

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

Injury No.: 98-179083

Employee: Norman L. Berra

Employer: Berra Construction, LLC

Insurer: Missouri Employers Mutual Insurance Company

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated April 26, 2011. The award and decision of Administrative Law Judge Edwin J. Kohner, issued April 26, 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 7th day of December 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Norman L. Berra Injury No.: 98-179083
Dependents: N/A Before the
Employer: Berra Construction, LLC **Division of Workers'**
Compensation
Additional Party: N/A Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Insurer: Missouri Employers Mutual Insurance Company
Hearing Date: April 6, 2011 Checked by: EJK/lsn

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: January 1, 1998
5. State location where accident occurred or occupational disease was contracted: Franklin 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:
The employee suffered pain and numbness in both arms from regularly using hand and power tools, including hammers, power saws, drills, and screw guns.
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: Both wrists, left elbow
14. Nature and extent of any permanent disability: 27 ½% permanent partial disability of the right wrist, a 7 ½% permanent partial disability to the left wrist, and a 2% permanent partial disability to the left elbow, plus 15% for multiplicity
15. Compensation paid to-date for temporary disability: \$6,378.24
16. Value necessary medical aid paid to date by employer/insurer: \$20,199.99

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$1,000.00
- 19. Weekly compensation rate: \$531.52/\$278.42
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

75.2675 weeks of permanent partial disability from Employer	\$20,955.98
1 week of disfigurement from Employer	\$ 278.42

- 22. Second Injury Fund liability: No

TOTAL: \$21,234.40

- 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: Joseph K. Robbins, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Norman L. Berra	Injury No.: 98-179083
Dependents:	N/A	Before the
Employer:	Berra Construction, LLC	Division of Workers'
Additional Party:	N/A	Compensation
Insurer:	Missouri Employers Mutual Insurance Company	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri Checked by: EJK/lsn

This workers' compensation case raises several issues arising out of a work related injury in which the claimant suffered pain and numbness in both arms from regularly using hand and power tools, including hammers, power saws, drills and screw guns. The sole issue for determination is permanent disability. The evidence compels an award for the claimant for permanent disability benefits.

At the hearing, the claimant testified in person and offered a medical report of Jerry R. Meyers, M.D., and voluminous medical records. The defense offered medical reports from David M. Brown, M.D., and Michelle D. Koo, M.D., and voluminous medical records from Barnes Hospital.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the occupational disease was contracted in Missouri. Any markings on the exhibits were present when offered into evidence.

SUMMARY OF FACTS

This fifty-one year old claimant's work involved general carpentry and construction regularly using hand and power tools, including hammers, power saws, drills and screw guns. He developed numbness in his right hand and fingers and his left hand would also go numb with extended use. His right hand symptoms were more severe than his left.

On June 15, 1998, the claimant consulted Dr. Michelle Koo for discomfort, pain, numbness, and tingling in his right and left hand as well as left elbow pain. Dr. Koo diagnosed bilateral carpal tunnel syndrome, which she noted to be aggravated by his work activities. She also diagnosed some left lateral epicondylitis, which is also related to his work activities. She noted he had no pain in his right lateral medial epicondyle on examination of his elbow. She recommended nerve conduction studies and administered bilateral carpal tunnel injections. On July 20, 1998, bilateral nerve conduction studies revealed median neuropathy affecting motor and sensory conduction at the right carpal tunnel. Left median and right and left ulnar nerve conduction studies were normal. On September 15, 1998, Dr. Koo performed a right endoscopic carpal tunnel syndrome release. She last examined the claimant on January 15, 1999, and opined

that he had very good relief of his preoperative symptoms, except for on the radial aspect of his ring finger, which still tingled somewhat. All other fingers were noted to have good relief of all of the symptoms. She noted minor tenderness on very deep palpation in the mid-palm area, with excellent grip strength and range of motion. She concluded he was at maximum medical improvement for his right hand and that he would not need any further intervention. Regarding his left hand symptoms, it was noted he was not numb and tingling all of the time and that he would wait until his symptoms progressed, or at least a year from his right hand surgery. Dr. Koo released the claimant from her care.

