AWARD

Employee: [redacted]

Injury No.: [redacted]

Dependents: n/a

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

Employer: Alliance [redacted]

Additional Party: Second Injury Fund (SIF)

Insurer: [redacted]

Hearing Date: [redacted]

Checked by:

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: [redacted]

5. State location where accident occurred or occupational disease was contracted: Franklin County, MO

6. Was above employee in employ of above employer at time of alleged accident or occupational disease?Yes

7. Did employer receive proper notice? Yes

8. Did accident or occupational disease arise out of and in the course of the employment? Yes

9. Was claim for compensation filed within time required by Law? Yes

10. Was employer insured by above insurer? Yes

11. Describe work employee was doing and how accident occurred or occupational disease contracted:

    Opening a fire hydrant.

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: Right shoulder, arm and upper extremity

14. Nature and extent of any permanent disability: Total Disability

15. Compensation paid to-date for temporary disability: zero

16. Value necessary medical aid paid to date by employer/insurer? $94,211.28

17. Value necessary medical aid not furnished by employer/insurer? zero

18. Employee's average weekly wages: $557.60

19. Weekly compensation rate: $371.65 - PTD/TTD; $340.12 - PPD

20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

96 weeks of underpaid TTD benefits @ $31.53	=	$3,026.88
139.2 weeks (60% of the right shoulder) @ $340.12	=	$47,344.70
Total amount payable by Employer:		$50,371.58

22. Second Injury Fund liability:

139.20 weeks at a rate @ $31.53	=	$4,388.98
Arrearage of 229.8 weeks @ $371.65	=	$85,405.17
Weekly checks for PTD from date of trial in the amount of $371.65		
total amount payable by Second Injury Fund	=	$89,794.15

23. Future requirements awarded:

SIF to provide weekly checks in the amount of $371.65 for life
Employer liable for all future medical aid for right shoulder

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: PRESTON E. ROSKIN.

Employee: [redacted]

Injury No.: [redacted]

Dependents: n/a

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

Employer: [redacted]

Additional Party: Second Injury Fund (SIF)

Insurer: [redacted]

Hearing Date: [redacted]

Checked by:

FINDINGS OF FACT and RULINGS OF LAW:

A hearing was held on the above-captioned matter on [redacted] (Claimant) was represented by attorney Preston E. Roskin. [redacted] (Employer) and [redacted] (Insurer) were represented by attorney [redacted] The Second Injury Fund (SIF) was represented by attorney [redacted].

All objections not expressly ruled upon in this award are overruled to the extent they conflict with this award.

STIPULATIONS

The parties stipulated to the following:

1. On [redacted], Claimant sustained an accident.

2. At the time of his accident, Claimant was an employee of Employer.

3. Employer and Claimant were operating under and subject to the provisions of the Missouri Workers' Compensation Law.

4. Employer's liability was fully insured by [redacted]

5. Employer had notice of Claimant's injury.

6. A claim for compensation was timely filed by Claimant.

7. Claimant's average weekly wage on the date of injury was $557.60, entitling him to rates of $371.65 and $340.12 for TTD/PTD and PPD respectively.

8. Employer has paid TTD benefits in the amount of $36,961.85.

9. Employer has paid medical benefits in the amount of $94,211.28.

ISSUES

The parties stipulated the issues to be resolved are as follows:

1. Liability of the Employer to provide future medical care to Claimant.

2. Liability of the Employer for TTD.

3. Nature and extent of permanent disability, PTD being alleged.

4. Liability of the Second Injury Fund.

EXHIBITS

Claimant submitted Exhibits A through N, inclusive, which were admitted without objection.

Employer submitted Exhibits 1, 2 and 3, together with the deposition exhibits attached to each exhibit, which were admitted into evidence without objection, subject to all objections made and recorded in each exhibit.

The Second Injury Fund offered no exhibits.

Official judicial notice was taken of the file of the Missouri Division of Workers' Compensation in regard to the above-captioned matter, and all documents and information contained in the file.

SUMMARY OF FACTS

Based upon the competent and substantial evidence, my observations of Claimant at trial, and all the reasonable inferences to be derived there from, I find:

The [redacted] year old Claimant testified that he sustained an injury to his right shoulder on [redacted] while attempting to close off a water hydrant in Franklin County, Missouri. As he pulled forcefully on the wrench, Claimant felt a "pop" and severe pain in his right mid clavicle. Pain, numbness and tingling radiated down his entire right upper extremity into his hands and fingers. Claimants wife drove him home from work where he rested for the weekend all the while applying heat and ice to the painful area. The pain worsened however, and upon returning to work he reported his injury.

Claimant began treatment at [redacted] in Washington, Missouri. Claimant had x-rays at [redacted] in Washington, Missouri on [redacted] which indicated a fracture of multiple screws holding the stabilization bar of his right shoulder and a united fracture of the mid aspect of the right clavicle. He was then advised to see an orthopedic surgeon.

