

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

Injury No.: 08-121699

Employee: John Anderson III
Employer: General Motors (Settled)
Insurer: General Motors (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 2, 2011. The award and decision of Chief Administrative Law Judge Grant C. Gorman, issued December 2, 2011, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 15th day of March 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: John Anderson III

Injury No. 08-121699

Dependents: None

Employer: General Motors (settled)

Additional Party: Second Injury Fund

Insurer: General Motors (settled)

Hearing Date: September 12, 2011

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

Checked by: GCG/ch

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: December 1, 2008
5. State location where accident occurred or occupational disease was contracted: St. Charles County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant sustained injury to the right wrist and left wrist from repetitive use in the course and scope of employment.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right wrist, left wrist.
14. Nature and extent of any permanent disability: Primary: 17% right wrist, 17% left wrist.
pre-existing: 25% of the left shoulder.
15. Compensation paid to-date for temporary disability: Unknown
16. Value necessary medical aid paid to date by employer/insurer? Unknown

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- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: Undetermined
- 19. Weekly compensation rate: \$389.04 for PPD benefits.
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

- 21. Amount of compensation payable: Settled

- 22. Second Injury Fund liability: Yes

17.625 weeks of permanent partial disability from Second Injury Fund \$6,856.83

TOTAL: \$6,856.83

- 23. Future requirements awarded: None

Said payments to begin as of the date of this award 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 20% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Michael Goldberg

FINDINGS OF FACT and RULINGS OF LAW:

Employee: John Anderson III

Injury No: 08-121699

Dependents: None

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: General Motors (settled)

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

Additional Party Second Injury Fund

Insurer: General Motors (settled)

Checked by: GCG/ch

PRELIMINARY STATEMENT

The parties appeared before the undersigned Administrative Law Judge on September 12, 2011, for a final hearing to determine the liability of the Second Injury Fund in the matter of John Anderson III (Claimant). Attorney Michael Goldberg represented Claimant. Assistant Attorney General Barbara Toepke represented the Second Injury Fund. Employer, General Motors, and its Insurer, previously settled with Claimant and did not participate in the hearing. Mr. Goldberg requested a fee in the amount of 20%.

The parties stipulated to the following:

1. On or about December 1, 2008, Claimant sustained an occupational disease arising out of and in the course and scope of employment that resulted in injury to Claimant. The injury occurred in St. Charles County, Missouri.
2. Claimant was an employee of Employer pursuant to Chapter 287 RSMo.
3. Venue is proper in St. Charles County.
4. Employer received proper notice of the claim.
5. Claimant filed the claim within the time allowed by law.
6. The applicable rate of compensation is \$389.04 for permanent partial disability (PPD) benefits, and \$660.72 for total disability benefits.
7. The disability from the primary injury is 17% PPD of the right and left wrists; pre-existing disability is 25% PPD of the left shoulder; the appropriate loading factor for the synergistic effect is 15%.

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The sole issue to be determined is:

1. What is the nature and extent of Second Injury Fund liability?

SUMMARY OF THE EVIDENCE

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

Exhibits

Claimant offered Exhibits A through D, which were received into evidence without objection. The Second Injury Fund did not offer any exhibits.

Testimony

1. On or about December 1, 2008, Claimant sustained an occupational disease arising out of and in the course and scope of employment that resulted in an injury to Claimant's right wrist.
2. Claimant received medical care as described in Exhibit B.
3. Claimant and Employer settled the workers' compensation claim arising out of the injury for 17% of the right wrist and 17% of the left wrist.
4. Claimant has the following limitations or complaints regarding the work injury:

Fatigue, numbness, reduced grip strength, and intermittent pain in both hands.
5. Prior to the date of injury, Claimant had the following disabling injuries or conditions:
 - a. In 2002, Claimant suffered a left rotator cuff tear. Claimant underwent a surgical procedure to repair the rotator cuff. Claimant complains of popping and discomfort in the left shoulder. Claimant has decreased strength in left shoulder, especially overhead. Claimant received medical care as described in Exhibit C.

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Opinion Evidence

6 Dr. Jerry Meyers 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 to Claimant. He provided the following ratings of permanent partial disability:

- b. With respect to the primary injury: 25% of the right and left wrists.
- c. With respect to the pre-existing disabilities, which constituted a hindrance and obstacle to employment: 25% of the left shoulder.
- d. Dr. Meyers found the combination of his disabilities created a substantially greater disability than the simple sum of each separate injury or illness.

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. E.D. 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.

The Second Injury Fund asserts as a defense that after the 2005 amendments to Chapter 287 RSMo., Fund liability is not triggered when the primary injury is an occupational disease claim. The argument is essentially that the language of §287.220.1 requires “a subsequent compensable *injury*” to trigger fund liability, and the definition of injury in §287.020.3(5) states that except as specifically provided for in the Chapter it is not to include occupational disease.

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The Fund argues applying strict construction; an occupational disease does not create Fund liability.

However, the definition of “injury” or “personal injury” in Section 287.020.3(5) only excludes occupational diseases **“except as specifically provided in this chapter.”** (emphasis added). Thus the definition of injury can include occupational disease under some circumstances. 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, §287.067.3 provides “An **injury** due to repetitive motion is recognized as an occupational disease for purposes of this chapter.” (emphasis added). Sections 287.067.2 and 3 both specifically provide for injury by occupational disease. Further, §287.067.3 specifically provides that occupational disease by repetitive motion, which is the primary injury in this case, is an “injury”. The claim against the Second Injury Fund is compensable.

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 find the following:

1. On or about December 1, 2008 Claimant sustained a compensable last injury which resulted in permanent partial disability equivalent to 17% of the right wrist and 17% of the left wrist. The testimony of Claimant; and the testimony and report of Dr. Meyers regarding medical causation are found to be credible with respect to the symptoms and injuries to the right and left wrists.
2. As of the time the last injury was sustained, Claimant had the following pre-existing permanent partial disabilities, which meet the statutory threshold and were of such seriousness as to constitute a hindrance or obstacle to employment or reemployment:
 - a. 25% of the left shoulder (58 weeks).

Total weeks for pre-existing disabilities: 58

3. The credible evidence establishes, and the parties stipulate, that the last injury, combined with the pre-existing permanent partial disabilities, causes 15% greater overall disability than the independent sum of the disabilities. The Second Injury Fund liability is calculated as follows: 59.5 weeks for last injury + 58 weeks for pre-existing injuries = 117.5 weeks x 15% = 17.625 weeks of overall greater disability. 17.625 weeks x \$389.04 = \$6,856.83.

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CONCLUSION

The Second Injury Fund is liable to Claimant for \$6,856.83 in permanent partial disability benefits. Attorney Michael Goldberg shall be entitled to an attorney fee of 20% of this award for necessary legal services provided.

Made by: /s/ GRANT C. GORMAN
Grant C. Gorman
*Chief Administrative Law Judge
Division of Workers' Compensation*