On December 1, 1999, Dr. Sudekum examined claimant for right hand and wrist symptoms and recorded a history of the 1998 right endoscopic carpal tunnel release and noted since his surgery he had pain in the area of the incision on the volar aspect of the wrist that radiated approximately into his forearm, elbow, and upper arm. Dr. Sudekum also noted that one month before this exam, the claimant began experiencing symptoms of numbness and tingling in ring and little fingers as well as decreased grip strength and nocturnal pain. Dr. Sudekum opined that the claimant had clinical symptoms of right ulnar neuropathy with the probable sign of injury or compression at the wrist and possibly the elbow. He opined that the ulnar neuropathy was a work-related condition due to the nature and duration of his employment as a carpenter. A December 15, 1999, bilateral nerve conduction study was consistent with bilateral carpal tunnel syndrome and a lesion, nerve compression, at the right Guyon's canal. Dr. Sudekum performed a steroid injection to both carpal tunnel regions. Dr. Sudekum also recommended right ulnar nerve decompression at the elbow and wrist as well as revision open carpal tunnel release. On February 16, 2000, Dr. Sudekum noted claimant's left hand pain and numbness had resolved completely and his right-sided symptoms improved significantly. He opined that surgery was not indicated at that time, but may be required in the future if symptoms reoccur.

On May 10, 2000, Dr. Sudekum noted recurrence of pain in claimant's right palm and intermittent numbness and tingling in the thumb and all four fingers. He also noted complaints of tenderness in the right lateral epicondylar region. Dr. Sudekum performed a surgical incision into his right lateral epicondylar region. Dr. Sudekum last saw claimant on December 5, 2000, for increasing pain and paresthesias in his hands, wrists, and forearms. He noted claimant had constant numbness in his right ring and little fingers, significant grip strength weakness and an inability to hold on to objects like a hammer. Intrinsic muscle atrophy of the right hand was noted, consistent with severe ulnar neuropathy. Surgery was scheduled to include a right open carpal tunnel revision, right open carpal tunnel release, as well as right ulnar nerve release at the wrist and elbow.

On December 20, 2000, Dr. Ollinger examined the claimant and diagnosed (1) postoperative endoscopic decompression right carpal tunnel 09/15/98; (2) atrophy in the right ulnar innervated hand musculature; (3) right tennis elbow, which he said was onset one year ago. On December 20, 2000, Dr. Phillips performed an NCV/EMG to compare with prior data revealing a severe right ulnar neuropathy, with the findings most consistent with localization at the level of the wrist. Dr. Phillips suspected that the median neuropathy represents residual from previously more severe involvement. The test also revealed moderate left carpal tunnel syndrome.

On January 3, 2001, Dr. Ollinger opined that the claimant's severe right ulnar tunnel compression neuropathy was related to his employment but not associated with the January 1, 1998, date of loss. He concluded the right ulnar nerve compression at the wrist developed sometime after Dr. Koo discharged the claimant on January 15, 1999, and, as such, not related to that date of loss. He noted the left carpal tunnel syndrome was an active condition needing operative decompression and that this condition did relate to the January 1, 1998, date of loss. He also commented that claimant's right tennis elbow was not referenced until Dr. Sudekum's record of May 2000 and, although work-related, was not related to the January 1, 1998, date of loss.

Dr. Ollinger performed a right ulnar nerve decompression on January 16, 2001. He continued to treat the claimant through February 21, 2002, with five postoperative visits. He released the claimant to return to work with no restrictions on March 12, 2001. Dr. Ollinger noted on this visit that the claimant's muscle mass of the ulnar nerve innervated intrinsic muscles was improving. He continued to have sensitivity and slight pain in his palm, especially with gripping and tenderness in the ulnar palm if it is bumped. He noted cramping in his thumb after gripping all day long and some residual tingling and numbness, which was a bit more noticeable in the past six months. His entire little finger and ring finger distal to the PIP showed clear improvement from his pre-operative condition. Regarding the left hand, claimant described no tingling or numbness and had no night symptoms. His symptoms at that point involved general wrist pain with heavy use, which included a lot of twisting. Dr. Ollinger noted both of claimant's hands were very heavily callused and dirty, consistent with heavy use.