He then saw Dr. [redacted] put Claimant on light duty due to a failure of the internal fixation of his non- union right clavicle. Dr. [redacted] then operated on Claimant on [redacted], performing an open reduction internal fixation with Flexon bone graft to the right clavicle non-union (Exhibit A). Dr. [redacted] thereafter ordered physical therapy. Dr. [redacted] continued to treat the Claimant and on [redacted] the doctor recommended applying an Exogen bone stimulator to try to boost the amount of new bone formation at the interface. It was recommend that patient delay unrestricted heavy physical labor until there was better bone. On [redacted] ordered an exercise program with a one to two pound progression per week. On [redacted] indicated that the patient had pain when trying to lift more than three pounds due to a persistent non-union fracture. At that time Dr. [redacted] ordered a further surgery. On [redacted] did a bone marrow and bone-void filler ignite injection to the right clavicle non-union. Claimant followed up with Dr. [redacted] and on [redacted] Claimant still had pain lifting over five pounds, popping around the shoulder blade and straining and pulling on the muscles around the shoulder. Dr. [redacted] ordered physical therapy based upon these complaints. On [redacted] Claimant underwent physical therapy at [redacted] (Exhibit A). Dr. [redacted] continued to follow the Claimant and on [redacted] indicated that if patient wanted further improvement he may need to consider surgical intervention; x-rays showed persistent non-union. On [redacted] Dr. [redacted] did an open bone grafting with autograft, both cancellous and corticocancellous bone from the right pelvis.

Claimant continued to follow up with Dr. [redacted] and on [redacted] ordered physical therapy which Claimant did at [redacted]. [redacted] ordered continuing physical therapy which Claimant did at [redacted]. On [redacted] Claimant saw Dr. [redacted] and was still having instability around the shoulder as well as persistent pain. Claimant reported that he gets shooting pains and numbness in the arm and the doctor ordered continued physical therapy and Dr. [redacted], on [redacted], also indicated that further surgery is only in the event of failure of the plate and/or screws. On [redacted] Claimant underwent an EMG at [redacted] and was diagnosed with bilateral carpel tunnel syndrome with loss of the sensory nerve function with the maintenance of the other nerves involved in the brachial plexus. On [redacted] he went to see Dr. [redacted] with continuing limitations and a 30% weaker shoulder in the right compared to the left. He had significant pain and limitation of motion and radiographic incomplete healing of the clavicle non-union and needed to continue with physical therapy. He saw Dr. [redacted] on [redacted] and, while attending physical therapy, seemed to have increased swelling around the right clavicle and shoulder and residual weakness of the right scapula. X-rays were taken showing some loosening around two of three lateral screws without failure of the plates. Claimant was told to continue with the ultrasound stimulation and physical therapy. On [redacted] indicated that Claimant had more pain with increased shoulder activity, radiating pain around the shoulder itself, and clicking behind the shoulder blade. There was snapping of the scapula not directly related to his clavicle other than the residual weakness and change in the muscular balance of the shoulder after prolonged limitation of use of the right upper extremity. On [redacted] also indicated no further surgical intervention was indicated because Claimant had not had complete failure of the hardware. Dr. [redacted] stated that he had reached MMI "to date." On [redacted] Claimant saw Dr. [redacted] and there was loosening and some continued motion of the screws. Claimant could not return to physical labor activities that require forceful use of the

right arm. On [redacted] Claimant saw Dr. [redacted] and had a spell of worsening pain during a long drive. Claimant saw Dr. [redacted] on [redacted] and Dr. [redacted] indicated that if the x-rays showed complete failure or fracture of the screws, Claimant would need further surgical intervention for the revision of the internal fixation hardware. [redacted] at [redacted] Claimant had a nerve conduction study of the right arm which shows chronic degeneration in the C6-7 and 8 innervated muscles. This is consistent with mild, early median neuropathy at the wrist/carpal tunnel and suggestive of chronic mild middle cervical radiculapathy. On [redacted] Claimant saw Dr. [redacted] wherein Dr. [redacted] took x-rays that showed a failure of the plate with distal screws pulling up allowing the plate to disassociate from the distal clavicle. Dr. [redacted], at that time, suggested repeat surgery. Dr. [redacted] also indicated that the chronic nerve degeneration from the neck was probably causing some of the numbness. Claimant did not want to consider cervical surgery at that time. On [redacted] performed another surgery at [redacted] wherein he removed the hardware, reduction of the fractured clavicle allograft intercalary bone graft, replating of the clavicle and application of Grafton Flex demineralized bone matrix. At this point, Claimant was released, having reached MMI and TTD payments were stopped. Despite this, however, Dr. [redacted] followed Claimant until [redacted] wherein Dr. [redacted] turned the Claimant over to Dr. [redacted].

[redacted], [redacted] x-rays revealed no evidence of healing of the clavicle fracture and Dr. [redacted] recommended a CT scan to further evaluate the healing. On [redacted] a CT was performed, showing an incomplete union of about 10% to 20% of the anterior portion of the clavicle. Claimant saw Dr. [redacted] on [redacted] with continuing chronic pain in the right clavicle area. On [redacted] Dr. [redacted] examined Claimant and he was tender to the palpation around the incision and had significant pain around the clavicle. X-rays taken showed that some of the screws were starting to back out of the plate and still had a non-union fracture. At that time, on [redacted], Dr. [redacted] referred Claimant to Dr. [redacted] (Exhibit A).

