

**FINAL AWARD ALLOWING COMPENSATION**  
(Affirming the Award and Decision of Administrative Law Judge  
With Supplemental Opinion)

Injury No.: 06-099227

Employee: Ricky Cantrell  
Employer: L. Krupp Construction, Inc.  
Insurer: Auto Owners Insurance Co.  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.<sup>1</sup> We have reviewed the evidence, read the briefs and heard the arguments of the parties. We find 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, we affirm the award and decision of the administrative law judge dated February 22, 2012, as supplemented herein. The award and decision of Administrative Law Judge Vicky Ruth is attached and incorporated to the extent it is not inconsistent with our findings, conclusions, award and decision herein.

We supplement the administrative law judge's award and decision solely to address an argument raised in employer/insurer's brief.

Employer/insurer argues, without citation to legal authority, that we should start our analysis of employer's liability in this claim in § 287.220.1, the statutory subsection laying out Second Injury Fund liability. Employer/insurer's argument fails. A proper analysis of every claim begins by considering employer/insurer's liability for the injury that is the subject of the claim – commonly referred to as the “primary injury.” Where the fact finder has found that the primary injury, standing alone, has rendered a claimant permanently and totally disabled – as we do in this case – there is no occasion to consider § 287.220.1. Section 287.220.1 is only implicated if the primary injury results in permanent partial disability.

We affirm the award and decision of the administrative law judge, as supplemented herein.

B. Michael Korte, Attorney at Law, is allowed a fee of 25% of the benefits awarded for necessary legal services rendered to employee, which shall constitute a lien on said compensation.

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

Given at Jefferson City, State of Missouri, this 31<sup>st</sup> day of October 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T  
Chairman

\_\_\_\_\_  
James Avery, Member

\_\_\_\_\_  
Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

<sup>1</sup> Statutory references are to the Revised Statutes of Missouri 2006, unless otherwise indicated.

## AWARD

Employee: Ricky J. Cantrell

Injury No. 06-099227

Dependents: N/A

Employer: L. Krupp Construction, Inc.

Additional Party: Second Injury Fund

Insurer: Auto Owners Insurance Co.

Hearing Date: November 21, 2011

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

### 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: October 18, 2006.
5. State location where accident occurred or occupational disease was contracted: Douglas 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:  
Employee was hit by falling lumber.
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: Body as a whole/back and left lower extremity at the level of the ankle.
14. Nature and extent of any permanent disability: Permanent and total disability.
15. Compensation paid to-date for temporary disability: \$43,132.20.
16. Value necessary medical aid paid to date by employer/insurer? \$144,983.14.
17. Value necessary medical aid not furnished by employer/insurer? None.

18. Employee's average weekly wages: \$1,201.53.
19. Weekly compensation rate: \$376.55 PPD / \$718.87 PTD.
20. Method of wages computation: By agreement.

**COMPENSATION PAYABLE**

21. Amount of compensation payable from employer:

Permanent and total disability benefits of \$718.87/week from December 13, 2007 through October 20, 2008, and from February 24, 2009 forward for claimant's lifetime as provided by law.

22. Second Injury Fund liability: None.
23. Future medical awarded: Yes.

Said payments to begin immediately and to be payable and 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: B. Michael Korte.

Employee: Ricky J. Cantrell

Injury No. 06-099227

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

Employee: Ricky J. Cantrell

Injury No. 06-099227

Dependents: N/A

Employer: L. Krupp Construction, Inc.

Additional Party: Second Injury Fund

Insurer: Auto Owners Insurance Co.

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

On November 21, 2011, Ricky J. Cantrell, L. Krupp Construction, Inc., Auto Owners Insurance Co., and the Second Injury Fund appeared for a final award hearing. This case was tried at the same time as Injury No. 07-040226.<sup>1</sup> Ricky Cantrell (the claimant) was represented by attorney B. Michael Korte. L. Krupp Construction, Inc. (the employer) and Auto Owners Insurance (the insurer) were represented by attorney Brandy L. Johnson. The Second Injury Fund was represented by attorney Cara Harris. Claimant testified in person at the trial. Dr. David Volarich, Dr. Ted Lennard, Dr. David Dale, Mr. James England, and Mr. Gary Weimholt testified by deposition. Claimant, the employer/insurer, and the Second Injury Fund submitted briefs on December 19, 2011, and the record closed at that time.

### **STIPULATIONS**

The parties stipulated to the following:

1. On October 18, 2006, claimant sustained injuries by accident when lumber fell on him. The parties agree that the claimant's thoracic spine and left ankle were injured in that accident; causation of any other injury is disputed. The parties agree that the injuries to claimant's thoracic spine and left ankle arose out of and in the course of his employment with L. Krupp Construction, Inc. (the employer). The injuries associated with that accident were assigned Injury No. 06-099227.
2. Claimant alleges that on May 1, 2007, he sustained injuries to both upper extremities at the level of the wrist. The employer/insurer agrees that claimant sustained repetitive motion injuries to both upper extremities at the level of the wrists, but the date of those injuries is disputed. The parties, however, agree that the injuries to claimant's wrists arose out of and in the course of his employment with the employer. These bilateral wrist injuries were assigned Injury No. 07-040226.
3. The employer was operating subject to the provisions of Missouri Workers' Compensation Law.

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<sup>1</sup> Although a separate award will be issued in that case, the timelines, the treatment, and the issues are largely intertwined and both cases will be discussed in this Award.

Employee: Ricky J. Cantrell

Injury No. 06-099227

4. The employer's liability for workers' compensation was insured by Auto Owners Insurance Company (the insurer).
5. The Missouri Division of Workers' Compensation has jurisdiction, and venue in Phelps County is proper and was agreed upon by the parties.
6. The employer had proper notice of the claimant's injuries.
7. Claimant filed Claims for Compensation within the time prescribed by law.
8. Claimant's average weekly wage was \$1,201.53, yielding a weekly compensation rate of \$376.55 for permanent partial disability benefits and \$718.87 permanent total disability benefits.
9. In Injury No. 06-099227, the employer paid temporary total disability benefits in the amount of \$43,132.20, for the period of October 19, 2006 through December 12, 2007 (a total of 60 weeks).
10. In Injury No. 06-099227, the employer/insurer paid medical benefits in the amount of \$144,983.14.
11. In Injury No. 07-040226, the employer paid temporary total disability benefits in the amount of \$12,939.66, for the period of October 21, 2008 through February 23, 2009 (a total of 18 weeks).
12. In Injury No. 07-040226, the employer/insurer paid medical benefits in the amount of \$16,479.32.

### **ISSUES**

The parties agreed that the issues to be resolved in this proceeding Injury No. 06-099227, are as follows:

1. Medical causation of any injuries to claimant other than his left ankle and back.
2. Nature and extent of permanent partial disability or permanent total disability.
3. Second Injury Fund liability.
4. Liability of the employer/insurer for payment of past medical expenses.
5. Liability for future medical treatment.

The issues to be resolved in Injury No. 07-040226 are as follows:

1. The date of claimant's injury by occupational disease.
2. Nature and extent of permanent partial disability or permanent total disability.
3. Second Injury Fund liability.
4. Liability of the employer/insurer for payment for future medical treatment.
5. Whether the employer is entitled to a credit of the temporary total disability benefits paid to claimant in the amount of \$12,939.66, for the 18 week period beginning October 21, 2008 and ending February 23, 2009.

### **EXHIBITS**

On behalf of the claimant, the following exhibits were entered into evidence:

Employee: Ricky J. Cantrell

Injury No. 06-099227

Exhibit A	Medical Records of Dale Family Medicine.
Exhibit B	Report of Dr. David Dale.
Exhibit C	<i>Curriculum vitae</i> of Dr. David Volarich.
Exhibit D	Report (4/24/08) of Dr. Volarich.
Exhibit E	Report (1/26/10) of Dr. Volarich.
Exhibit F	Report (9/13/00) of Dr. Volarich.
Exhibit G	Anatomical diagram – joints and ligaments of the right foot.
Exhibit H	Anatomical diagram – bones of the right foot.
Exhibit I	<i>Curriculum vitae</i> of Gary Weimholt.
Exhibit J	Deport (12/15/06) of Gary Weimholt.
Exhibit K	Deposition of Dr. David Dale.
Exhibit L	Deposition of Dr. Volarich.
Exhibit M	Deposition of Gary Weimholt.

On behalf of the employer/insurer, the following exhibits were admitted into the record:

Exhibit 1	Report of Air Evac EMS, Inc.
Exhibit 2	Deposition of Dr. Donald Pruitt and exhibits.
Exhibit 3	Reports (1/08/08, 1/26/08, and 7/12/11) of Dr. Ted Lennard.
Exhibit 4	Deposition (with exhibits) of Dr. Lennard.
Exhibit 5	Reports (12/12/08 and 4/25/11) of James England.
Exhibit 6	Depositions (1/05/09 and 5/20/11) and exhibits of James England.

The following exhibit was admitted on behalf of the Second Injury Fund (SIF):

Exhibit I	Deposition of claimant.
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On behalf of the parties, the following joint exhibits were entered into evidence:

Exhibit AA	Records of Air Evac EMS.
Exhibit BB	Records of Baxter Regional.
Exhibit CC	Records of St. Anthony's Medical Center.
Exhibit DD	Records of Signature Health.
Exhibit EE	Records of Springfield Neurological and Spine Institute, LLC.
Exhibit FF	Records of Advanced Care Physical Therapy, LLC.
Exhibit GG	Records of Orthopedic Specialists of Springfield.
Exhibit HH	Records of Springfield Surgical Specialists, ASC.
Exhibit II	Records of WEEA.
Exhibit JJ	Records of St. Louis Orthopedic, Inc.
Exhibit KK	Records of St. John's Health Center.
Exhibit LL	Records of Phelps County Regional Medical Center.
Exhibit MM	Records of Dr. David's Family Clinic.
Exhibit NN	Records of Dr. Theodore Koreckij.
Exhibit OO	Records of Jefferson Memorial Hospital.
Exhibit PP	Records of Tesson Heights.
Exhibit QQ	Records of Parkcrest Surgical Associates, Inc.
Exhibit RR	Records of Dr. David Peeples.