On February 27, 2002, Dr. Phillips performed another EMG/NCS study revealing significant improvement in the right ulnar nerve study and significantly increased strength and muscle bulk. "This study is not impressive for activity and the degree of improvement that occurred is impressive. There has been further improvement in the right medial nerve values across the carpal tunnel. There is evidence for only mild left median neuropathy across the carpal tunnel." Dr. Ollinger concluded the claimant was at maximum medical improvement, although there may be some additional improvement over a prolonged period of time. Regarding the left upper extremity, he opined that the claimant had no specific symptoms of carpal tunnel and that his physical examination was not impressive for this condition. The NCS studies revealed only mild median neuropathy across the carpal tunnel and he concluded claimant had very mild left carpal tunnel syndrome. He opined that the claimant was at maximum medical improvement for this condition as well.

On August 30, 2002, Dr. Brown examined the claimant for an independent medical evaluation of his right arm. The claimant continued to have numbness in the right hand, little finger, ring finger, and middle finger. He also complained of pain over the volar aspect of his right wrist and a lump in the right palm. Dr. Brown noted some of the claimant's symptoms may be residual from a severe ulnar neuropathy of the right wrist, however he had positive Tinel's over the cubital tunnel on this exam. Repeat nerve conduction studies on October 2, 2002, revealed improvement of the right medial distribution consistent with decompression with mild residual symptoms. The test was not impressive for right ulnar neuropathy across the elbow and revealed substantial improvement in the right ulnar nerve responses. He opined that the claimant's palm pain relates to scar tissue but offered no further treatment recommendations for the right wrist.

On March 24, 2003, Dr. Brown evaluated the claimant's left arm. The claimant reported that over the past six months he started waking up at night with a numb left hand. An April 1, 2003, NCS/EMG study was consistent with mild-moderate left sensory motor carpal tunnel and borderline mild left ulnar neuropathy across the cubital tunnel. The claimant returned to Dr. Brown on April 11, 2003, and was told to wear a Heelbo pad over his left elbow and wear a wrist splint over his left wrist at night and sleep with his elbow in an extended position. On June 13, 2003, the claimant reported that overall, his left hand was doing better. He still had some intermittent numbness in his left hand. Dr. Brown noted that claimant's symptoms were much improved since he had been off work for an unrelated low back condition. Since he was minimally symptomatic at that point, he recommended observation and to see him on an as-needed basis. Dr. Brown continued him on full duty with no restrictions.

The claimant continues to experience right hand numbness and tingling in three fingers. His right index finger is cold all the time, especially in cold weather. He continues to experience pain in his right wrist when working with hammers and saws. He has right elbow symptoms, associated with flare-up of his carpal tunnel, which can last a couple of days. He also testified that he experiences left hand numbness if he holds on to an object for too long. He also experiences symptoms in his left elbow when he does any activities with his left hand. With regard to grip strength, he testified that his right hand is very weak but his left hand is not as bad. He has difficulty using a fork with his right hand. He testified that his hands cramp up if he uses a keyboard for too long, especially the right side. He is on no prescription medication but takes Ibuprofen for back pain.

He continued to operate Berra Construction on a full-time basis through 2006, but then went to work for McMillan Contracting as a project manager, which does not require as much physical hand intensive work. Part of the reason he left was because he could no longer perform some of his job duties, including framing due to the condition of his hands and low back.

Dr. Koo

On January 25, 1999, Dr. Koo examined the claimant for his status-post right endoscopic carpal tunnel release and opined that he had excellent relief of his preoperative symptoms, except for on the radial aspect of his ring finger, which still tingled somewhat. His sensation was completely intact as to all of his fingers and thumb and static two-point discrimination was 5 mm throughout, including the radial aspect of his ring finger. Mild tenderness on deep palpation in his right mid-palm was noted. He had excellent grip strength and range of motion. Dr. Koo opined that the claimant had a 6% permanent partial disability of the right wrist. He was returned to work with no restrictions.