On [redacted] Claimant saw Dr. [redacted] who assessed a chronic non-union of the right clavicle fracture. X-rays at that time showed that three screws were broken and that his diagnosis was the same as before, a non- united clavicular fracture with hardware failure. Dr. [redacted] then ordered surgery on [redacted] performed at [redacted]. The operation procedure was complex hardware removal with irrigation debridment of infected right clavicular non-union and application of five antibiotic beads. On [redacted] x-rays were taken at [redacted] showing a clavicular fracture that was unchanged. On [redacted] Dr. [redacted] assessed an infected hardware status post right clavicular non-union and that there was no change from the previous x-rays. Claimant saw Dr. [redacted] on [redacted] and the x-rays demonstrated increase in the space between the two distal and proximal clavicular segments. There was some weakness of the biceps and triceps and parathesias in the ulnar nerve distribution suggestive of a traction-type phenomenon. Physical therapy was recommended.

Pre-existing Conditions

Claimant first injured his back when he was about thirteen years old and involved in a bicycle accident. The back pain progressed throughout his adolescent and early adult years, to the present. He was treated by Dr. [redacted], a [redacted], three times a week for a year. On [redacted], while working at [redacted], Claimant was picking up a carton of copy paper to put on a conveyor belt when he hurt his back. He received treatment for this injury at [redacted], Missouri and by Dr. [redacted]. In the early [redacted] Claimant was treated by Dr. [redacted] and Dr. [redacted]. On [redacted] Claimant was involved in an automobile accident and X-rays of the Thoracic spine indicated an irregularity at the anterior and inferior margins at T4 and of the anterior and superior margins at T5 suspicious of a slightly compressed fracture, with fragments in good position. X-rays of the Lumbar spine old juvenile epiphysitis, L1. On [redacted] Claimant saw Dr. [redacted] (Exhibit D), an [redacted], for further evaluation of exacerbation of low pack pain. Claimant saw Dr. [redacted] from [redacted] through [redacted]. In [redacted] Dr. [redacted] ordered an MRI and on [redacted] Dr. [redacted] (Exhibit D) indicated the the MRI showed focal degenerative disc degeneration at L5-S1 with a disc protrusion at the midline and lateralizing towards the left and touching the dural space on the left S1 nerve root; moderate degenerative disc bulge at L4-5; degenerative disc bulge at L3-4; some evidence of anterior disc herniation at L3-4. Dr. [redacted] ordered physical therapy. Dr. [redacted] referred Claimant to Dr. [redacted]. (Dr. Johnston Exhibit D) Claimant thereafter saw Dr. [redacted] for steroid injections.

On [redacted] Claimant began treatment with Dr. [redacted], a [redacted] in Washington, Missouri, for cervical brachial syndrome, muscle spasms, thoracic/lumbossacral neuritis/radiculitis. Claimant received treatment from Dr. [redacted] from [redacted] through [redacted] (Exhibit E). On [redacted] Claimant returned to Dr. [redacted] for treatment for lower back pain, lower back pain radiating to both legs, numbness in the right arm and shoulder pain. Claimant received treatment from Dr. [redacted] from [redacted] through [redacted] (Exhibit F). On [redacted] Claimant was seen by [redacted], his family doctor for low back pain radiating to both legs (Exhibit G). Dr. [redacted] ordered a CT Scan of the Lumbar spine. The CT Scan showed grossly midline degenerative disc changes mainly L4-5 and L5-S1 causing mild extradural compression. Claimant followed up with Dr. [redacted] on [redacted] and Claimant indicated that he felt better as long as he takes medication. Dr. [redacted] referred Claimant to Dr. [redacted]. Claimant saw Dr. [redacted] on [redacted] with complaints of back pain. (Exhibit H). Dr. [redacted] discussed non-operable treatment with Claimant.

After the [redacted] injury, Claimant saw [redacted]. for worsening back pain (Exhibit I). [redacted] ordered an MRI of the Lumbar Spine which indicated mild to moderate L4-L5 central spinal canal stenosis secondary to a lobular central disc herniation combined with modest facet hypertrophy; Left L4-L5 foraminal disc herniation causing moderate foraminal stenosis and contacts the exiting left L4 nerve root; Central and right paracentral disc herniation at L5-S1 causing right inferolateral recess stenosis and minor mass effect upon the right Si nerve root. The right paracentral extruded component extends just below the intervertebral disc level; Mild right L3-L4, mild right L4-L5 and mild bilateral L5-S1 foraminal stenosis; Colonic diverticulosis (Exhibit I). Dr. [redacted] referred Claimant to [redacted]. On [redacted] Claimant saw Dr. [redacted], [redacted]. who referred claimant to Dr. [redacted] for epidural steroid injections (Exhibit J). Thereafter, Claimant

came under the care of [redacted] on [redacted] (Exhibit K). Dr. [redacted] Impressions were left lumbar radiculitis, suspect left L4 radiculitis with left L4-5 foraminal disc herniation; multilevel lumbar degenerative disc disease. Claimant was treated by Dr. [redacted] from [redacted] through [redacted] and underwent a L4-5 selective epidural steroid injection with fluoroscopy on [redacted].

On [redacted] Claimant saw [redacted] for pain and discomfort in his neck. Claimant had slipped and fell on ice in the parking lot at his place of employment on [redacted]. Dr. [redacted] diagnosed mild cervical myositis.