Employee: Ricky J. Cantrell

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Exhibit SS	Records of Michael Ball.
Exhibit TT	Records of PRORehab, P.C.
Exhibit UU	Records of Missouri Div. of Workers' Compensation.
Exhibit VV	Records of Mercy Trauma & Surgery.

*Note: All marks, handwritten notations, highlighting, or tabs on the exhibits were present at the time the documents were admitted into evidence. Some of the depositions were admitted with objections contained in the record. Unless otherwise specifically noted below, the objections are overruled.*

### **FINDINGS OF FACT**

Based on the above exhibits and the testimony presented at the hearing, I make the following findings:

1. At the time of the hearing, claimant was 55 years old. He obtained a G.E.D. while in the military. He was in active duty in the Marine Corps for about four years, ending in 1976; he then spent four years on non-active duty. Nearly his entire work history consists of performing heavy labor in the construction industry.
2. Claimant worked for L. Krupp Construction, doing heavy labor/construction work. His job duties included operating a jackhammer for extended periods on a daily basis, shoveling 20-pound loads of concrete hundreds of times daily, carrying heavy objects, working with his arms extended overhead, digging, setting concrete forms, raking and finishing concrete, and setting up cranes.
3. On October 18, 2006, claimant was working for the employer on a highway bridge in Douglas County, Missouri, when lumber fell on him while the lumber was being lifted in the air by a crane. This October 18, 2006 accident and the resulting injuries will often be referred to as the "lumber accident" or the "lumber injuries" in order to distinguish them from the occupational disease/injuries in the case designated as Injury No. 07-040226.
4. The falling lumber knocked claimant to the ground and rendered him unconscious. He felt immediate pain in his back and left ankle; he also had a severe headache. Claimant was transported by helicopter to Baxter Regional Medical Center in Mountain Home, Arkansas.<sup>2</sup> Claimant was diagnosed with an unstable Chance vertebral fracture and fractured ribs. He also complained of pain in his left ankle. An x-ray revealed a lateral malleolar fracture and a probably ligamentous injury; he was provided with a CAM walker boot.
5. On October 19, 2006, Dr. Travis Richardson performed surgery on claimant; that surgery consisted of open fracture treatment and fusion of the spine from T10 through L2.<sup>3</sup> Claimant was provided with a back brace. Claimant spent two weeks in the hospital. He was released to St. Anthony's Rehab, where he spent about ten days for pain management

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<sup>2</sup> Exhibit AA.

<sup>3</sup> Exhibit BB.

and therapy. While at St. Anthony's Rehab, x-rays of claimant's ankle revealed a lateral malleolar fracture and a probable ligamentous injury.<sup>4</sup> X-rays taken later also revealed a possible superior end plate fracture at the L2 level.<sup>5</sup>

6. When he released from St. Anthony's Rehab, claimant's wife took him home and then immediately left; they subsequently divorced.
7. Claimant received follow-up care with Dr. Dale, his primary care physician, and with Dr. Lennard, the authorized treating physician. Claimant also treated with Dr. Rahm regarding his back, and with Dr. Hicks for his left ankle.
8. On January 11, 2007, while treating with Dr. Lennard for his back and ankle, claimant complained of numbness in both upper extremities and of neck pain. Dr. Lennard's impression as status post T10-L2 fusion, rib fractures, and left distal fibular fracture, and well as neck pain and upper extremity numbness. Dr. Lennard restricted claimant from work. He also ordered physical therapy of the left ankle.
9. On January 24, 2007, Dr. Lennard prescribed a TENS unit and ordered an EMG study of the upper extremities due to claimant's ongoing symptomology. The study revealed bilateral median neuropathies of the wrists.<sup>6</sup> On February 6, 2007, claimant was diagnosed with bilateral carpal tunnel syndrome.
10. Dr. Lennard later ordered an MRI of the left leg; that test revealed a torn anterior T-F ligament with an osteochondral lesion. Dr. Lennard referred claimant to Dr. David Hicks.
11. Dr. Hicks diagnosed left ankle stability, left medial talar dome OCD lesion, and left peroneous longus and brevis tendon tears. On July 2, 2007, Dr. Hicks performed surgery on claimant's left ankle. He fitted claimant with a boot and a walker. He released claimant on December 13, 2007, with a permanent restriction of avoiding standing or walking for prolonged periods.<sup>7</sup>
12. On January 8, 2008, Dr. Lennard determined that claimant required no further medical treatment.<sup>8</sup> Dr. Lennard imposed permanent restrictions of lifting no more than 15 pounds only occasionally, and only occasional bending; he also made note of Dr. Hicks's restrictions. Dr. Lennard rated claimant's disabilities as 25% of the body as a whole and 15% of the left ankle as a direct result of the October 2006 accident.
13. Claimant has not worked anywhere since the lumber accident on October 18, 2006.

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<sup>4</sup> Exhibit BB.

<sup>5</sup> Exhibit DD.

<sup>6</sup> Exhibit EE.

<sup>7</sup> Exhibit HH.

<sup>8</sup> Exhibit EE.

*Occupational disease/carpal tunnel case (Injury No. 07-040226)*

14. In December 2006, while treating for the October 2006 lumber accident, claimant began to have numbness and tingling in his upper extremities. Claimant underwent an EMG on or about May 1, 2007, which confirmed a diagnosis of carpal tunnel syndrome.
15. As a result, claimant filed a Claim for Compensation on May 7, 2008; he amended the claim on August 14, 2008 and August 29, 2008. That case was designated as Injury No. 07-040229.
16. The employer provided treatment for both of claimant's upper extremities. Claimant was evaluated by Dr. Donald Pruitt, an orthopedic surgeon, on September 30, 2008.<sup>9</sup> Claimant reported that he had performed construction work for twenty-seven years, and that in his work he would frequently use jackhammers, pour concrete, and smooth concrete. Claimant indicated that he had begun noticing numbness and tingling in his hands, especially at night, two and one-half months after this accident on October 18, 2006. Dr. Pruitt diagnosed claimant with probably bilateral carpal tunnel syndrome and opined that the prevailing factor in the condition would be claimant's work activities in the construction industry.
17. An EMG/nerve conduction study revealed moderate to severe right carpal tunnel syndrome and moderately severe left carpal tunnel syndrome. Dr. Pruitt performed carpal tunnel releases on October 21, 2008 (left hand) and on January 16, 2009 (right hand). Claimant reported improvement in his finger symptoms and his night-time symptoms.
18. Dr. Pruitt found claimant to be at maximum medical improvement on April 22, 2009, and released him from care. He rated claimant as having a PPD of 10% of each wrist. The doctor did not recommend any further treatment. Dr. Pruitt did not assign any work restrictions to claimant because he was not working. Dr. Pruitt indicated that if claimant had been working, he would have released him to work without restrictions for one month to determine if restrictions were needed. Just considering the carpal tunnel syndrome, Dr. Pruitt thought that claimant probably would have been able to go back to work.<sup>10</sup>

*Pre-existing injuries*

19. In April 1993, claimant injured his low back in a slip and fall accident while working for Pace Construction (Injury No. 93-042862). Claimant performed heavy labor for Pace Construction. He received only conservative treatment and was able to return to work at full duty shortly after that back injury. Claimant settled with Pace Construction for 5% permanent partial disability to the body as a whole. Claimant returned to working full-time at the heavy manual labor level without restrictions.

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<sup>9</sup> Exhibit JJ.

<sup>10</sup> Exhibit 2.

20. In October 1999, claimant was involved in an accident while working for Lionmark, Inc., d/b/a Pace Grading Inc. (Injury No. 99-132466). That accident occurred when he was in a "man lift" that suspended him in the air while working on the side of the bridge. A vehicle went through the barricade and hit the man lift, causing claimant to drop approximately 14 feet to the ground. He sustained injuries to his low back, his left arm, and he developed headaches. He was off work for approximately four months because of this fall, although he did not have surgery and was not hospitalized. Claimant testified that he did have problems from this accident for a period of time and restrictions were imposed on his activities; by 2001 he had returned to work and was performing tasks in excess of his restrictions. He indicated by 2006, his complaints had all resolved. Claimant settled this claim based on a 15.5% PPD of the body as a whole. Claimant again returned to working at the heavy manual labor level without restrictions.

21. In September 2005, claimant sustained a work-related hernia that was surgically repaired (Injury No. 05-093792). He settled that workers' compensation claim with the employer, L. Krupp Construction, based on 5% PPD of the body as a whole. Although claimant returned to working full-duty, heavy labor without restrictions, he did experience discomfort on occasion, such as when he lifted too much.

22. Claimant testified that after the 1999 accident but before the October 2006 accident, he was very active; he ran three to five miles per day, played softball, shot targets, and went skiing, boating, hunting, and fishing. During this time period, he was no longer taking any medication and was not having trouble sleeping. In addition, he did not have any limitations on how long he could sit or stand; he was able to squat, kneel, and crawl without difficulty. He had no need to lie down during the day. Although he would sometimes get stiff and sore, he did stretching and other exercises to stay fit.

*Post-October 2006 injuries or conditions*

23. Claimant sustained hearing loss in his right ear while he was in the military.

24. After October 2006, claimant developed problems with his heart and his knee. He did not have any difficulties or limitations from these conditions prior to October 18, 2006. Claimant underwent cardiac bypass surgery in February 2009.