Dr. Meyers

Dr. Meyers examined claimant on December 9, 2010, and noted some atrophy of the first dorsal inner osseous muscle group of the right hand and decreased grip strength as compared to the left hand. He noted pain along the ulnar aspect of the hand with gripping tightly and decreased sensation to pinprick in the right fourth and fifth fingers and the tip of the right index finger. He noted pain in the palm of the dorsum of the right wrist when pushing against

resistance. The claimant had full range of motion of his fingers and right wrist. The left wrist examination revealed full range of motion and no evidence of atrophy, normal sensation and normal range of motion without pain in the wrist or fingers. A Tinel's sign was "weakly positive."

Dr. Meyers diagnosed (1) right carpal tunnel syndrome requiring right carpal tunnel decompression; (2) left carpal tunnel syndrome; (3) right ulnar nerve compression syndrome at the wrist requiring ulnar nerve tunnel decompression. He related these conditions to January 1, 1998, and concluded the claimant had achieved maximum medical improvement. He opined that the claimant suffered a 22% permanent partial disability of the left hand and a 45% permanent partial disability of the right hand. He also opined that the disabilities are synergistic in effect and concluded there is a 15% "load factor." He provided work restrictions of avoidance of repetitive pulling, pushing or lifting objects over 15 pounds using his right hand, no lifting of over 25 pounds on a single occasion using his right hand, avoiding repetitive use of vibratory power tools, and taking rest breaks at his discretion.

Dr. Brown

On February 8, 2011, the claimant had numbness in the right middle, ring and little fingers and numbness and tingling in his left hand. His symptoms were worse on the right than left. He also complained of some elbow pain and some pain over the ulnar aspect of his right wrist. On examination, Dr. Brown noted two-point discrimination was 4 to 5 mm in the digits of both hands and there was no obvious intrinsic muscle atrophy in either hand. He noted negative Tinel's and direct compression tests over the median nerve and ulnar nerve of the right wrist and a negative Phalen's test on the right as well. Tinel's testing induced some discomfort over the ulnar nerve of the right cubital tunnel. He noted a positive Tinel's sign over the left carpal tunnel with a mildly positive Tinel's sign over the left cubital tunnel. Phalen's test was negative. Dr. Brown concluded claimant's right-sided symptoms were most likely residual from his severe ulnar neuropathy at the wrist. He noted the claimant's history of left carpal tunnel syndrome and cubital tunnel syndrome and recommended repeat nerve conduction studies if claimant desired further treatment.

Dr. Brown opined that the claimant sustained a 10% permanent partial disability of the right wrist as a result of his ulnar neuropathy of his right wrist and right carpal tunnel syndrome. Regarding the left upper extremity, he opined that the claimant sustained a 4% permanent partial disability of the left wrist as a result of the left carpal tunnel syndrome and a 2% partial permanent disability of the left elbow as a result of his left cubital tunnel syndrome. He opined that the claimant could work without restrictions. Dr. Brown did not comment on causation with regard to these medical conditions.

PERMANENT DISABILITY

Workers' compensation awards for permanent partial disability are authorized pursuant to section 287.190. "The reason for [an] award of permanent partial disability benefits is to compensate an injured party for lost earnings." *Rana v. Landstar TLC*, 46 S.W.3d 614, 626 (Mo. App. W.D. 2001). The amount of compensation to be awarded for a PPD is determined pursuant to the "SCHEDULE OF LOSSES" found in section 287.190.1. "Permanent partial disability" is

defined in section 287.190.6 as being permanent in nature and partial in degree. Further, "[a]n actual loss of earnings is not an essential element of a claim for permanent partial disability." Id. A permanent partial disability can be awarded notwithstanding the fact the claimant returns to work, if the claimant's injury impairs his efficiency in the ordinary pursuits of life. Id. "[T]he Labor and Industrial Relations Commission has discretion as to the amount of the award and how it is to be calculated." Id. "It is the duty of the Commission to weigh that evidence as well as all the other testimony and reach its own conclusion as to the percentage of the disability suffered." Id. In a workers' compensation case in which an employee is seeking benefits for PPD, the employee has the burden of not only proving a work-related injury, but that the injury resulted in the disability claimed. Id. A multiplicity factor is "a special or additional allowance for cumulative disabilities resulting from a multiplicity of injuries." Sharp v. New Mac Electric Cooperative, 92 S.W.3d 351, 354 (Mo. App. S.D. 2003). The commission has the discretion to include a multiplicity factor in assessing cumulative disabilities but is not required to do so. Id.