On [redacted] Claimant was involved in an automobile accident and received Emergency Room Treatment at [redacted], Sullivan for Right Shoulder injury. X-rays of the right shoulder revealed a fracture of the middle portion of the shaft of the clavicle, with moderate superior displacement of the lateral fragment; small intermediate fragments at the fracture site, with the fragments in satisfactory position. No dislocation of the lateral end of the clavicle, or head of the humerus; Fracture, right clavicle. Claimant was placed in a clavicle strap. Thereafter, Claimant received treatment for his mid clavicle fracture from [redacted]. Claimant received treatment with Dr. [redacted] for his mid clavicle fracture from [redacted]. On [redacted] Dr. [redacted] performed surgery at [redacted] to excise fragment, right clavicle. On [redacted] Dr. [redacted] took x-rays which showed no fracture at that area and Claimant was to return on an as needed basis. The next treatment client received for his right shoulder/right clavicle was on [redacted] when he went to [redacted]. (Exhibit L, pg. 13) due to increasing arm and shoulder pain and occasional numbness in his hands. Dr. [redacted] took x-rays which confirmed a hypertrophic area of the clavicle non-union site. On [redacted] Claimant had a CT performed at [redacted] in Washington, Missouri and the impression was a non-union of right clavicle fracture. [redacted] Claimant had surgery at [redacted] in Washington, Missouri where Dr. [redacted] did an open reduction internal fixation of right clavicle fracture for non-union with allograft fibular strut graft. Claimant continued to be treated by Dr [redacted] and on [redacted] x-rays confirmed more consolidation of his fracture. On [redacted] evaluation showed increasing swelling around the mid-clavicle area indicative of a breakdown of a non-union fixation. This was verified by significant bending of the reconstruction plate on radiographs and radial lucency at fracture area. Claimant was advised to get a opinion from a Dr. [redacted] in regard to plate removal, re-bone grafting and electrical stimulation. On [redacted] Dr. [redacted] indicated that Claimant could return to work on limited duty. On [redacted] Claimant was seen by [redacted], M.D. (Exhibit L, pg. 14) for an opinion regarding plate removal. On [redacted] Dr. [redacted] performed an open reduction and internal fixation of the right clavicle fracture with bone grafting at [redacted]. On [redacted] Dr. [redacted] stated that there was excellent alignment and that the plate was in place; there was no evidence of hardware failure. On [redacted] allowed Claimant to return to on work-light duty. Claimant's last appointment with Dr. [redacted] was on [redacted]. Dr. [redacted] indicated at that time that there was excellent alignment and no failure of hardware; that the bone seems to be filling in without difficulty but is still woven bone. Dr. [redacted] thought it would be safe to give Claimant a release to return to work as long as he can be restricted from lifting ten pounds or less resistance with his right arm.

Claimant testified he was seen by Dr. [redacted] on [redacted] for some tenderness in his right clavicle. Dr. [redacted] indicated that Claimant should call [redacted]

[redacted] in [redacted] to schedule an appointment. On [redacted] Claimant was seen at the [redacted] at which time Claimant may still have a non-union he is completely asymptomatic. On [redacted] Claimant was released to return to work by [redacted]., [redacted] (Exhibit L, pg. 14).

DR. [redacted]

Dr. [redacted] is an expert in diagnostic imaging, specifically nuclear medicine, also occupational medicine and an independent medical examiner. Dr. [redacted] (Exhibit L) examined the Claimant at the request of Claimant's attorney. In an effort to gather as much information about the Claimant's injuries, Dr. [redacted] asked about Claimant's activities of daily living. Dr. [redacted] asked Claimant about his prior activities regarding his right shoulder prior to [redacted] and Claimant stated that he continued to experience some tenderness and deformity at the surgery site and had some numbness and tingling in his hand. Claimant was able to return to [redacted] performing heavy lifting and repair of water pumps and water meters because this was not as heavy as the earlier demolition work. Claimant was able to lift 50 pounds, swim, play softball with is daughter, take float trips, go camping with the family, riding a motorcycle and off the road vehicles. He could wash his back and dress without difficulty prior to his injury of [redacted] (pg. 19).

After the injury in [redacted], Claimant was able to perform personal care with greater difficulty. Bathing and dressing moved very slowly and with occurred with greater difficulty forcing Claimant to rely mostly on his left arm. He had to ask his wife to wash his back or areas he was unable to reach. When dressing, he had to put his right arm in first. As far as his leisure activity, he is no longer able to swim, play basketball, baseball or volleyball or throw balls to his daughter. Fishing is very difficult and he has to use his left hand. When he tried to return to riding a motorcycle the vibration was too painful for him (pg. 18). He lives on two acres and was able to push a power mower until 2002 and now has to use a riding lawn mower with his left hand. He also has to use his left arm to drive his motor vehicle. He can no longer take long trips because of the pain. Even sitting as a passenger is more painful than driving. He tries to help around the house performing household chores but found sweeping, mopping, washing dishes and anything that required him to use the weight of his arms hanging down resulted in pain for three to four days (pgs. 18-19).