*Current complaints*

25. Claimant testified that he has constant pain in his back from his neck all the way down to his low back; he also has constant pain in his left ankle. He testified that he is never pain free, although his pain does increase with activity. He is not able to sleep well, and he frequently wakes up during the night. He takes at least two naps every day because of his lack of sleep and the pain. The naps are usually one to one and one-half hours long. Claimant uses a TENS unit on his low back two to four times per week.

26. Claimant tries to avoid stairs when at all possible. He can sit for only 30 to 45 minutes without having increased pain. He can stand 10 to 15 minutes. He is unable to squat, knee, or crawl. He can walk approximately one block at his own pace.

27. Claimant does mow his yard using both a riding mower and a self-propelled push mower. He is able to shop for groceries, although he limits the trips to 30 minutes each and he rests during the trip. He can drive about 30 miles before he must stop. He drove 30 miles to the hearing, but had to stop once on the way due to pain.
28. Claimant testified that he is no longer able to hunt, fish, shoot targets, ride in a boat, dive, or water ski – activities that he was able to do before the lumber accident on October 18, 2006. He is no longer able to run three to five miles per day, work out, or play softball; these are all activities he engaged in before the accident.
29. Claimant testified that since the October 2006 accident he has developed depression. He believes that most of the depression is from the work injury and the resulting limitations, although he acknowledged that some of the depression is from his divorce.
30. Claimant currently takes over-the-counter pain medications; sometimes he takes Tylenol IV with Codeine. He quit taking narcotic pain mediation because it made him sick to his stomach.

*Dr. David Dale*

31. Dr. David Dale testified by deposition on March 16, 2011. Dr Dale first saw claimant on December 7, 2006, after the October 2006 lumbar accident. At that time, Dr. Dale noted that claimant had a gait disturbance, and that he had hypertension, intractable pain, Surgical Back Syndrome, and was developing anxiety and depression. Dr. Dale later diagnosed claimant with Surgical Ankle Syndrome.
32. Dr. Dale opined that claimant's anxiety and depression arose as a result of the October 2006 accident. He testified that claimant is "totally and quite remarkably disabled."<sup>11</sup> He indicated that claimant is unable to walk, stand, sit, or perform repetitive activity for any extended period of time. He testified that claimant can no longer work in construction.
33. Dr. Dale opined that the October 2006 accident is the prevailing factor in causing the injuries that he diagnosed. Dr. Dale testified that he is reasonably certain that the 2006 accident is the exclusive cause of claimant's permanent total disability. He explained the basis for his opinion as follows "[y]ou can combine them if you want, but the bottom line is . . . he already had preexisting problems but they weren't disabling."<sup>12</sup>
34. When asked about claimant's preexisting symptoms combining with the symptoms from the work accident, Dr. Dale testified as follows:

It was based on what I'm an expert at. I knew him before, during and after the accident. I knew what he was doing before, during and after the accident. I knew

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<sup>11</sup> Exhibit K.

<sup>12</sup> Exhibit K, p.74

he was working before. He was working at the moment he had the accident, making money and suddenly he couldn't.<sup>13</sup>

*Dr. Ted Lennard*

35. Dr. Ted Lennard, one of claimant's treating physicians, testified that as a result of the October 2006 accident, claimant has a permanent partial disability (PPD) of 25% of the body as a whole for the back and ribs, and a 15% PPD to the left ankle at the 155-week level. Dr. Lennard opined that the 1993 and 1999 injuries resulted in 5% PPD to the body as a whole. Dr. Lennard placed restrictions on claimant; those restrictions included no lifting more than 15 pounds, bending only occasionally, and limited standing and walking.

*Dr. Donald Pruitt*

36. Dr. Donald Pruitt testified by deposition on July 5, 2011. Dr. Pruitt treated claimant for carpal tunnel syndrome. He first saw claimant on September 2008. The history he took that day indicated that claimant had worked in the construction industry for 27 years and that approximately two months after his October 2006 (lumber) injury, claimant began having numbness and tingling into his hands. The numbness and tingling was frequently at night.

37. Dr. Pruitt reviewed a nerve conduction study done by Dr. Lennard in February 2007. Based on the testing, claimant's complaints, and his physical exam, on or about May 1, 2007, Dr. Pruitt diagnosed claimant with carpal tunnel syndrome. Dr. Pruitt opined that claimant's construction activities were the prevailing factor in the cause of his carpal tunnel syndrome.

38. Dr. Pruitt performed carpal tunnel releases on claimant on October 31, 2008 (left wrist) and January 30, 2009 (right wrist). Dr. Pruitt opined that claimant has a PPD of 10% of each wrist for the carpal tunnel syndrome. The doctor did not recommend any additional treatment for the wrists. He did not place any specific restrictions on claimant because claimant was no longer working due to other health concerns. However, he opined that based on claimant's carpal tunnel syndrome alone claimant should have been able to return to work.

*Dr. David Volarich – Independent Medical Examinations*

39. On April 24, 2008, Dr. David Volarich performed an independent medical examination of claimant at the request of claimant's attorney; the doctor then prepared a complete medical report. Dr. Volarich reexamined claimant on January 26, 2010, and issued an addendum report. Dr. Volarich also testified by deposition on April 28, 2011. Prior to his October 2006 accident, Dr. Volarich evaluated claimant in September 2000.

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<sup>13</sup> Exhibit K, p. 67.

40. As a result of the October 2006 accident, Dr. Volarich made the following diagnoses: compression fracture at the T12 level with instability requiring fusion surgery from the T12 to the L2 levels of the claimant's spine; failed back syndrome; internal derangement of the left ankle secondary to a chondral injury to the talus; some lateral fracture; a tear of the anterior talofibular ligament that required lateral compartment reconstruction of the anterior talofibular ligament and excision of a loose body; aggravation of cervical syndrome, including disc protrusions at C3-4 and C6-7; and fractures to the 7<sup>th</sup> and 8<sup>th</sup> ribs on the left. Dr. Volarich rated these injuries at 15% permanent partial disabilities of the cervical spine, 50% of the body as a whole from the T12-L2 injury, and 50% of the left ankle. Dr. Volarich also recommended various permanent restrictions for claimant's physical activities. The restrictions he assigned in 2008 were similar to those he assigned in 2000, with the important additional restriction that claimant change positions, rest, and lie down as needed. He also recommended pain management.
41. Regarding claimant's repetitive motion injuries (carpal tunnel syndrome) from Injury No. 07-0040226, Dr. Volarich indicated that he generally rates disabilities similar to the claimant's repetitive motion injuries between 25% and 35%.
42. As to claimant's pre-existing injuries, Dr. Volarich assessed the following permanent partial disabilities: 5% of the body as a whole due to the hernia; 25% of the body as a whole referable to the cervical spine; 10% of the body as a whole referable to the thoracic spine; 15% of the body as a whole referable to the lumbar spine; and 20% of the left shoulder. Dr. Volarich opined that claimant's heart problems and his hypertension are not work-related.<sup>14</sup>
43. Dr. Volarich opined that claimant is permanently and partial disabled due to a combination of his October 2006 injury and his pre-existing conditions. Dr. Volarich indicated that although claimant's repetitive motion injuries added some disability, he believed that claimant was permanently and totally disabled without consideration of the repetitive motion injury or the heart condition.<sup>15</sup>

*Gary Weimholt – Vocational Evaluation*

44. On July 25, 2008, Gary Weimholt evaluated claimant at the request of claimant's attorney. Mr. Weimholt is a certified vocational rehabilitation consultant. He testified by deposition on October 20, 2011. Mr. Weimholt acknowledged that the restrictions of Dr. Lennard and Dr. Hicks might allow sedentary employment in theory, however, he does not believe that any employer in the claimant's labor market would employ claimant due to his pain, his lack of experience in sedentary work, his use of a cane, and his need to lie down.
45. Mr. Weimholt testified that it is his opinion that claimant is unemployable in the open labor market and that no employer in the normal course and scope of employment would

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<sup>14</sup> Exhibit L.

<sup>15</sup> Exhibit L.

Employee: Ricky J. Cantrell

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hire him.<sup>16</sup> As to whether claimant is unemployable from the last injury alone, or from a combination of the last injury and the pre-existing conditions, Mr. Weimholt indicated that this is a medical opinion and he defers to a medical expert.

*James England – Vocational Expert*

46. On November 25, 2008, James England, a vocational expert, saw claimant on behalf of the employer/insurer. Mr. England testified by deposition in 2009 and 2011. Mr. England opined that if you consider the restrictions of the treating doctors, claimant cannot return to work in the construction industry but could return to work in related activities or in other areas of employment.
47. Mr. England testified that if one assumes the restrictions of Dr. Volarich – which require claimant to recline during the day – then claimant is not employable due to a combination of his October 2006 work injury and his pre-existing disabilities. Mr. England did acknowledge that prior to the October 2006 injury, claimant was working fulltime in a heavy duty job and was not taking narcotic pain medication.
48. On April 25, 2011, Mr. England issued a supplemental report. He did not see claimant again before creating that supplemental report, but he did review additional medical records. In the supplemental report, Mr. England noted that his overall opinions as to claimant’s employability did not change from his initial report. He noted that he still believes that based on the restrictions of the treating doctors, claimant is employable in the open labor market.

