AWARD

Employ	ee:	Injury No.:	
Depend	ents: n/a	Before the	
Employ	er: Alliance	Division of Workers' Compensation	
Additional Party: Second Injury Fund (SIF)		Department of Labor and Industrial Relations of Missouri	
Insurer:		Jefferson City, Missouri	
Hearing	Date:	Checked by:	
	FINDINGS OF FACT AND RULINGS OF L	AW	
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:		
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	ne 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 occu	pational 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 extremity	shoulder, arm and upper	
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:		Injury No.:		
Dependents: n/a		Before the Division of Workers'		
Employer:		Compensation Department of Labor and		
Industrial Additional Par	rty: Second Injury Fund (SIF)	Relations of Missouri Jefferson City, Missouri		
Insurer:		Jenerson City, Missouri		
Hearing Date:	C	hecked by:		
	FINDINGS OF FACT and RULING	S OF LAW:		
A hearing was held on the above-captioned matter on (Claimant) was represented by attorney Preston E. Roskin. (Employer) and (Insurer) were represented by attorney The Second Injury Fund (SIF) was represented by attorney All objections not expressly ruled upon in this award are overruled to the extent they conflict with this award.				
commet with t	STIPULATIONS			
The parties sti	pulated to the following:			
1.	On 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			
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 o to rates of \$371.65 and \$340.12 for TTD/PTD	, ,		
8.	Employer has paid TTD benefits in the amoun	t 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.

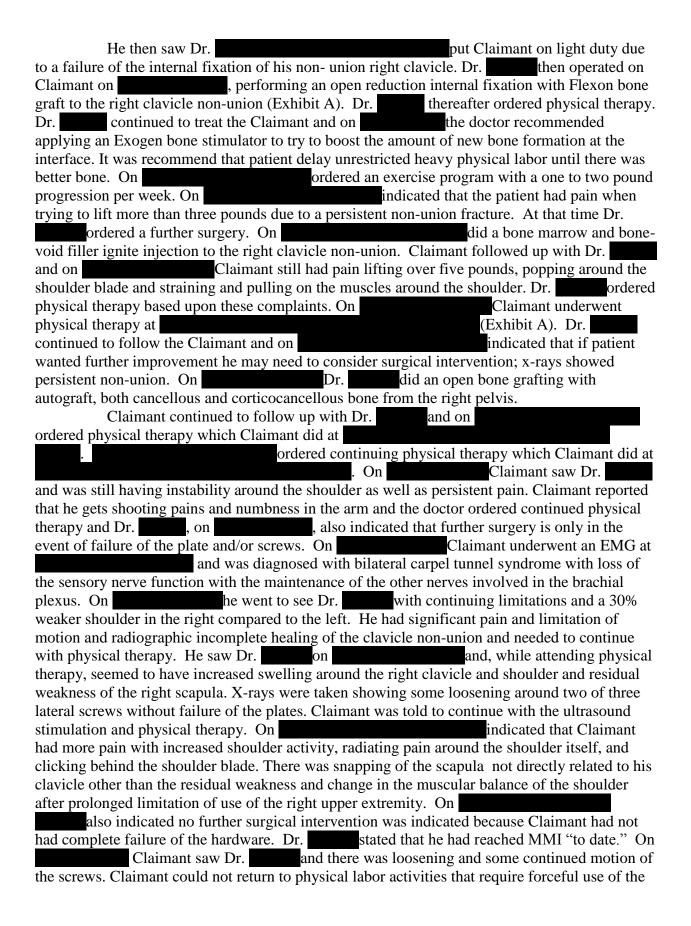
Employer submitted Exhibits 1, 2 and 3, together with the deposition exhibits attached to each exhibit, which were admitted into evidence without objection, subject to all objections made and recorded in each exhibit.

