



## AWARD

Employee:	Deborah Allen	Injury No.:	07-124935
Dependents:	N/A		Before the
Employer:	Chrysler LLC (Settled)		<b>Division of Workers'</b>
			<b>Compensation</b>
Additional Party:	Second Injury Fund		Department of Labor and Industrial
			Relations of Missouri
Insurer:	Old CARO LLC, c/o Sedgwick Claims Management Services		Jefferson City, Missouri
Hearing Date:	July 27, 2012	Checked by:	SC

### 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: May 1, 2007
5. State location where accident occurred or occupational disease was contracted: St. Louis
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:  
Claimant injured both hands, fingers and her right shoulder from repetitive motion activities at work.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Bilateral hands, fingers, and right shoulder
14. Nature and extent of any permanent disability: 15% PPD of each wrist, 17.5% PPD of the right ring finger, and 7.5% PPD of the right shoulder (Settled)
15. Compensation paid to-date for temporary disability: \$0
16. Value necessary medical aid paid to date by employer/insurer? \$5,600.09

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- 17. Value necessary medical aid not furnished by employer/insurer?
- 18. Employee's average weekly wages: \$718.87
- 19. Weekly compensation rate: \$376.55-permanent partial disability ("PPD")
- 20. Method wages computation: Stipulated

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable:

Employer settled prior to hearing.

- 22. Second Injury Fund liability:

11.25 weeks of permanent partial disability from Second Injury Fund	\$4,236.19
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<b>TOTAL:</b>	<b>\$4,236.19</b>
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- 23. Future requirements awarded: None.

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: Brent Cantor

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee:	Deborah Allen	Injury No.: 07-124935
Dependents:	N/A	Before the <b>Division of Workers' Compensation</b>
Employer:	Chrysler, LLC (Settled)	Department of Labor and Industrial Relations of Missouri
Additional Party:	Second Injury Fund	Jefferson City, Missouri
Insurer:	Sedgwick Claims Management Services	Checked by: SC

### **PRELIMINARIES**

The parties appeared before the undersigned administrative law judge on July 27, 2012 for a final hearing to determine the liability of the Second Injury Fund at the request of Deborah Allen ("Claimant"). Attorney Brent Cantor represented Claimant. Assistant Attorney General Rodney Campbell represented the Second Injury Fund ("SIF"). The Employer, Chrysler, and its Insurer, Sedgwick Claims Management, previously settled with Claimant for 15% PPD of each wrist, 17.5% of the right ring finger, and 7.5% PPD of the right shoulder, and did not participate in the hearing.

The parties stipulated to that on or about May 1, 2007:

1. Claimant worked for Employer and sustained an injury by occupational disease which arose out of and in the course of her employment in St. Louis County;
2. Claimant and Employer operated under the Missouri Workers' Compensation Law;
3. Employer's liability was fully insured;
4. Employer had notice of the injury;
5. A claim for compensation was timely filed;
6. Claimant's average weekly wage was \$718.87 and her rate for PPD benefits is \$376.55; and
7. If the Court finds the case compensable, Claimant sustained 15% PPD of each wrist for the primary injury, and 15% PPD of the cervical spine as a preexisting disability, and a 10% loading factor should be applied.

The issues to be determined are:

1. Is SIF liability triggered when the primary injury is an occupational disease injury?
2. If so, what is the nature and extent of SIF liability for PPD benefits, if any?

## SUMMARY OF THE EVIDENCE

All evidence was reviewed but only evidence which supports the award will be summarized. Any objections not expressly ruled on during the hearing or in this award are now overruled.

### *Exhibits*

Claimant's Exhibits A through K and SIF's Exhibit I were received into evidence without objection. To the extent there are marks or highlights contained in the exhibits, those markings were made prior to being made part of this record, and were not placed thereon by the Administrative Law Judge.

### *Live Testimony*

1. Claimant testified live and her testimony was credible. Claimant worked for Employer for 14 years, and used high and low impact guns. She installed rods inside car doors. As a team leader, Claimant worked overhead, used wrenches, and installed weather stripping. She worked long hours and stocked parts. Claimant developed bilateral carpal tunnel syndrome, trigger finger, and shoulder problems.
2. On May 1, 2007, Claimant sustained an occupational disease injury which arose out of and in the course of employment that resulted in injury to Claimant's bilateral wrists.
3. Dr. Rotman surgically repaired Claimant's left wrist on November 9, 2007 (Exhibit H), and the right wrist, ring finger, and shoulder on November 21, 2007 (Claimant's Exhibit I).
4. Claimant and Employer settled the workers' compensation claim arising out of the accident for 15% PPD of the right wrist,<sup>1</sup> 17.5% PPD of the right ring finger, 15% PPD of the left wrist, and 7.5% PPD of the right shoulder.
5. Claimant continues to have hand weakness, fatigue, and decreased grip strength, aggravated with repetitive activity. She has right shoulder pain, and decreased range of motion, aggravated with overhead activity. She also has pain if the shoulder "hangs" down without support. It is difficult to comb or braid her hair. During the hearing, Claimant changed chairs to accommodate her right arm.
6. Currently Claimant is employed part-time for a different employer, where she assists clients with shopping and similar activities.