**CONCLUSIONS OF LAW**

Based upon the findings of fact and the applicable law, I find the following:

**Issue 1: Medical causation of any injuries other than those to claimant’s left ankle and back.**

To receive workers’ compensation benefits, the claimant bears the burden of proving not only that the accident arose out of and in the course of employment, but also that the alleged injury was caused by the accident.<sup>17</sup> In other words, the claimant must establish a causal connection between the accident and the injury.<sup>18</sup> Under the law applicable at the time of the accident, in order to satisfy the causation element of the claim, the employee must prove that the employment was a “substantial factor” in the cause of the medical condition and disability.<sup>19</sup> Medical causation must be established by scientific or medical evidence “showing the cause and effect relationship between the complained of condition and the asserted cause.”<sup>20</sup> When

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<sup>16</sup> Exhibit J.

<sup>17</sup> *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 279 (Mo.App. 1997).

<sup>18</sup> *McDermott v. City of Northwoods Police Dep’t*, 103 S.W.3d 134, 138 (Mo.App. 2002).

<sup>19</sup> Section 287.020.2, RSMo 2000; *Cahall v. Cahall*, 963 S.W.2d 368 (Mo.App. 1998).

<sup>20</sup> *Williams v. DePaul Health Center*, 996 S.W.2d 619, 631 (Mo.App. 1999).

medical theories conflict, deciding which to accept is an issue reserved for the determination of the fact finder.<sup>21</sup>

In addition, the fact finder may accept only part of the testimony of a medical expert and reject the remainder of it.<sup>22</sup> Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony that it does not consider credible and accept as true the contrary testimony given by the other litigant's expert.<sup>23</sup>

In the October 2006 accident case, the parties agree that the falling lumber caused compensable injuries to claimant's thoracic spine and left ankle. The parties disagree as to whether the accident was the prevailing factor in claimant's hypertension, cardiac condition, left knee condition, and depression/anxiety.

With regard to the hypertension and cardiac condition, the only doctor to find a possible causal relation was Dr. Dale, and his explanation regarding his opinion is somewhat tenuous. Dr. Volarich specifically found that there was no causal relationship between the work accident and the hypertension and cardiac condition. I find Dr. Volarich's opinion on this matter to be more credible than that of Dr. Dale. I find that neither the hypertension nor the cardiac condition is causally related to the lumber accident on October 18, 2006.

As to claimant's left knee condition, Dr. Dale attributed the condition to claimant's gait disturbances because of the work injury. Dr. Volarich and Dr. Lennard, however, testified credibly and convincingly that the left knee condition was degenerative in nature. And in his testimony, Dr. Dale did acknowledge that there was some degenerative pathology. I find that claimant failed to meet his burden of proof that the left knee condition is causally related to the work accident.

The medical records demonstrate that claimant has depression and anxiety, although he has never seen a psychiatrist or psychologist from treatment or an in-depth evaluation. Dr. Volarich acknowledged that claimant suffered from depression, although he did offer an opinion as to the cause or causes of the depression and anxiety. Instead, Dr. Volarich indicated that finding the cause or causes of depression/anxiety requires quite a bit of lengthy history encompassing essentially the entire individual's life. Dr. Dale, however, suggests that the 2006 work accident was prevailing factor in causing claimant's depression. Dr. Dale is a general practitioner and not a psychiatrist or psychologist. In making his determination, Dr. Dale ruled out other possible causes of claimant's depression, such as his marital difficulties and divorce; the doctor did not inquire as to whether claimant had a history of depression or anxiety. I find that Dr. Dale's opinion as to the medical causation of claimant's depression/anxiety was not convincing. I find that claimant failed to meet his burden of proof that his depression/anxiety is causally related to the work accident.

<sup>21</sup> *Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 977 (Mo. App. 1984).

<sup>22</sup> *Cole v. Best Motor Lines*, 303 S.W.2d 170, 174 (Mo. App. 1957).

<sup>23</sup> *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo. App. 1992); *Hutchinson v. Tri State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo. App. 1986).

**Issue 2: Nature and extent of permanent partial disability or permanent total disability.**  
**Issue 3: Second Injury Fund liability, if any.**

The Workers' Compensation Law provides compensation to those employees who become totally disabled on a permanent basis as a result of an otherwise compensable claim.<sup>24</sup> Section 287.020.7, RSMo, provides that "total disability" is the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident.<sup>25</sup> The main factor in this determination is whether, in the ordinary course of business, any employer would reasonably be expected to employ the employee in this present physical condition and reasonably expect him to perform the duties of the work for which he was hired.<sup>26</sup> The test for permanent and total disability is whether the claimant would be able to compete in the open labor market.<sup>27</sup>

Various factors have been considered by courts attempting to determine whether or not an employee is permanently and totally disabled. An employee's ability or inability to perform simple tasks such as sitting,<sup>28</sup> bending,<sup>29</sup> and walking<sup>30</sup> may prove that the employee is permanently and totally disabled.

When the claimant is disabled by a combination of the work-related event and pre-existing disabilities, the responsibility for benefits lies with the Second Injury Fund.<sup>31</sup> If the last injury in and of itself renders a claimant permanently and totally disabled, the Second Injury Fund has no liability and the employer is responsible for the entire compensation.<sup>32</sup> That is, Second Injury Fund liability exists only if the employee suffers from a pre-existing permanent partial disability that combines with a compensable injury to create a disability greater than the simple sum of disabilities.<sup>33</sup> When such proof is made, the Second Injury Fund is liable only for the difference between the combined disability and the simple sum of the disabilities.<sup>34</sup> In order to find permanent total disability against the Second Injury Fund, it is necessary that the employee suffer from a permanent partial disability as the result of the last compensable injury, and that the disability has combined with a prior permanent partial disability to result in total disability.<sup>35</sup>

I find that claimant was credible and persuasive. His appearance, attitude, and demeanor at the hearing were appropriate and he testified forthrightly and candidly. His testimony was not impeached, and was consistent with the accounts in the medical records and in the depositions of Dr. Volarich, Mr. England, and Mr. Weimholt. His current symptoms in his back and left ankle prevent him from performing the physical requirements of his previous employments.

<sup>24</sup> Section 287.200.1, RSMo.

<sup>25</sup> See also *Houston v. Roadway Express, Inc.*, 133 S.W.3d 173, 178 (Mo.App. S.D. 2004).

<sup>26</sup> *Reiner v. Treasurer of the State of Missouri*, 837 S.W.2d 363, 367 (Mo.App. 1992).

<sup>27</sup> *Id.*

<sup>28</sup> *Brown v. Treasurer of Missouri*, 795 S.W.2d 478 (Mo.App. E.D. 1990).

<sup>29</sup> *Sprung v. Interior Const. Service*, 752 S.W.2d 354 (Mo.App. E.D. 1988).

<sup>30</sup> *Keener v. Wilcox Elec. Inc.*, 884 S.W.2d 744 (Mo.App. W.D. 1994).

<sup>31</sup> Section 287.200.1, RSMo.

<sup>32</sup> *Nance v. Treasurer of Missouri*, 85 S.W.3d 767 (Mo.App. W.D. 2003).

<sup>33</sup> Section 287.220.1, RSMo.; *Anderson v. Emerson Elec. Co.*, 698 S.W.2d 574, 576 (Mo. App. 1985).

<sup>34</sup> *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo. App. 1990).

<sup>35</sup> Section 287.220.1, RSMo.; *Brown* at 482; *Anderson* at 576.

Employee: Ricky J. Cantrell

Injury No. 06-099227

Taking into consideration the evidence as a whole, I find that the claimant has met his burden of establishing that he is permanently and totally disabled. Moreover, I find that claimant is permanently and totally disabled due to the work injury alone. In making this determination, I find the opinions of Dr. Volarich and Mr. Weimholt to be particularly persuasive. Both were thorough and credible. Dr. Volarich opined that claimant is permanently and totally disabled without regard to his repetitive motion injury (carpal tunnel). Although Dr. Volarich indicated that claimant was permanently and totally disabled due to a combination of his primary work injury (the lumber accident) plus his pre-existing disabilities, the doctor was not asked if the October 2006 (lumber accident) alone, without any of the pre-existing disabilities, would render claimant permanently and totally disabled.

Both vocational experts, Mr. Weimholt and Mr. England, testified that the physical restrictions and limitations that claimant testified effect him (how long he can sit, stand, or walk) prevent claimant from being employable in the open labor market, no matter any other factors. Both experts testified that claimant's need to lie down during the day also renders claimant permanently and totally disabled. It is clear that before the 2006 accident claimant was not so severely limited in how long he could sit, stand, or walk, In addition, claimant did not need to lie down during the day before the work accident

Even Dr. Dale opined that claimant is permanently and totally disabled as a result of the 2006 accident. Neither Dr. Pruitt nor Dr. Lennard, however, fully addressed the totality of claimant's injuries; each limited his opinion to the injuries he treated.

As claimant is permanently and totally disabled due to the last injury alone, the employer bears responsibility for the disability. I find that claimant reached maximum medical improvement on December 13, 2007, the date identified by Dr. Hicks (following claimant' left ankle surgery). Thus, the employer/insurer is liable for permanent total disability benefits from this date forward, as provided by law; however, it must be noted that after his October 2006 work accident, claimant received temporary total benefits for a repetitive injury claim. Specifically, in Injury No. 07-0040226, claimant received temporary total disability benefits for the period of October 21, 2008 through February 23, 2009 (a period of 18 weeks). Claimant is not entitled to receive permanent total disability benefits for the period in which he already received temporary total disability benefits. Therefore, claimant is entitled to permanent total benefits of \$718.87 /week from December 13, 2007 through October 20, 2008 and from February 24, 2009 forward.

As the employer is responsible for permanent total disability benefits, the Second Injury Fund is not liable for any benefits in this case.

**Issue 4: Unpaid Medical Bills.**

**Issue 5: Future Medical Treatment.**

Subsection 1 of RSMo Section 287.140 states, in pertinent part, as follows:

In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial,

ambulance and medicines, as may reasonably be required after the injury or disability to cure and relieve from the effects of the injury.