With regard to Claimant's Second Injury Fund claim and his past medical history, his low back problems began at age [redacted] when he was involved in a bicycle accident. Claimant had been treated in the past by Dr. [redacted], a chiropractor three days a week for a year. Claimant's symptoms resolved except for some intermittent pain at the waist and he was able to play ball and be active as a youngster (pg. 20). On [redacted] while working at [redacted] he bent over and picked up a carton of copy paper and his back became exacerbated and he returned for conservative management because of his back pain (pg. 20). Sometime in [redacted] Claimant's flare ups of his low back pain became accompanied by pain radiating down both lower extremities, left greater than right. He was seen by Dr. [redacted] (Exhibit D) who reviewed the CT scan and opined that it demonstrated a bulging disc at L5-S1. He was diagnosed with discogenic low back pain and recommended the use of a lumbosacral corset, work restrictions, physical therapy and antiinflammatory medications. He gradually improved

and then on [redacted] returned to Dr. [redacted] because of an exacerbation of low back pain (pg. 20). On [redacted], Claimant underwent an MRI and returned to Dr. [redacted] on [redacted] and Dr. [redacted] opined that it demonstrated focal degenerative disc changes at L5-S1 with disc protrusion at the midline lateralizing toward the left and touching the dural space on the left S1 nerve root. Also a moderate degenerative bulge was seen at L4-5 without focal lateralization and degenerative bulging at L3-4 without lateralization. There was evidence of an anterior disc herniation at L3-4 Dr. [redacted] recommended epidural steroid injections and no work for three weeks. This helped relieve Claimant's pain and he was able to do well and work regularly with only occasional flareups until the exacerbation of pain radiating down both legs in [redacted]. A CT scan of the lumbar spine on [redacted] revealed grossly midline degenerative disc changes mainly at L4-L5 and L5-S1 causing mild extradural compression of both S-1 nerve root sheaths (pg 21). Up to [redacted] Claimant continued to experience annual episodes of severe aching across his low back at the belt line, radiating down both lower extremities, left greater than right. Claimant occasionally missed a day at times because of severe flareups that could last a week and were treated by a chiropractor (pg. 22).

Dr. [redacted] noted that Claimant had weakness of the right shoulder. Testing of the deltoid and rotator cuff as 3/5 (pg. 24) which is about a 40% loss of power. The left shoulder was strong at 5/5. Claimant had problems walking heal to toe because of weakness in the left leg as well as back discomfort (pg. 25). The neck and cervical spinal motion was restricted. Dr. [redacted] found a 20% loss in flexion, 13% loss in extension, 7% loss in side bending to the right, 16% loss in side bending to the left, 35% loss in rotation to the right and 32% to the left (pg. 25). Examination of the right shoulder revealed there was at least a 35% loss in motion as evaluated by the Apley Scratch test (pg. 26). Significant deformity was noted over the clavicle with at least a three to four centimeter soft tissue and bony deft at approximately mid shaft. There was a 15 centimeter scar traversing the length of the clavicle (pg. 26). Pain occurred when palpating the central bony defect consistent with the history of recurrent nonunions (Pgs. 26 and 27). Dr. [redacted] checked the hand grip strength and pinch strength using the Jamar device. In the right hand settings 1 through 5 his grip strength measured 40, 70, 75, 55 and 50 foot pounds. The left measured 50, 85, 90, 65 and 60 foot pounds.

Dr. [redacted] diagnosed an aggravation of the right clavicle nonunion with hardware failure. Status was post five separate surgical repairs including repeat open reduction internal fixation and bone grafting procedures culminating in placement of antibiotic beads because of chronic infection of the right clavicle and persistent nonunion (pg. 28). Dr. [redacted] also opined regarding the previous status was that there were three surgical repairs including open reduction internal fixation with bone grafting and chronic lumbar syndrome secondary to degenerative disc disease and degenerative joint disease with disc bulges at L4-5 and L5-S1 along with chronic cervical strain syndrome (pgs. 28 and 29).

Dr. [redacted] opined that the work accident that occurred on [redacted] while turning off a fire hydrant pulling with a two foot wrench when Claimant felt a pop in the right shoulder was the substantial contributing factor as well as the prevailing or primary factor causing the aggravation of his right clavicle nonuion and hardware failure that required a series of five surgical repairs from which he continued to experience significant difficulties from the nonuinon and loss of function (pg. 29). Dr. [redacted] found that Claimant had a 60% permanent partial disability of the right upper extremity at the shoulder due to the aggravation of his right clavicle fracture nonuion and hardware failure that required a series of five surgical repairs. The rating accounts for this injury's contribution to pain, lost motion, weakness, crepitus and atrophy in the

dominant arm (pg. 30).

Dr. [redacted] gave a preexisting disability prior to [redacted] which included at 25% permanent partial disability of the right upper extremity at the shoulder due to the fracture that required three surgical repairs including two open reductions and bone grafting. The rating accounted for preexisting pain, lost motion, weakness, crepitus and atrophy in the dominant arm (pg. 30). Dr. [redacted] opined that Claimant had a 20% permanent/partial disability of the body as a whole rated at the lumbosacral spine due to the chronic lumbar syndrome secondary to the bulging disc at L4-L5 and L5-S1. The rating accounted for back pain and lost motion and occasional lower extremity paresthesias (pgs. 30 and 31). Dr. [redacted] opined that Claimant had a 12.5% permanent/partial disablity of the body as a whole rated at the cervical spine due to his chronic cervical syndrome causing neck pain and lost motion (pg. 31). Dr. [redacted] recommended that Claimant undergo vocational assessment to determine if he is able to work in the open labor market in any capacity in the mid Missouri region (pg. 31). Claimant's education was limited to the 10th grade and he has never earned a GED and has worked as a laborer the majority of his working career and has not been able to get back to work since [redacted] and has received Social Security benefits (pg. 31).

If the vocational assessment is unable to identify a job for which he was suited then it is Dr. [redacted] opinion that Claimant is permanently and totally disabled as a direct result of the work related injuries of [redacted] in combination with the preexisting medical conditions (pg. 32).

