considered alone, did not result in the claimant's permanent and total disability. Instead, the combination of the June 19, 2008 injury and the claimant's pre-existing disabilities in his left and right shoulders resulted in the claimant being permanently and totally disabled. Consequently, the Second Injury Fund is liable for permanent and total disability benefits pursuant to Missouri's workers' compensation law.

¹⁸ Claimant's Exh. 6, attached Exh. 3 – Independent Medical Examination Report, p. 7.

¹⁹ Claimant's Exh. 6, attached Exh. 3 – Independent Medical Examination Report, p. 7.

²⁰ SIF Exh. B, p. 26.

²¹ SIF Exh. B, pp. 30-31.

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Notwithstanding the fact that the claimant settled his claim against the employer/insurer for a lump sum, I find that for the purposes of the liability of the Second Injury Fund, the 27.5% permanent partial disability would have been paid in 63.8 weekly installments commencing on January 19, 2009, the end of the healing period, and continuing through April 4, 2010.²² Since the compensation rate for permanent partial disability (PPD) is less than the amount payable for permanent total disability (PTD) under Section 287.200, RSMo, the Second Injury Fund is liable for the difference of between what the claimant received for PPD from the employer/insurer and what he is entitled to receive for PTD under Section 287.220.1, RSMo. The difference between the PTD rate of \$742.72 per week and the PPD rate of \$389.04 per week is \$353.68 per week. The Second Injury Fund is therefore ordered to pay to the claimant the sum of \$353.68 per week for 63.8 weeks – that is, for the period of January 19, 2009 through April 4, 2010. Beginning on April 5, 2010, the Second Injury Fund is responsible for paying the full PTD benefit to the claimant at the rate of \$742.72 per week.

These payments for PTD shall continue for the remained of the claimant's lifetime or until suspended if the claimant is restored to his regular work or its equivalent as provided in Section 287.200, RSMo.

The claimant's attorney, Randall O. Barnes, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the claimant. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein. Interest on all sums awarded hereunder shall be paid as provided by law.

Any pending objections not expressly addressed in this award are overruled.

Date: _____

Made by: _____

Vicky Ruth
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation

²² As the number of weeks is 63.8, the relevant period is 63 and 5.6/7 weeks – which I have rounded to 63 and 6/7 weeks.