Since his release from treatment by Dr. Lennard, Dr. Hicks, and Dr. Pruitt, claimant has received medical care from Dr. Dale for his work-related injuries. However, Dr. Dale is claimant's primary care physician, and he has treated claimant for a number of conditions in addition to his work-related injuries. Dr. Dale's bills and records reveal that at every visit for which reimbursement is requested, claimant was treated for both work-related injuries and unrelated conditions without itemization on the bill or explanation by Dr. Dale in his records or testimony as to what part of his charges could be allocated to claimant's work-related injuries only. I cannot discern what, if any, amount of the medical charges since his release from the authorized treating physicians are attributable exclusively to medical aid provided to cure or relieve only his work-related injuries. I find that claimant is not entitled to reimbursement of any unpaid and past due medical expenses.

As to future medical care, the employee need only show that he is likely to need additional treatment "as may reasonably be required . . . to cure and relieve . . . the effects of the injury . . . that flow from the accident [or disease]." <sup>36</sup> This has been interpreted to mean that an employee is entitled to compensation for care and treatment that gives comfort, i.e., relieves the employee's work-related injury, even though a cure or restoration to soundness is not possible, if the employee establishes a reasonable probability that he or she needs additional future medical care. <sup>37</sup> "Probable" means founded on reason and experience that inclines the mind to believe but leaves room for doubt. <sup>38</sup> Claimant need not show evidence of the specific nature of the treatment required, but only that treatment is going to be required. <sup>39</sup>

Dr. Volarich credibly opines that claimant will need ongoing medical treatment for his work injury. Specifically, Dr. Volarich noted that claimant will pain management in the form of medication and physical therapy in order to relieve his work-related injuries. Dr. Dale is also reasonably certain that claimant will require pain management in the future in order to relieve his work-related injuries. Likewise, Dr. Lennard indicates that he is reasonably certain that claimant will require pain management in the form of medication and the use of a TENS unit in order to relieve his work-related injuries. In fact, no expert witness testified that the claimant would not require future medical care to relieve his work-related injuries. I find that claimant has met his burden of proof that he is entitled to future medical care in order to cure and relieve the effects of his work-related injuries.

### SUMMARY

The issues and their resolution are as follows:

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<sup>36</sup> *Sullivan v. Masters and Jackson Paving*, 35 S.W.2d 879, 888 (Mo.App. 2001).

<sup>37</sup> *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).

<sup>38</sup> *Rana* at 622, citing *Sifferman v. Sears, Roebuck & Co.*, 906 S.W.2d 823, 828 (Mo.App. 1995).

<sup>39</sup> *Aldredge v. Southern Missouri Gas*, 131 S.W. 3<sup>rd</sup> 786 at 833 (Mo. App. D. D. 2004).

Employee: Ricky J. Cantrell

Injury No. 06-099227

1. Medical causation of any injuries to claimant other than to his left ankle and his back.  
*Claimant failed to meet his burden on this issue.*
2. Nature and extent of permanent partial disability or permanent total disability.  
*Claimant is permanently and totally disabled due to the last injury alone. Therefore, the employer/insurer is liable for benefits.*
3. Second Injury Fund liability, if any.  
*The Second Injury Fund has no liability.*
4. Past-due medical bills.  
*Employer/insurer is not liable for any past-due medical bills.*
5. Future medical treatment.  
*Employer/insurer is liable for future medical treatment.*

Any pending objections not expressly ruled on in this award are overruled. Interest, if any, is applicable as provided by law.

This Award is subject to a lien in the amount of 25% of the payments hereunder in favor of the claimant's attorney, B. Michael Korte, for necessary legal services rendered to the claimant.

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

Vicky Ruth  
*Administrative Law Judge*  
*Division of Workers' Compensation*

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

Injury No.: 07-040226

Employee: Ricky Cantrell  
Employer: L. Krupp Construction, Inc.  
Insurer: Auto Owners Insurance Co.  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.<sup>1</sup> Having read the briefs, heard the parties' arguments, reviewed the evidence and considered the whole record, we find that the award of the administrative law judge denying compensation is not supported. Pursuant to § 286.090 RSMo, we reverse the award and decision of the administrative law judge dated February 22, 2012. The award and decision of Administrative Law Judge Vicky Ruth is attached and incorporated to the extent it is not inconsistent with our findings, conclusions, award and decision herein.

**Preliminaries**

This claim was tried with the claim in Injury No. 06-099227. The administrative law judge found that employee was rendered permanently and totally disabled by the back injury for which he claimed benefits in Injury No. 06-099227. The administrative law judge denied permanent partial disability benefits in this claim essentially reasoning that an injured worker cannot recover any permanent partial disability benefits for an injury sustained while an employee is permanently and totally disabled.

Employer/insurer filed a Motion to Strike a portion of employee's respondent's brief discussing what he believes is the proper date of injury for employee's bilateral carpal tunnel syndrome on the ground that employee did not raise the issue in his Application for Review. We deny the motion. Employee's discussion is in response to employer/insurer's brief, and not in support of employee's own Application for Review. In any event, our analysis and decision do not depend upon the resolution of that issue.

**Issues Presented**

Employee filed an Application for Review arguing the administrative law judge erred in concluding employee cannot recover permanent partial disability benefits for his bilateral carpal tunnel syndrome because employee was already permanently and totally disabled on the date of injury.

Employer/insurer filed an Application for Review. Employer/insurer argues that the administrative law judge analyzed employee's claims in the wrong order. Employer/insurer argues the administrative law judge should have "first determined whether the last compensable injury, the occupational disease, rendered [employee] permanent total

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<sup>1</sup> Statutory references are to the Revised Statutes of Missouri 2006, unless otherwise indicated.

Employee: Ricky Cantrell

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disability.” Nonetheless, employer/insurer concedes employer/insurer is liable for permanent partial disability benefits in this case.<sup>2</sup> We deny this point. See our award in Injury No. 06-099227 for a more detailed discussion regarding why this argument fails.

## **Findings of Fact**

### Preliminaries

The parties agree that employee sustained bilateral carpal tunnel syndrome that arose out of and in the course of his employment. Employer/insurer provided medical treatment to employee in the form of carpal tunnel releases. Employer/insurer paid temporary total disability benefits for the period during which employee’s carpal tunnel syndrome, treatment and recovery rendered him unable to work.

### Expert Medical Opinions

Employer/insurer selected Dr. Pruitt to treat employee for his bilateral carpal tunnel syndrome and he performed employee’s carpal tunnel releases. Dr. Pruitt opined that employee sustained a permanent partial disability of 10% of each wrist as a result of his work-related carpal tunnel syndrome.

Dr. Volarich examined employee for the purpose of rendering his expert opinions regarding employee’s injury in Injury No. 06-099227 but not for employee’s carpal tunnel syndrome. Upon questioning, Dr. Volarich testified he generally rates a surgically released wrist at between 25% and 30% permanent partial disability, but Dr. Volarich offered no rating regarding employee’s wrists.

We accept the opinion of Dr. Pruitt. We believe employee sustained a 10% permanent partial disability of each wrist as a result of his work-related carpal tunnel syndrome.

## **Law**

### Relevant Statutes

Section 287.800.1 RSMo provides:

Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts shall construe the provisions of this chapter strictly.

Section 287.190.1 RSMo provides, in relevant part:

For permanent partial disability, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with sections 287.170 and 287.180, respectively, the employer shall pay to the employee compensation computed at the weekly rate of compensation in effect under subsection 5 of this section on the date of the injury for which compensation is being made, **which**

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<sup>2</sup> In its brief, employer/insurer argues that we should enter an award against employer/insurer of 15% permanent partial disability of each wrist with a 10% load. Employee argues we should award 10% of each wrist.

Employee: Ricky Cantrell

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**compensation shall be allowed for loss by severance, total loss of use, or proportionate loss of use of one or more of the members mentioned in the schedule of losses.**

Emphasis added.

Section 287.220 RSMo provides, in relevant part:

...

3. If more than one injury in the same employment causes concurrent temporary disabilities, compensation shall be payable only for the longest and largest paying disability.

4. If more than one injury in the same employment causes concurrent and consecutive permanent partial disability, compensation payments for each subsequent disability shall not begin until the end of the compensation period of the prior disability.

Relevant Case Law<sup>3</sup>

"Where strict construction is required, the court should not enlarge or extend the law, and only the clear, plain, obvious, or natural import of the language should be used. 3 SUTHERLAND STATUTORY CONSTRUCTION § 58:2 (6th ed. 2008)." *Allcorn v. Tap Enters.*, 277 S.W.3d 823, 829 (Mo. App. 2009).

Strict construction means that a "statute can be given no broader application than is warranted by its plain and unambiguous terms." *Harness v. S. Copyroll, Inc.*, 291 S.W.3d 299, 303 (Mo.App. 2009). The operation of the statute must be confined to "matters affirmatively pointed out by its terms, and to cases which fall fairly within its letter." *Allcorn v. Tap Enters., Inc.*, 277 S.W.3d 823, 828 (Mo. App. 2009) (citing 3 SUTHERLAND STATUTORY CONSTRUCTION § 58:2 (6th ed. 2008)). "A strict construction of a statute presumes nothing that is not expressed." *Id.*, (quoting SUTHERLAND, supra.).