Dr. [redacted] had comments to make. Claimant needed to continue on medical care in order to maintain his current state (pg. 33). He will require ongoing care for his pain syndrome using narcotics, non-narcotic medications, muscle relaxants, physical therapy and similar treatments (pg 33). Dr. [redacted] thought Claimant would need periodic plain x-rays of the right shoulder and/or MRI scan of the right shoulder to further assess the ongoing difficulties with the non-union and infection (pg. 33).

Dr. [redacted] recommended that Claimant should not use his right arm for anything other than activities of daily living because of the severity of the non-union and infection of the right clavicle and cannot use his arm above the chest level (pg. 34). Dr. [redacted] limited him to not use his right arm overhead or prolonged use of his arm anyway from his body above chest level and limit him pushing, pulling and particularly traction maneuvers with the right upper extremity (pg. 34).

Dr. [redacted] testified that Claimant was to be careful about heaving lifting and to restrict his bending, pushing and pulling as much as possible due to his low back (Pg. 50).

Dr. [redacted] indicated that his low back symptoms worsened between [redacted] of [redacted] and sometime in ' [redacted] (Pg. 56).

Dr. [redacted] testified that he didn't think Claimant was able to work and "I think the disabilities and his inability to get back to work is a combination of all of his conditions as they were up to [redacted] in combination with the [redacted] accident" (Pg. 59).

[redacted] is a vocational evaluator who testified at trial by deposition (Exhibit 2). Ms. [redacted] generated an eighteen page report which relied heavily on Mr. [redacted] testing (pg. 23). Ms. [redacted] testified that she works out of her home and does not have an office (pg.33). Ms.

[redacted] testified on direct that she is a licensed professional counselor (pg. 6) but on cross-examination she indicated that she is not licensed in the State of Missouri (pg. 36). Ms. [redacted] performed no testing and reviewed some of the medical records but did not review any depositions in this case. Ms. [redacted] also admitted that she only takes defense cases (Pg. 30). Ms. [redacted] testified that, in her opinion, Claimant was employable in several employments, none of which involved any type of labor work that being, greeter, cashier, desk clerk, housekeeping, and counter person. Ms. [redacted] indicated that she did not go to any of these places that she recommended to see what was actually involved in the work (pg. 48). Ms. [redacted] failed to ask Claimant what activities causes pain (pg. 50). Ms. [redacted] asked him about the use of his right arm and if it caused him pain and he responded he did not use it (pg. 64). Ms. [redacted] employments all exceed the sedentary restrictions set on Claimant by his doctors. Ms. [redacted] indicated in her deposition that the taking of pain medication does not necessarily render him unemployable and she indicated "no" (pg. 25) which contradicts Dr. [redacted].

DR. [redacted]

Dr. [redacted] is an orthopedic surgeon hired by the Defendant and had seen Claimant on [redacted]. Dr. [redacted] indicated that Claimant had a non-union clavicle fracture in [redacted] and had pain since [redacted] (pg. 10). Dr. [redacted], upon cross-examination, indicated that he saw nothing in the records that would indicate that Claimant had a non-union fracture or pain from the [redacted] incident (pg. 23). He didn't know if he was on any pain medication when he went back to work (pg.26). He did not review any types of pain medication from [redacted], [redacted] until the present (pg. 27). Dr. [redacted] did not contact any of the treating doctors (pg. 33) and is not certified by the American Board of Independent Medical Examiners (Pg. 33). Dr. [redacted] performs four examinations per week and charges $600.00 for the evaluation and $400.00 for review (pg.33). He limits himself to four depositions a month at a rate of $1,250.00 for the first hour and a half and then $500.00 per thirty minutes afterwards (pgs.34-35). In taking these numbers into consideration, Dr. [redacted] makes in excess of $250,000.00 a year doing examinations. Dr. [redacted] indicates that he probably 5% Claimant's work and the rest defense work (pg. 47).

Dr. [redacted] indicated that one of the prior treating doctors, Dr. [redacted], gave an 80% impairment rating of the right shoulder (Pg. 29). Claimant admitted that prior to going back to work in [redacted] that he was 100% able to work and was on pain medication (Pg. 30). Dr. [redacted] indicated that taking hydrocodone and Tylenol 4 should not be used while driving a vehicle nor making any decisions or operating any motor vehicles and the same goes for Tylenol 4 (pg. 37-38). Dr. [redacted] did not ask Claimant whether he was on any pain medication the day he came to see him and whether it would affect his range of motion (Pg. 40). Dr. [redacted] indicated that the Claimant needs further medical attention if nothing else for the pain medication (pg. 41). Dr. [redacted] did not ask Claimant about his sleeping habits but if he did have bad sleeping habits it would affect his ability to work (Pg. 44). Dr. [redacted] did indicate that if Claimant was back on hydrocodone he would have the same limitations of driving, operating machinery, thinking or making decisions (pg. 51).