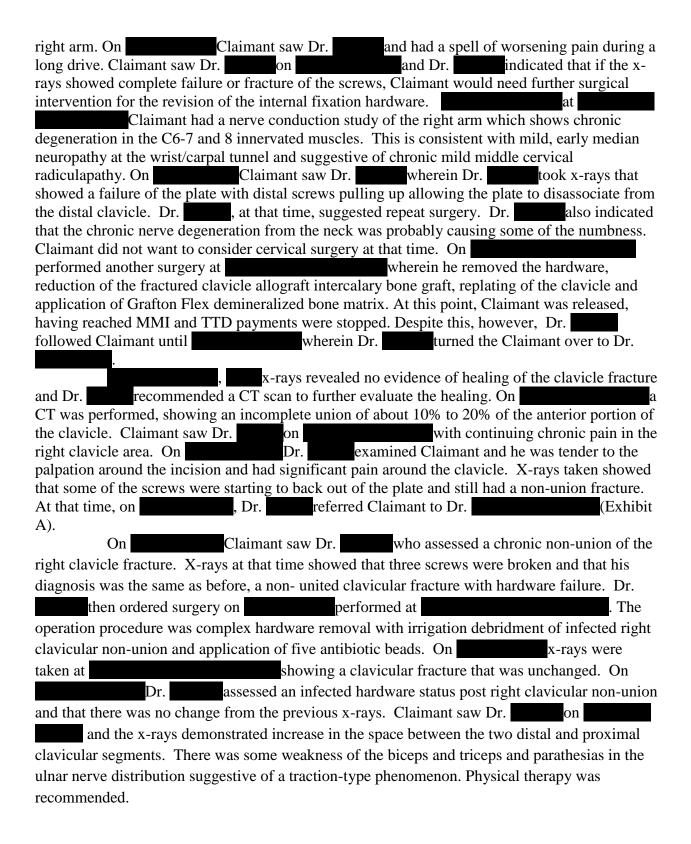
The Second Injury Fund offered no exhibits.

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

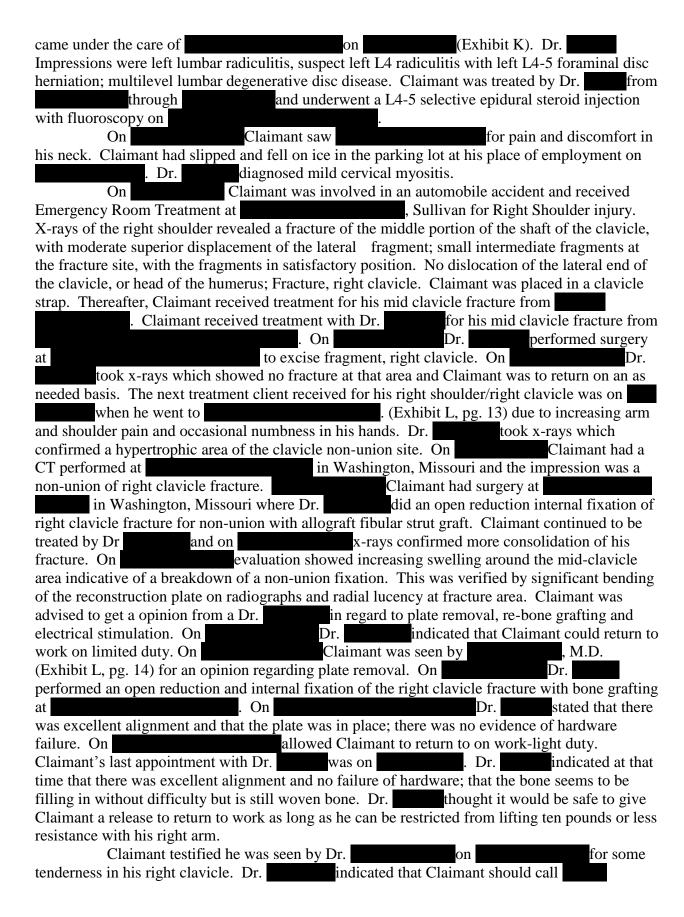
Based upon the competent and substant	ial evidence, my observations of Claimant at trial			
and all the reasonable inferences to be derived	there from, I find:			
The year old Claimant testified to	hat he sustained an injury to his right shoulder on			
while attempting to close of	f a water hydrant in Franklin County, Missouri.			
As he pulled forcefully on the wrench, Claimar	nt 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	in Washington, Missouri.			
Claimant had x-rays at in Wa	shington, Missouri on 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 cla	avicle. He was then advised to see an orthopedic			
surgeon.	-			