*Robinson v. Hooker*, 323 S.W.3d 418, 423 (Mo. App. 2010)

[P]ermanent partial disability can be awarded notwithstanding the fact that the employee returned to work if the employee's injury impaired his efficiency in the ordinary pursuits of life. *Komosa v. Monsanto Chemical Co.*, 317 S.W.2d 396, 400 (Mo. 1958). In *Komosa*, the employee suffered a back injury in the course of his employment, but continued to work without any lost wages. In approving an award for permanent partial disability, the court said: If it appears that the injury has caused a partial

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<sup>3</sup> The *Sapienza*, *Wiele*, and *Rana* cases cited in this section were overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

Employee: Ricky Cantrell

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loss of bodily function, which impairs the efficiency of the employee in the ordinary pursuits of life, recovery may be had under § 287.190 for permanent partial disability, notwithstanding the fact that the employee injured has suffered no loss of time from work and no immediate loss of earning power. Thus, even if an employee is working at the same wage, he is entitled to compensation if, from a consideration of the whole record, he sustained an injury that caused a partial loss of bodily function which impairs the efficiency of the person in the ordinary pursuits of life. *Gordon v. Chevrolet-Shell Division of Gen. M. Corp.*, 269 S.W.2d 163, 170 (Mo.App. 1954); *Betz v. Columbia Tel. Co.*, 224 Mo. App. 1004, 24 S.W.2d 224 (1930).

*Sapienza v. Deaconess Hospital*, 738 S.W.2d 149, 151 (Mo. App. 1987).

'[A]n actual loss of earnings is not an essential element of a claim for permanent partial disability.' *Wiele v. Nat'l Supermks., Inc.*, 948 S.W.2d 142, 148 (Mo. App. 1997). 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. *Sapienza v. Deaconess Hosp.*, 738 S.W.2d 149, 151 (Mo. App. 1987).

*Rana v. Landstar TLC*, 46 S.W.3d 614, 626 (Mo. App. 2001).

[L]oss of earning capacity is conclusively presumed and the amount of an award for permanent partial disability is determined by reference to a "schedule of losses" section of the Workers' Act [sic]. Thus, while an injury may have had no effect on an individual's long-term earning capacity, he may still be awarded benefits for permanent partial disability.

The reason for the award of permanent partial disability benefits is to compensate an injured party for lost earnings. The use of the schedule is only for administrative convenience.

*Hankins Constr. Co. v. Missouri Ins. Guar. Ass'n*, 724 S.W.2d 583, 587 (Mo. App. 1986).

### **Discussion**

The administrative law judge found employee sustained a permanent partial disability as a result of his occupationally-induced bilateral carpal tunnel syndrome. But she denied permanent partial disability benefits reasoning:

[B]y the time employee was diagnosed with the carpal tunnel condition, in May 2007, claimant was already permanently and totally disabled from conditions unrelated to that carpal tunnel syndrome. The claimant has not worked since October 18, 2006 (the date of the lumber accident), and has been awarded compensation for the loss of his earning capacity since that time in the form of temporary total disability and permanent total disability

Employee: Ricky Cantrell

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benefits. Thus, claimant did not suffer a reduction in, or loss of, his earning or earning capacity due to the occupational disease.

We reverse the administrative law judge's denial of permanent total disability benefits. Under the 2005 change to § 287.800.1 RSMo, we must apply the provisions of the Workers' Compensation Law strictly. The administrative law judge essentially rules that permanent partial disability benefits under § 287.190.1 are only payable if an injured worker suffers an actual loss of or a reduction in earning capacity. But that is not what § 287.190.1 says. The statute states unequivocally that permanent partial disability "shall be allowed for loss by severance, total loss of use, or proportionate loss of use of one or more of the members mentioned in the schedule of losses." Under a plain reading of the statute, an employer shall pay permanent partial disability benefits for impairment to the functioning of the body (loss of use). While a loss of function will often lead to some actual impairment of earning capacity, there are times that it will not.<sup>4</sup> We are forbidden to graft a requirement on the statute, where the requirement is not warranted by its plain and unambiguous terms. See *Robinson*, supra.

We note the same result would attain under the law as it existed before the 2005 amendments to the Workers' Compensation Law. An actual impairment of earning capacity is not a prerequisite to the recovery of permanent partial disability benefits. See *Rana*, supra. Historically, a loss of earning capacity was conclusively presumed for scheduled losses and the amount of an award for permanent partial disability was determined by reference to the schedule of losses. The use of the schedule is for administrative convenience. See, *Hankins*, supra.

We do not believe the highlighted language of § 287.190.1 is ambiguous, so resort to statutory construction is not necessary. But any lingering concerns regarding legislative intent in the case of concurrent and consecutive disabilities are obviated by the provisions of §§ 287.220.3 and 4, supra. Those provisions make clear that the legislature was aware that an employee might sustain consecutive injuries in the same employment and that the disabilities from such injuries might run concurrently. The legislature considered this inevitability and provided employers with relief in two concurrent disability situations – concurrent temporary disabilities and concurrent permanent partial disabilities. The legislature did not provide relief for concurrent permanent total and permanent partial disabilities. "The maxim of expressio unius est exclusio alterius creates 'an inference that all omissions [in an individual statute] should be understood as exclusions.'" *Gasconade County Counseling Servs. v. Mo. Dep't of Mental Health*, 314 S.W.3d 368, 376, n. 7 (Mo. App. 2010), citing 2A SUTHERLAND STATUTORY CONSTRUCTION § 47:26 (7th ed.).

### Conclusions of Law

The administrative law judge erred when she concluded employee was not entitled to permanent partial disability benefits for his carpal tunnel syndrome. Employee is entitled to permanent partial disability for 35 weeks. The parties have stipulated that employee's permanent partial disability rate is \$376.55.

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<sup>4</sup> For example, if a laborer loses an arm, he will likely suffer impairment to his earning capacity. If an attorney loses her arm, she may suffer little to no impairment in earning capacity.

Employee: Ricky Cantrell

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**Award**

We reverse the award of the administrative law judge.

We direct employer/insurer to pay to employee \$13,179.25 for permanent partial disability benefits ( $\$376.55 \times 35 = \$13,179.25$ ).

B. Michael Korte, Attorney at Law, is allowed a fee of 25% of the benefits awarded for necessary legal services rendered to employee, which shall constitute a lien on said compensation.

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

Given at Jefferson City, State of Missouri, this 31<sup>st</sup> day of October 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

## AWARD

Employee: Ricky J. Cantrell

Injury No. 07-040226

Dependents: N/A

Employer: L. Krupp Construction, Inc.

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

Additional Party: Second Injury Fund

Insurer: Auto Owners Insurance Co.

Hearing Date: November 21, 2011

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
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: Douglas 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:  
Employee sustained a repetitive motion injury to both wrists from his construction work, particularly the repetitive use of jackhammers and shoveling and smoothing concrete.
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: Bilateral wrists.
14. Nature and extent of any permanent disability: See Award.
15. Compensation paid to-date for temporary disability: \$12,939.66.
16. Value necessary medical aid paid to date by employer/insurer? \$16,479.32
17. Value necessary medical aid not furnished by employer/insurer? None.

18. Employee's average weekly wages: \$1,201.53.
19. Weekly compensation rate: \$376.55 PPD / \$718.87 PTD.
20. Method of wages computation: By agreement.

**COMPENSATION PAYABLE**

21. Amount of compensation payable from employer: None; see Award.
22. Second Injury Fund liability: None.
23. Future medical awarded: Yes.

Employee: Ricky J. Cantrell

Injury No. 07-040226

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

Employee: Ricky J. Cantrell

Injury No. 07-040226

Dependents: N/A

Employer: L. Krupp Construction, Inc.

Additional Party: Second Injury Fund

Insurer: Auto Owners Insurance Co.

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

On November 21, 2011, Ricky J. Cantrell, L. Krupp Construction, Inc., Auto Owners Insurance Co., and the Second Injury Fund appeared for a final award hearing. This case was tried at the same time as Injury No. 06-099227.<sup>1</sup> Ricky Cantrell (the claimant) was represented by attorney B. Michael Korte. L. Krupp Construction, Inc. (the employer) and Auto Owners Insurance (the insurer) were represented by attorney Brandy L. Johnson. The Second Injury Fund was represented by attorney Cara Harris. Claimant testified in person at the trial. Dr. David Volarich, Dr. Ted Lennard, Dr. David Dale, Mr. James England, and Mr. Gary Weimholt testified by deposition. Claimant, the employer/insurer, and the Second Injury Fund submitted briefs on December 19, 2011, and the record closed at that time.

### **STIPULATIONS**

The parties stipulated to the following:

1. On October 18, 2006, claimant sustained injuries by accident when lumber fell on him. The parties agree that the claimant's thoracic spine and left ankle were injured in that accident; causation of any other injury is disputed. The parties agree that the injuries to claimant's thoracic spine and left ankle arose out of and in the course of his employment with L. Krupp Construction, Inc. (the employer). The injuries associated with that accident were assigned Injury No. 06-099227.
2. Claimant alleges that on May 1, 2007, he sustained injuries to both upper extremities at the level of the wrist. The employer/insurer agrees that claimant sustained repetitive motion injuries to both upper extremities at the level of the wrists, but the date of those injuries is disputed. The parties, however, agree that the injuries to claimant's wrists arose out of and in the course of his employment with the employer. These bilateral wrist injuries were assigned Injury No. 07-040226.
3. The employer was operating subject to the provisions of Missouri Workers' Compensation Law.

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<sup>1</sup> Although a separate Award will be issued in that case, the timeline, the treatment, and the issues of both cases will be discussed here.

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4. The employer's liability for workers' compensation was insured by Auto Owners Insurance Company (the insurer).
5. The Missouri Division of Workers' Compensation has jurisdiction, and venue in Phelps County is proper and was agreed upon by the parties.
6. The employer had proper notice of the claimant's injuries.
7. Claimant filed Claims for Compensation within the time prescribed by law.
8. Claimant's average weekly wage was \$1,201.53, yielding a weekly compensation rate of \$376.55 for permanent partial disability benefits and \$718.87 permanent total disability benefits.
9. In Injury No. 06-099227, the employer paid temporary total disability benefits in the amount of \$43,132.20, for the period of October 19, 2006 through December 12, 2007 (a total of 60 weeks).
10. In Injury No. 06-099227, the employer/insurer paid medical benefits in the amount of \$144,983.14.
11. In Injury No. 07-040226, the employer paid temporary total disability benefits in the amount of \$12,939.66, for the period of October 21, 2008 through February 23, 2009 (a total of 18 weeks).
12. In Injury No. 07-040226, the employer/insurer paid medical benefits in the amount of \$16,479.32.