Permanent partial disability or permanent total disability shall be demonstrated and certified by a physician. Medical opinions addressing compensability and disability shall be stated within a reasonable degree of medical certainty. Section 287.190.6 (2), RSMo Supp. 2010.

The three physicians all identified permanent partial disability to the claimant's wrists. In addition, Dr. Brown identified a 2% permanent partial disability to the claimant's left elbow. Based on the weight of this evidence, the claimant suffered a 27 ½% permanent partial disability to his right wrist, a 7 ½% permanent partial disability to his left wrist, and a 2% permanent partial disability to the left elbow as a result of the left cubital tunnel syndrome. The overall disability from the claimant's upper extremity injuries exceeds the simple sum of the individual disabilities (65.45) by 15%. The claimant is awarded 75.2675 weeks of permanent partial disability benefits. In addition, the claimant is awarded an additional week of permanent partial disability for disfigurement.

The defense argued in its brief that the claimant is entitled to no compensation at all, because the claimant, in its third amended claim for compensation, failed to state the specific body parts that were injured by the alleged occupational disease. In the first and second amended claims for compensation, the claimant alleged injury to his wrists and elbows. In the second and third amended claims for compensation, the claimant stated that the purpose of the amended claim was to "amend claim to add Missouri Employers Mutual Insurance ... as an additional insured." The defense argued:

However, the claim fails to allege any specific injury or part of body injured. The claim was not amended prior to the close of evidence to allege any specific body part or to conform with the medical evidence. As such, claimant has failed to perfect his Claim for Compensation as there is no claim pending before the Division of Workers' Compensation asserting which of the above listed medical conditions or body parts injured are associated with the occupational exposure of 1/1/98. As such, additional benefits for permanent partial disability must be denied. See Defense brief.

Certainly, the defense is entitled to notice of what the claimant alleges to be his compensable injury. Generally, administrative pleadings do not involve strict fact pleading.

No case law has been found related to disputes as to insufficient pleading in a claim form as to the portion of the body which is claimed to be injured. The administrative law judge is generally granted broad discretion in this regard, and if it is shown that the objecting party was not surprised, a motion to amend the pleadings to conform to the evidence may be entertained, or an amended claim may be filed. ... The claim for compensation does not have to contain the formal aspects of a petition and the usual procedural requirements of the civil rules are unnecessary. ... The claim needs only be sufficient to notify the parties and the Division of the nature of the claim. See 29 Missouri Practice, Workers' Compensation Law and Practice, Section 7.20 1997.

The only issue raised at the commencement of the hearing was permanent disability. The defense failed to file a motion or otherwise place the sufficiency of the third amended claim into issue at the commencement of the hearing. Certainly, the employer had knowledge of the claimant's allegation that he suffered injury to both of his upper extremities from his work, based on the claimant's prior pleadings, which the employer's then legal counsel filed answers denying the allegation. In addition, the claimant's forensic medical evidence was received in evidence without any objection. Finally, the defense offered a full, vigorous, and exceptionally well prepared and executed defense based on extensive forensic medical evidence from the three separate experts. Based on the evidence, the defense had notice of the claimant's allegation, mounted a full and vigorous defense to the allegations, and waived any defense claiming that the claimant's third amended claim for compensation was legally insufficient.

Made by: /s/ EDWIN J. KOHNER
EDWIN J. KOHNER
Administrative Law Judge
Division of Workers' Compensation

This award is dated and attested to this 26th day of April, 2011.

/s/ Naomi L. Pearson
Naomi L. Pearson
Division of Workers' Compensation