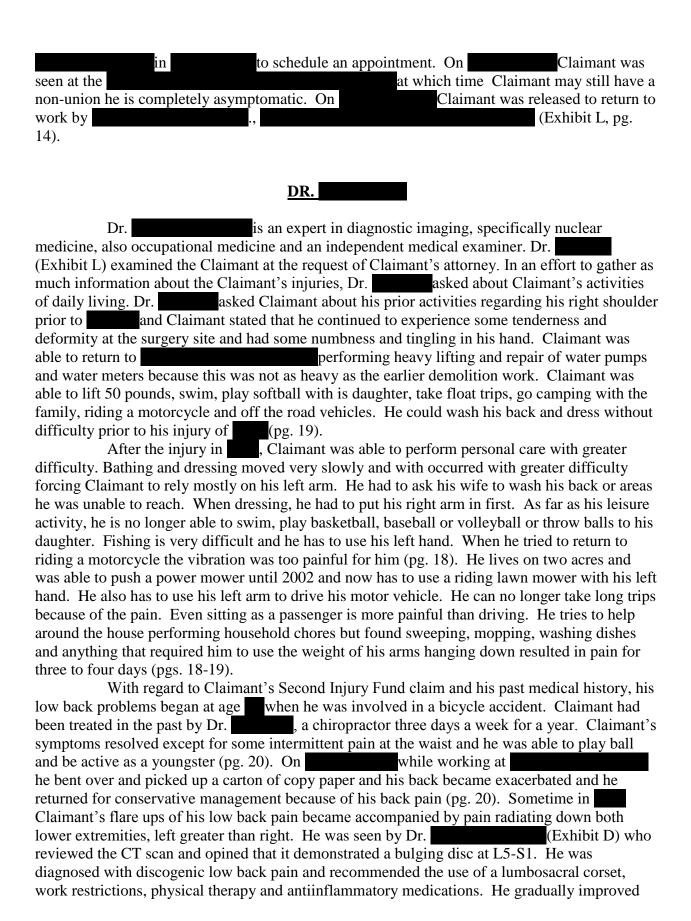


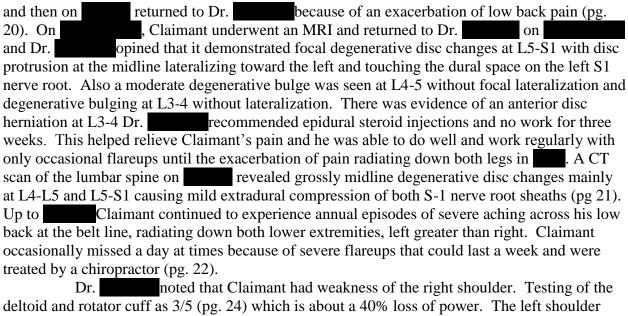


Pre-existing Conditions

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, a, three times a week for a year.
On , while working at , 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 , Missouri and by Dr In the early
Claimant was treated by Dr. and Dr. On 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 Claimant saw Dr.
(Exhibit D), an , for further evaluation of exacerbation of low pack pain.
Claimant saw Dr. from through . In Dr.
ordered an MRI and on Dr. (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. ordered physical therapy. Dr. referred Claimant to Dr
. (Dr. Johnston Exhibit D) Claimant thereafter saw Dr. for steroid injections.
On Claimant began treatment with Dr. , a
in Washington, Missouri, for cervical brachial syndrome, muscle spasms,
thoracic/lumbossacral neuritis/radiculitis. Claimant received treatment from Dr.
through (Exhibit E). On Claimant
returned to Dr. 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.
from through (Exhibit F). On
Claimant was seen by his family doctor for low back pain radiating to both legs
(Exhibit G). Dr. 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. and Claimant
indicated that he felt better as long as he takes medication. Dr.
Dr on with complaints of back
pain. (Exhibit H). Dr. discussed non-operable treatment with Claimant.
After the injury, Claimant saw injury.
worsening back pain (Exhibit I). 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.
. On Claimant saw Dr. , who
referred claimant to Dr. for epidural steroid injections (Exhibit J). Thereafter, Claimant