### **ISSUES**

At the hearing, the parties agreed that the issues to be resolved in this proceeding, Injury No. 07-040226, are as follows:

1. The date of claimant's injury by occupational disease.
2. Nature and extent of permanent partial disability or permanent total disability.
3. Second Injury Fund liability.
4. Liability of the employer/insurer for payment for future medical treatment.
5. Whether the employer is entitled to a credit of the temporary total disability benefits paid to claimant in the amount of \$12,939.66, for the 18 week period beginning October 21, 2008 and ending February 23, 2009.

The issues to be resolved in Injury No. 07-040226 are as follows:

1. Medical causation of any injuries to claimant other than his left ankle and his back.
2. Nature and extent of permanent partial disability or permanent total disability.
3. Second Injury Fund liability.
4. Liability of the employer/insurer for payment of past medical expenses.
5. Liability for future medical treatment.

### **EXHIBITS**

On behalf of the claimant, the following exhibits were entered into evidence:

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Exhibit A	Medical Records of Dale Family Medicine.
Exhibit B	Report of Dr. David Dale.
Exhibit C	<i>Curriculum vitae</i> of Dr. David Volarich.
Exhibit D	Report (4/24/08) of Dr. Volarich.
Exhibit E	Report (1/26/10) of Dr. Volarich.
Exhibit F	Report (9/13/00) of Dr. Volarich.
Exhibit G	Anatomical diagram – joints and ligaments of the right foot.
Exhibit H	Anatomical diagram – bones of the right foot.
Exhibit I	<i>Curriculum vitae</i> of Gary Weimholt.
Exhibit J	Deport (12/15/06) of Gary Weimholt.
Exhibit K	Deposition of Dr. David Dale.
Exhibit L	Deposition of Dr. Volarich.
Exhibit M	Deposition of Gary Weimholt.

On behalf of the employer/insurer, the following exhibits were admitted into the record:

Exhibit 1	Report of Air Evac EMS, Inc.
Exhibit 2	Deposition of Dr. Donald Pruitt and exhibits.
Exhibit 3	Reports (1/08/08, 1/26/08, and 7/12/11) of Dr. Ted Lennard.
Exhibit 4	Deposition (with exhibits) of Dr. Lennard.
Exhibit 5	Reports (12/12/08 and 4/25/11) of James England.
Exhibit 6	Depositions (1/05/09 and 5/20/11) and exhibits of James England.

The following exhibit was admitted on behalf of the Second Injury Fund (SIF):

Exhibit I	Deposition of claimant.
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On behalf of the parties, the following joint exhibits were entered into evidence:

Exhibit AA	Records of Air Evac EMS.
Exhibit BB	Records of Baxter Regional.
Exhibit CC	Records of St. Anthony's Medical Center.
Exhibit DD	Records of Signature Health.
Exhibit EE	Records of Springfield Neurological and Spine Institute, LLC.
Exhibit FF	Records of Advanced Care Physical Therapy, LLC.
Exhibit GG	Records of Orthopedic Specialists of Springfield.
Exhibit HH	Records of Springfield Surgical Specialists, ASC.
Exhibit II	Records of WEEA.
Exhibit JJ	Records of St. Louis Orthopedic, Inc.
Exhibit KK	Records of St. John's Health Center.
Exhibit LL	Records of Phelps County Regional Medical Center.
Exhibit MM	Records of Dr. David's Family Clinic.
Exhibit NN	Records of Dr. Theodore Koreckij.
Exhibit OO	Records of Jefferson Memorial Hospital.
Exhibit PP	Records of Tesson Heights.
Exhibit QQ	Records of Parkcrest Surgical Associates, Inc.
Exhibit RR	Records of Dr. David Peeples.

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Exhibit SS     Records of Michael Ball.  
Exhibit TT     Records of PRORehab, P.C.  
Exhibit UU     Records of Missouri Div. of Workers' Compensation.  
Exhibit VV     Records of Mercy Trauma & Surgery.

*Note: All marks, handwritten notations, highlighting, or tabs on the exhibits were present at the time the documents were admitted into evidence. Some of the depositions were admitted with objections contained in the record. Unless otherwise specifically noted below, the objections are overruled.*

### **FINDINGS OF FACT**

Based on the above exhibits and the testimony presented at the hearing, I make the following findings:

1. At the time of the hearing, claimant was 55 years old. He obtained a G.E.D. while in the military. He was in active duty in the Marine Corps for about four years, ending in 1976; he then spent four years on non-active duty. Nearly his entire work history consists of performing heavy labor in the construction industry.
2. Claimant worked for L. Krupp Construction, doing heavy labor/construction work. His job duties included operating a jackhammer for extended periods on a daily basis, shoveling 20-pound loads of concrete hundreds of times daily, carrying heavy objects, working with his arms extended overhead, digging, setting concrete forms, raking and finishing concrete, and setting up cranes.
3. On October 18, 2006, claimant was working for the employer on a highway bridge in Douglas County, Missouri, when lumber fell on him while the lumber was being lifted in the air by a crane. This October 18, 2006 accident and the resulting injuries will often be referred to as the "lumber accident" or the "lumber injuries" in order to distinguish them from the occupational disease/injuries in the case designated as Injury No. 07-040226.
4. The falling lumber knocked claimant to the ground and rendered him unconscious. He felt immediate pain in his back and left ankle; he also had a severe headache. Claimant was transported by helicopter to Baxter Regional Medical Center in Mountain Home, Arkansas.<sup>2</sup> Claimant was diagnosed with an unstable Chance vertebral fracture and fractured ribs. He also complained of pain in his left ankle. An x-ray revealed a lateral malleolar fracture and a probably ligamentous injury; he was provided with a CAM walker boot.
5. On October 19, 2006, Dr. Travis Richardson performed surgery on claimant; that surgery consisted of open fracture treatment and fusion of the spine from T10 through L2.<sup>3</sup> Claimant was provided with a back brace. Claimant spent two weeks in the hospital. He

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<sup>2</sup> Exhibit AA.

<sup>3</sup> Exhibit BB.

was released to St. Anthony's Rehab, where he spent about ten days for pain management and therapy. While at St. Anthony's Rehab, x-rays of claimant's ankle revealed a lateral malleolar fracture and a probable ligamentous injury.<sup>4</sup> X-rays taken later also revealed a possible superior end plate fracture at the L2 level.<sup>5</sup>

6. When he released from St. Anthony's Rehab, claimant's wife took him home and then immediately left; they subsequently divorced.
7. Claimant received follow-up care with Dr. Dale, his primary care physician, and with Dr. Lennard, the authorized treating physician. Claimant also treated with Dr. Rahm regarding his back, and with Dr. Hicks for his left ankle.
8. On January 11, 2007, while treating with Dr. Lennard for his back and ankle, claimant complained of numbness in both upper extremities and of neck pain. Dr. Lennard's impression as status post T10-L2 fusion, rib fractures, and left distal fibular fracture, and well as neck pain and upper extremity numbness. Dr. Lennard restricted claimant from work. He also ordered physical therapy of the left ankle.
9. On January 24, 2007, Dr. Lennard prescribed a TENS unit and ordered an EMG study of the upper extremities due to claimant's ongoing symptomology. The study revealed bilateral median neuropathies of the wrists.<sup>6</sup> On February 6, 2007, claimant was diagnosed with bilateral carpal tunnel syndrome.
10. Dr. Lennard later ordered an MRI of the left leg; that test revealed a torn anterior T-F ligament with an osteochondral lesion. Dr. Lennard referred claimant to Dr. David Hicks.
11. Dr. Hicks diagnosed left ankle stability, left medial talar dome OCD lesion, and left peroneous longus and brevis tendon tears. On July 2, 2007, Dr. Hicks performed surgery on claimant's left ankle. He fitted claimant with a boot and a walker. He released claimant on December 13, 2007, with a permanent restriction of avoiding standing or walking for prolonged periods.<sup>7</sup>
12. On January 8, 2008, Dr. Lennard determined that claimant required no further medical treatment.<sup>8</sup> Dr. Lennard imposed permanent restrictions of lifting no more than 15 pounds only occasionally, and only occasional bending; he also made note of Dr. Hicks's restrictions. Dr. Lennard rated claimant's disabilities as 25% of the body as a whole and 15% of the left ankle as a direct result of the October 2006 accident.
13. Claimant has not worked anywhere since the lumber accident on October 18, 2006.

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<sup>4</sup> Exhibit BB.

<sup>5</sup> Exhibit DD.

<sup>6</sup> Exhibit EE.

<sup>7</sup> Exhibit HH.

<sup>8</sup> Exhibit EE.