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<sup>1</sup> The right wrist and shoulder were reduced due to 17.5% PPD of right ring finger and 75% PPD of the right shoulder.

7. Prior to the date of injury, Claimant had the following disabling injuries or conditions:
  - a. An MRI dated August 25, 2004 revealed severe right rotator cuff tendinopathy, osteoarthritis, and joint effusion. Dr. Rotman injected Claimant's right AC joint and subacromial space to relieve shoulder pain in September and October 2004. Claimant settled the case for 10% of the right shoulder (SIF Exhibit I).
  - b. In 1998 Claimant injured her neck while she installed car speakers when she reached above head level and her neck popped. She takes at least three Oxycodone pills per day, and up to six if she moves her neck the wrong way. Claimant has limited range of motion of her cervical spine. She installed circle mirrors on her car to improve her field of vision. Claimant settled the workers' compensation claim arising out of the injury for 15% PPD of the cervical spine. The injury was disabling and constituted a hindrance and obstacle to employment.

### *Opinion Evidence*

8. Shawn L. Berkin, D.O., examined Claimant, took a history, and issued a report. He found Claimant sustained an accident arising out of and in the course of employment that resulted in injury. He provided the following ratings of permanent partial disability:
  - a. With respect to the primary injury: 35% of the right shoulder, 35% of both the right and left wrists, and 20% of the right ring finger.
  - b. With respect to the preexisting disabilities, which constituted a hindrance and obstacle to employment:
    - i. 20% of the body for the cervical spine.
    - ii. 20% of the body for seizures.
  - c. Dr. Berkin opined Claimant's preexisting disabilities were a hindrance or obstacle to employment or reemployment in May 2007, and created more disability than the simple sum of the primary and preexisting disabilities.

### **FINDINGS OF FACT & RULINGS OF LAW**

Claimant has established a right to recover from the Second Injury Fund. A claimant in a worker's compensation proceeding has the burden of proving all elements of his claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 911 (Mo.App. E.D.2008). In order for a claimant to recover against the SIF, he must prove that he sustained a compensable injury, referred to as "the last injury," which resulted in permanent

partial disability. Section 287.220.1 RSMo. A claimant must also prove that he had a pre-existing permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment should he become unemployed; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15% for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo.App. 2008) (Citations omitted). In order for a claimant to be entitled to recover permanent partial disability benefits from the Second Injury Fund, he must prove that the last injury, combined with his pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. *Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 138 S.W.3d 714, 717-18 (Mo. banc 2004). Claimant has met the burden imposed by law.

Although it has stipulated to the basic elements of the case, the SIF asserts a legal defense that could absolve it of any liability in cases such as this. SIF argues that when the legislature changed the construction of the Missouri Workers' Compensation Law from "liberal" to "strict", it eliminated SIFs liability when the primary claim is an occupational disease. Strict construction means that a statute can be given no broader application than is warranted by its plain and unambiguous terms. *Robinson v. Hooker*, 323 S.W.3d 418, 423 (Mo.App. W.D.2010). A strict construction of a statute presumes nothing that is not expressed. *Id.*

The Second Injury Fund argument is crafted by viewing two portions of the Missouri Workers' Compensation Law through the lenses of strict construction: §287.020.3(5), which provides in relevant part, "the terms "injury" and "personal injuries" shall ... in no case except as specifically provided in this chapter be construed to include occupational disease in any form..."; and the part of §287.220 RSMo that provides for Second Injury Fund liability when a worker with preexisting disability "receives a subsequent *compensable injury*." If a "compensable *injury*" is necessary for Second Injury Fund liability, and "injury" cannot be construed to include "occupational disease," the logical conclusion, says the Second Injury Fund, is there is no Second Injury Fund liability when the primary claim is for an occupational disease. For the reasons herein, I find the Second Injury Fund's argument is without merit.

The flaw in SIF's position is that it ignores seven key words: "except as specifically provided in this chapter." Chapter 287 is replete with provisions specifically providing that "injury" includes "occupational disease."<sup>2</sup> Section 287.067.2 provides that an "**injury by occupational disease** is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability" (emphasis added). Likewise,

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<sup>2</sup> Other provisions include §287.420 ("No proceedings for compensation for any occupational disease or repetitive trauma under this chapter shall be maintained unless written notice of the time, place, and nature of the injury."), §287.063.3 ("The statute of limitation referred to in section 287.430 shall not begin to run in cases of occupational disease until it becomes reasonably discoverable and apparent that an injury has been sustained related to such exposure")

§287.067.3 provides, “An **injury** due to repetitive motion is recognized as an **occupational disease** for purposes of this chapter” (emphasis added).

Furthermore, by ignoring the important qualifying language, the Second Injury Fund’s position corrupts the rule of statutory construction which mandate, “all provisions of a statute must be harmonized and every word, clause, sentence, and section thereof must be given some meaning.” *Cub Cadet Corp. v. Mopec, Inc.*, 78 S.W.3d 205, 215 (Mo.App. 2002).