[redacted]

Mr. [redacted] is a vocational rehabilitation expert who saw Claimant on [redacted] and again on [redacted]. Mr [redacted] reviewed the medical records submitted as exhibits and are more fully set forth earlier in this ruling as well as in exhibits L and M. He stated that Claimant completed the 10th grade and later obtained his GED sometime around [redacted]- [redacted]. He also received training to certify him to manage public drinking water. Claimant began working for [redacted] in [redacted] of [redacted]. He was paid $12.50 an hour to work as a field maintenance operator. He was responsible for reading water meters and maintaining water and sewer facilities. The job could require him to drive 5 hours in a day. He was required to perform 5 hours of paperwork per day which required sitting. The heaviest lifting consisted of items weighing 150 pounds. He needed to be able to bend, kneel, squat, reach overhead and climb a ladder. After Claimants first surgery he was unable to return to work. In [redacted] Dr. [redacted] never released Claimant to return to work. He was terminated from employment in [redacted] and was told he could return if he did not have the restrictions that were placed on him and if there was a job opening.

Prior to this employment Claimant worked out of the labor hall for $21.00 per hour. He worked on demolishing buildings, doing interior work and performing manual labor.

He also worked for the City of [redacted] in the public works department. He was responsible for budgeting and operating heavy equipment such as backhoes and dozers.

Lastly, Claimant worked in a factory after high-school.

Claimant has never learned to type, but can use the internet. He has skills with a variety of manual equipment. Claimant stated that he is unable to stand, sit or drive for any long period of time. When he was required to do tasks for any extended period of time he required a recliner or a spot on the floor where he could lay down to recover from any pain he was experiencing.

Claimant tested at the 7th grade level for reading and the high-school level for arithmetic.

[redacted] is unable to get a good nights rest. The only activity he has during the day is dropping off and picking up his daughter from school. He is able to sweep and mop during the day, but only in 15 minute increments. He can cut the grass, but only on a riding lawn mower and only for 30 minutes at a time. He is able to prepare a dinner as long as there is not much prep in doing so. Standing to cut or chop causes pain. He is only able to go to the store for 30 minutes and this includes time that he is sitting down. The majority of his day is spent in his recliner watching television. He does not visit people much as he feels depressed and unmotivated to do so.

Based upon the medical records, Mr. [redacted] examination of Claimant, his symptoms and limitations, Mr. [redacted] concluded that Claimant is unable to secure and maintain employment in the open labor market. Claimant would not be able to effectively work in even a sedentary position through a full work day because of his need to repeatedly rest tto relieve the symptoms in his low back and right upper extremity. He also has to support his right arm on most occasions with only limited movement for short periods of time and he needs to recline using heat and cold packs to relieve his low back symptoms. The need to rest throughout the day precludes him from any gainful employment. Mr. [redacted] opines that there is no vocational rehabilitation services for Claimant unless he can better control his symptoms and is able to function at a sedentary level or greater through a full work shift on a regular bases.

RULINGS OF LAW

1. Employer is liable for future medical treatment.

An allowance or the expense of reasonable future medical care and treatment may be awarded by the labor and industrial relations commission ; *Rana v. Landstar TLC*, 46 S.W.3d 614 (Mo.App. W.D. 2001), if an employee establishes a reasonable probability that he or she needs additional future medical care: *Rana v. Landstar TLC*, 46 S.W.3d 614 (Mo.App. W.D. 2001); *Boyles v. USA Rebar Placement, Inc.*, 26 S.W.3d 418 (Mo.App. W.D.2000).

"Probable" means founded on reason and experience that inclines the mind to believe but leaves room for doubt: *Rana v. Landstar TLC*, 46 S.W.3d 614 (Mo.App. W.D. 2001).

The Workers' Compensation Law has been interpreted to mean that an employee is entitled to compensation for care and treatment with gives comfort, i.e., relieves the employee's work-related injury, even though a cure, or restoration to soundness, of the employee is beyond avail: *Rana v. Landstar TLC*, 46 S.W.3d 614 (Mo.App. W.D. 2001).

The testimonies of Dr. [redacted] Dr. [redacted], provide competent and substantial evidence upon which to base an award requiring the Employer to provide further medical care to the Petitioner: *Boyles v. USA Rebar Placement, Inc.*, 26 S.W.3d 418 (Mo.App. W.D.2000). Dr. [redacted] has stated that the need for continued treatment is necessary in order for Claimant to maintain his current state. These include narcotics, non-narcotics, physical therapy, muscle relaxants, and similar treatment as directed by the current standard of medical practice for symptomatic relief of his complaints. Additionally, periodic plain film s-rays of the right shoulder and/or MRIs of the right shoulder will be needed to further assess the ongoing difficulties with nonunion and infection.

2. Employer is liable to Claimant for TTD.

The Workers' Compensation Law does not define the term "temporary total disability": Herring v. Yellow Freight System, Inc., 914 S.W.2d 816 (App. 1995). Nevertheless, the provisions of The Law regarding temporary total disability benefits must be interpreted in their plain, ordinary or usual sense: Caldwell v. Melbourne Hotel, 116 S.W.2d 232 (App. 1938). Thus, the term "any employment" means any reasonable and normal occupation or employment: Reeves v. Midwestern Mortg. Co., 929 S.W.2d 286 (App. 1996); Phelps v. Jeff Wolk Const. Co., 803 S.W.2d 641 (App. 1991); and the ability or inability of an employee to return to employment refers to the employee's ability to perform the usual duties of the employee's regular employment, in the manner that such duties are customarily performed by the average person engaged in those duties: Caldwell v. Melbourne Hotel, *supra*.