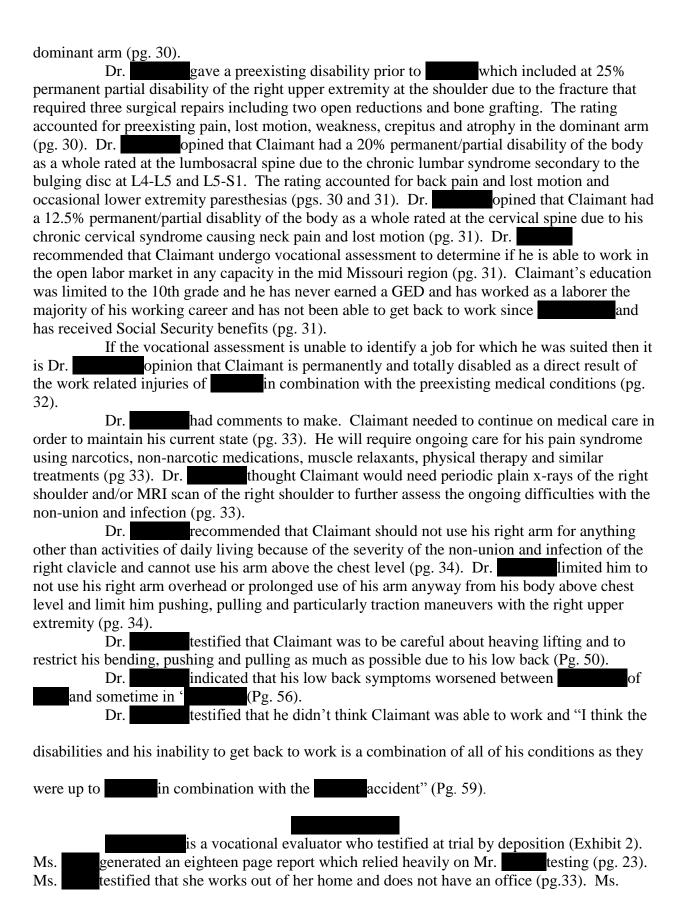




deltoid and rotator cuff as 3/5 (pg. 24) which is about a 40% loss of power. The left shoulder was strong at 5/5. Claimant had problems walking heal to toe because of weakness in the left leg as well as back discomfort (pg. 25). The neck and cervical spinal motion was restricted. Dr. found a 20% loss 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. 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. 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. 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).

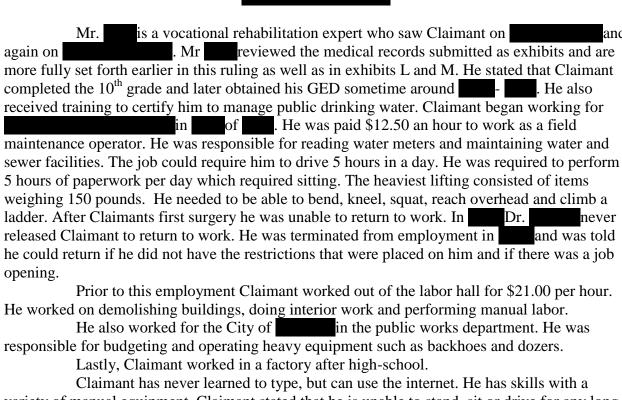
Dr. opined that the work accident that occurred on while turning off a fire hydrant pulling with a two foot wrench when Claimant felt a pop in the right shoulder was the substantial contributing factor as well as the prevailing or primary factor causing the aggravation of his right clavicle nonuion and 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. 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



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.
performed no testing and reviewed some of the medical records but did not review any
depositions in this case. Ms. also admitted that she only takes defense cases (Pg. 30). Ms.
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. 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. failed to ask
Claimant what activities causes pain (pg. 50). Ms. 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. employments
all exceed the sedentary restrictions set on Claimant by his doctors. Ms.
deposition that the taking of pain medication does not necessarily render him unemployable and
she indicated "no" (pg. 25) which contradicts Dr.

DR.

Dr. is an orthopedic surgeon hired by the Defendant and had seen Claimant indicated that Claimant had a non-union clavicle fracture in . Dr. and had pain since (pg. 10). Dr. upon cross-examination, indicated that he saw nothing in the records that would indicate that Claimant had a non-union fracture or pain 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 did not contact any of the treating doctors (pg. 33) and is not the present (pg. 27). Dr. certified by the American Board of Independent Medical Examiners (Pg. 33). Dr. 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. makes in excess of \$250,000.00 a year doing examinations. Dr. indicates that he probably 5% Claimant's work and the rest defense work (pg. 47). indicated that one of the prior treating doctors, Dr. Dr. impairment rating of the right shoulder (Pg. 29). Claimant admitted that prior to going back to that he was 100% able to work and was on pain medication (Pg. 30). Dr. 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. 37did 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. indicated that the Claimant needs further medical attention if nothing else for the pain medication (pg. 41). Dr. 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. 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).



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.

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. examination of Claimant, his symptoms and limitations, Mr. 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. copines 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. Dr. Dr. 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. 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

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

Here, Claimant has been unable to work since his injury on 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. and Mr. 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. 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. believes that Claimant is permanently and totally disabled as a result of the combination of his work-related and pre-existing disabilities. Mr. 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:	
	<u></u>	
	Acting Director	
	Division of Workers' Compensation	