It is only by ignoring and discounting other words, phrases and clauses throughout the Chapter that the Second Injury Fund can assert their argument.

As recently explained in *State ex rel. KCP & L Greater Missouri Operations Co. v. Cook*, 353 S.W.3d 14, 18 (Mo.App. 2011), the qualifying language of §287.020.3 has further significance. In *KCP & L*, the court held that the definition of “accident” in Chapter 287 did NOT include “occupational disease” for purposes of the application of the exclusivity provision of §287.120.<sup>3</sup> The court noted at page 23:

The 2005 amendments eliminated the qualifier that the statutory definition of “accident” applied “unless a different meaning is clearly indicated by the context.” In contrast, the 2005 legislature *retained* similar qualifying language in the definitions of an “injury” and an “occupational disease.”<sup>4</sup>

The removal of the qualification from the definition of “accident” resulted in a single, narrow definition, whereas the retention of the qualifying language for “injury” and “occupational disease” indicates the legislature intended to maintain the established, broader definition of injury. The retention of the qualifying language and the lack of any substantive change to the Second Injury Fund or “occupational disease” portions of the statute is further evidence the legislature had no intention to change the type of disability that triggers Second Injury Fund liability as the Second Injury Fund suggests.

On October 9, 2012, the Missouri Court of Appeals Western District distinguished its’ exclusivity ruling in *KCP&L* from the decision reached in *Gloria Stiers vs. Treasurer of the State of Missouri-Custodian of the Second Injury Fund*, (WD75101). In *Stiers*, the Court held the plain language of Section 287.220 only requires a “compensable injury” to trigger SIF liability; therefore, it includes both accidents and occupational disease. Therefore, I find Claimant’s bilateral carpal tunnel syndrome was a compensable occupational disease injury.

Claimant’s assertion is not persuasive that her prior right shoulder settlement should be “stacked” with her right shoulder settlement from the primary injury. Section 287.220.1

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<sup>3</sup> The focus on the definition of “accident” and the application of the exclusivity provision distinguishes the *KCP & L* case from the case at hand, which turns on the definition of “injury” and the Second Injury Fund statute.

<sup>4</sup> See § 287.020.3(5) (“The[ ] terms [‘injury’ or ‘personal injuries’] shall in no case *except as specifically provided in this chapter* be construed to include occupational disease in any form.” (emphasis added)); § 287.067.1 (“the term ‘occupational disease’ is hereby defined to mean, *unless a different meaning is clearly indicated by the context*, an identifiable disease arising with or without human fault out of and in the course of employment” (italics added)).

requires a claimant prove that he or she had a preexisting PPD of such seriousness as to constitute a hindrance or obstacle to employment or reemployment in order to recover permanent disability compensation from SIF. The preexisting disability needed to trigger SIF liability must exist at the time the work-related injury was sustained. *Motton v. Outsource Intern.*, 77 S.W.3d 669, 673 (Mo.App. 2002). Additionally, for injuries resulting in permanent partial disability, the claimant must show that the "preexisting permanent partial disability . . . if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation." *Id.* at 673 (citations omitted). The Court in *Shipp v. Treasurer*, 99 S.W.3d 44, (Mo.App. 2003), held an employee may "stack" preexisting minor injuries to the same body part to reach the required SIF threshold.<sup>5</sup>

Here, Claimant settled her prior right shoulder claim for 10% of the shoulder, which is below the threshold pursuant to *Joseph Salviccio v. Treasurer*, (ED97862), issued September 11, 2012. For these reasons, I find Claimant cannot "stack" the preexisting injury and the primary injury to the same body part. I further find Claimant's preexisting right shoulder injury does not meet the required threshold to trigger SIF liability.

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I make the following additional findings:

1. Claimant sustained a compensable last injury which resulted in permanent partial disability equal to 15% of each wrist (52.5 weeks).
2. As of the time the last injury was sustained, Claimant had the following preexisting permanent partial disabilities, which meet the statutory thresholds and were of such seriousness as to constitute a hindrance or obstacle to employment or reemployment:
  - a. 15% of the cervical spine (60 weeks).

Total weeks for preexisting disabilities: 60

3. The credible evidence establishes that the last injury, combined with the pre-existing permanent partial disabilities, causes 10% greater overall disability than the independent sum of the disabilities.
4. The Second Injury Fund liability is calculated as follows: 52.5 weeks for last injury + 60 weeks for preexisting injuries = 112.5 weeks x 10% = 11.25 weeks of overall greater disability.

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<sup>5</sup> Overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo banc 2003)). No further reference will be made to the *Hampton* line of cases.

**CONCLUSION**

The Second Injury Fund is liable to Claimant for \$4,236.19 in permanent partial disability benefits. Attorney for Claimant shall be entitled to an attorney fee of 25% of this award.

Made by: \_\_\_\_\_

**Suzette Carlisle**  
*Administrative Law Judge*  
*Division of Workers' Compensation*