Awards of temporary total disability benefits pursuant to The Law are intended to cover the period during which an employee is healing from an injury or occupational disease: Reeves v. Midwestern Mortg. Co., *supra*; Vinson v. Curators of Un. of Missouri, 822 S.W.2d 504 (App. 1991); Phelps v. Jeff Wolk Const. Co., *supra*; Williams v. Pillsbury Co., 694 S.W.2d 488 (App. 1985). Temporary total disability benefits are warranted until an employee's medical condition has reached the point where further progress or healing is not expected: Strate v. Al

Baker's Restaurant, 864 S.W.2d 417 (App. 1993); Vinson v. Curators of Un. of Missouri, *supra*; Phelps, *supra*; Williams v. Pillsbury Co., *supra*.

Here, Claimant has been unable to work since his injury on [redacted]. Claimant was paid TTD for part of this time for a total of 96 weeks when he was released at MMI. Claimant was paid $340.12 which was $31.53 less than the owed amount of $371.65. The total amount owed for underpaid TTD by the employer is $3,026.88.

3. Employer is liable to Claimant for PPD.

Although Claimant cannot compete for work in the open labor market, Dr. [redacted] and Mr. [redacted] agree that her situation is the result of the combination of her work-related injuries and disabilities with various pre-existing disabilities. There is little that her inability to work results exclusively from her injuries and disabilities resulting from the Accident.

Dr. [redacted] has rated the injury at 60% of the right upper extremity at the level of the shoulder, and I find this conclusive. Claimant is still in need of narcotic medication, non-narcotic medication, and physical therapy. He has numbness and tingling in his right hand and fingers, spasms in his pectoral muscle, has atrophy in the right upper extremity and has limited use of his right extremity for any amount of time. Therefore I find that the Employer owes Claimant 139.2 weeks for PPD at the rate of $340.12 or $47,344.70.

4. The Second Injury Fund is liable to Claimant for PTD.

The test applied by The Workers' Compensation Law in order to determine whether or not Claimant qualifies for permanent total disability is based upon Claimant's ability to compete in the open labor market. *McCormack v. Carmen Schell Const. Co.*, 97 S.W.3d 497 (Mo.App. W.D. 2002); *Fletcher v. Second Injury Fund*, 922 S.W.2d 402 (Mo. App. W.D. 1996).

Claimant is totally disabled if he is unable to perform the usual duties of whatever employment may be under consideration in the manner that such duties are customarily performed by the average person engaged in that employment: *Maddux v. Kansas City Public Service Co.*, 100 S.W.2d 535 (Mo. 1936); *Vogel v. Hall Implement Co.*, 551 S.W.2d 922 (Mo. App. W.D. 1977).

The basic issue to be determined is whether or not any employer of labor, in the usual and ordinary course of its business, seeking workers to perform the duties of an employment in the usual and customary manner such duties are performed, could reasonably be expected to employ Claimant in his present condition and could reasonably expect him to perform the duties of the employment for which he was hired: *Maddux v. Kansas City Public Service Co.*, 100 S.W.2d 535 (Mo. 1936); *McCormack v. Carmen Schell Const. Co.*, 97 S.W.3d 497 (Mo.App. W.D. 2002); *Fletcher v. Second Injury Fund*, 922 S.W.2d 402 (Mo. App. W.D. 1996); *Vogel v. Hall Implement Co.*, 551 S.W.2d 922 (Mo. App. W.D. 1977).

The Law's definition of total disability is to be liberally construed in accordance with the public welfare: *Maddux v. Kansas City Public Service Co.*, 100 S.W.2d 535 (Mo. 1936)

Doubt, if any, respecting the right to compensation is resolved in favor of the employee: *Maddux v. Kansas City Public Service Co.*, 100 S.W.2d 535 (Mo. 1936)

Dr. [redacted] believes that Claimant is permanently and totally disabled as a result of the combination of his work-related and pre-existing disabilities. Mr. [redacted] is reasonably certain that the limitations of Claimant render him unable to compete for work in the open labor market,

or to be re-trained.

Thus, I find that Claimant suffered from a 25% pre-existing permanent disability due to his previous right shoulder surgeries, a 20% pre-existing permanent disability to his body due to his chronic lumbar syndrome, a 12.5% pre-existing disability due to his chronic cervical syndrome. These pre-existing disabilities were hindrances and obstacles to Claimant's employment and prospects for re-employment, and their value, when combined with Claimant's work-related disabilities substantially exceeds the mere arithmetic sum of the disabilities when considered alone, to wit: Claimant is permanently and totally disabled as a result of the combination of his work-related and pre-existing disabilities. Thus, the Treasurer of Missouri, as custodian of the Second Injury Fund, is liable to Claimant for payment of permanent total disability benefits.

Claimant's healing period lasted 96 weeks. Employer is liable to him for 139.20 weeks of permanent partial disability thereafter, totaling 235.2 weeks. For the 139.20 weeks, the Fund owes claimant at a rate of $31.53, the differential between the PTD and PPD rates($371.65 - $340.12) or $4,388.98. Thereafter, the arrearage of 229.8 weeks as of the date of this award, is 229.8 weeks at the $371.65 PTD rate, or $85,405.17 for a total owed by the Second Injury Fund of $89,794.15. The Second Injury Fund is to provide weekly compensation in the amount of $371.65.

Date: _____ Made by: _____

Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

_____
[redacted]
Acting Director
Division of Workers' Compensation