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*Occupational disease/carpal tunnel case (Injury No. 07-040226)*

14. In December 2006, while treating for the October 2006 lumber accident, claimant began to have numbness and tingling in his upper extremities. Claimant underwent an EMG on or about May 1, 2007, which confirmed a diagnosis of carpal tunnel syndrome.
15. As a result, claimant filed a Claim for Compensation on May 7, 2008; he amended the claim on August 14, 2008 and August 29, 2008. That case was designated as Injury No. 07-040229.
16. The employer provided treatment for both of claimant's upper extremities. Claimant was evaluated by Dr. Donald Pruitt, an orthopedic surgeon, on September 30, 2008.<sup>9</sup> Claimant reported that he had performed construction work for twenty-seven years, and that in his work he would frequently use jackhammers, pour concrete, and smooth concrete. Claimant indicated that he had begun noticing numbness and tingling in his hands, especially at night, two and one-half months after this accident on October 18, 2006. Dr. Pruitt diagnosed claimant with probably bilateral carpal tunnel syndrome and opined that the prevailing factor in the condition would be claimant's work activities in the construction industry.
17. An EMG/nerve conduction study revealed moderate to severe right carpal tunnel syndrome and moderately severe left carpal tunnel syndrome. Dr. Pruitt performed carpal tunnel releases on October 21, 2008 (left hand) and on January 16, 2009 (right hand). Claimant reported improvement in his finger symptoms and his night-time symptoms.
18. Dr. Pruitt found claimant to be at maximum medical improvement on April 22, 2009, and released him from care. He rated claimant as having a PPD of 10% of each wrist. The doctor did not recommend any further treatment. Dr. Pruitt did not assign any work restrictions to claimant because he was not working. Dr. Pruitt indicated that if claimant had been working, he would have released him to work without restrictions for one month to determine if restrictions were needed. Just considering the carpal tunnel syndrome, Dr. Pruitt thought that claimant probably would have been able to go back to work.<sup>10</sup>

*Pre-existing injuries*

19. In April 1993, claimant injured his low back in a slip and fall accident while working for Pace Construction (Injury No. 93-042862). Claimant performed heavy labor for Pace Construction. He received only conservative treatment and was able to return to work at full duty shortly after that back injury. Claimant settled with Pace Construction for 5% permanent partial disability to the body as a whole. Claimant returned to working full-time at the heavy manual labor level without restrictions.

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<sup>9</sup> Exhibit JJ.

<sup>10</sup> Exhibit 2.

20. In October 1999, claimant was involved in an accident while working for Lionmark, Inc., d/b/a Pace Grading Inc. (Injury No. 99-132466). That accident occurred when he was in a "man lift" that suspended him in the air while working on the side of the bridge. A vehicle went through the barricade and hit the man lift, causing claimant to drop approximately 14 feet to the ground. He sustained injuries to his low back, his left arm, and he developed headaches. He was off work for approximately four months because of this fall, although he did not have surgery and was not hospitalized. Claimant testified that he did have problems from this accident for a period of time and restrictions were imposed on his activities; by 2001 he had returned to work and was performing tasks in excess of his restrictions. He indicated by 2006, his complaints had all resolved. Claimant settled this claim based on a 15.5% PPD of the body as a whole. Claimant again returned to working at the heavy manual labor level without restrictions.
21. In September 2005, claimant sustained a work-related hernia that was surgically repaired (Injury No. 05-093792). He settled that workers' compensation claim with the employer, L. Krupp Construction, based on 5% PPD of the body as a whole. Although claimant returned to working full-duty, heavy labor without restrictions, he did experience discomfort on occasion, such as when he lifted too much.
22. Claimant testified that after the 1999 accident but before the October 2006 accident, he was very active; he ran three to five miles per day, played softball, shot targets, and went skiing, boating, hunting, and fishing. During this time period, he was no longer taking any medication and was not having trouble sleeping. In addition, he did not have any limitations on how long he could sit or stand; he was able to squat, kneel, and crawl without difficulty. He had no need to lie down during the day. Although he would sometimes get stiff and sore, he did stretching and other exercises to stay fit.

*Post-October 2006 injuries or conditions*

23. Claimant sustained hearing loss in his right ear while he was in the military.
24. After October 2006, claimant developed problems with his heart and his knee. He did not have any difficulties or limitations from these conditions prior to October 18, 2006. Claimant underwent cardiac bypass surgery in February 2009.

*Current complaints*

25. Claimant testified that he has constant pain in his back from his neck all the way down to his low back; he also has constant pain in his left ankle. He testified that he is never pain free, although his pain does increase with activity. He is not able to sleep well, and he frequently wakes up during the night. He takes at least two naps every day because of his lack of sleep and the pain. The naps are usually one to one and one-half hours long. Claimant uses a TENS unit on his low back two to four times per week.
26. Claimant tries to avoid stairs when at all possible. He can sit for only 30 to 45 minutes without having increased pain. He can stand 10 to 15 minutes. He is unable to squat, knee, or crawl. He can walk approximately one block at his own pace.

27. Claimant does mow his yard using both a riding mower and a self-propelled push mower. He is able to shop for groceries, although he limits the trips to 30 minutes each and he rests during the trip. He can drive about 30 miles before he must stop. He drove 30 miles to the hearing, but had to stop once on the way due to pain.
28. Claimant testified that he is no longer able to hunt, fish, shoot targets, ride in a boat, dive, or water ski – activities that he was able to do before the lumber accident on October 18, 2006. He is no longer able to run three to five miles per day, work out, or play softball; these are all activities he engaged in before the accident.
29. Claimant testified that since the October 2006 accident he has developed depression. He believes that most of the depression is from the work injury and the resulting limitations, although he acknowledged that some of the depression is from his divorce.
30. Claimant currently takes over-the-counter pain medications; sometimes he takes Tylenol IV with Codeine. He quit taking narcotic pain mediation because it made him sick to his stomach.

*Dr. David Dale*

31. Dr. David Dale testified by deposition on March 16, 2011. Dr Dale first saw claimant on December 7, 2006, after the October 2006 lumbar accident. At that time, Dr. Dale noted that claimant had a gait disturbance, and that he had hypertension, intractable pain, Surgical Back Syndrome, and was developing anxiety and depression. Dr. Dale later diagnosed claimant with Surgical Ankle Syndrome.
32. Dr. Dale opined that claimant’s anxiety and depression arose as a result of the October 2006 accident. He testified that claimant is “totally and quite remarkably disabled.”<sup>11</sup> He indicated that claimant is unable to walk, stand, sit, or perform repetitive activity for any extended period of time. He testified that claimant can no longer work in construction.
33. Dr. Dale opined that the October 2006 accident is the prevailing factor in causing the injuries that he diagnosed. Dr. Dale testified that he is reasonably certain that the 2006 accident is the exclusive cause of claimant’s permanent total disability. He explained the basis for his opinion as follows “[y]ou can combine them if you want, but the bottom line is . . . he already had preexisting problems but they weren’t disabling.”<sup>12</sup>
34. When asked about claimant’s preexisting symptoms combining with the symptoms from the work accident, Dr. Dale testified as follows:

It was based on what I’m an expert at. I knew him before, during and after the accident. I knew what he was doing before, during and after the accident. I knew

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<sup>11</sup> Exhibit K.

<sup>12</sup> Exhibit K, p.74

he was working before. He was working at the moment he had the accident, making money and suddenly he couldn't.<sup>13</sup>

*Dr. Ted Lennard*

35. Dr. Ted Lennard, one of claimant's treating physicians, testified that as a result of the October 2006 accident, claimant has a permanent partial disability (PPD) of 25% of the body as a whole for the back and ribs, and a 15% PPD to the left ankle at the 155-week level. Dr. Lennard opined that the 1993 and 1999 injuries resulted in 5% PPD to the body as a whole. Dr. Lennard placed restrictions on claimant; those restrictions included no lifting more than 15 pounds, bending only occasionally, and limited standing and walking.

*Dr. Donald Pruitt*

36. Dr. Donald Pruitt testified by deposition on July 5, 2011. Dr. Pruitt treated claimant for carpal tunnel syndrome. He first saw claimant on September 2008. The history he took that day indicated that claimant had worked in the construction industry for 27 years and that approximately two months after his October 2006 (lumber) injury, claimant began having numbness and tingling into his hands. The numbness and tingling was frequently at night.
37. Dr. Pruitt reviewed a nerve conduction study done by Dr. Lennard in February 2007. Based on the testing, claimant's complaints, and his physical exam, on or about May 1, 2007, Dr. Pruitt diagnosed claimant with carpal tunnel syndrome. Dr. Pruitt opined that claimant's construction activities were the prevailing factor in the cause of his carpal tunnel syndrome.
38. Dr. Pruitt performed carpal tunnel releases on claimant on October 31, 2008 (left wrist) and January 30, 2009 (right wrist). Dr. Pruitt opined that claimant has a PPD of 10% of each wrist for the carpal tunnel syndrome. The doctor did not recommend any additional treatment for the wrists. He did not place any specific restrictions on claimant because claimant was no longer working due to other health concerns. However, he opined that based on claimant's carpal tunnel syndrome alone claimant should have been able to return to work.

*Dr. David Volarich – Independent Medical Examinations*

39. On April 24, 2008, Dr. David Volarich performed an independent medical examination of claimant at the request of claimant's attorney; the doctor then prepared a complete medical report. Dr. Volarich reexamined claimant on January 26, 2010, and issued an addendum report. Dr. Volarich also testified by deposition on April 28, 2011. Prior to his October 2006 accident, Dr. Volarich evaluated claimant in September 2000.

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<sup>13</sup> Exhibit K, p. 67.

40. As a result of the October 2006 accident, Dr. Volarich made the following diagnoses: compression fracture at the T12 level with instability requiring fusion surgery from the T12 to the L2 levels of the claimant's spine; failed back syndrome; internal derangement of the left ankle secondary to a chondral injury to the talus; some lateral fracture; a tear of the anterior talofibular ligament that required lateral compartment reconstruction of the anterior talofibular ligament and excision of a loose body; aggravation of cervical syndrome, including disc protrusions at C3-4 and C6-7; and fractures to the 7<sup>th</sup> and 8<sup>th</sup> ribs on the left. Dr. Volarich rated these injuries at 15% permanent partial disabilities of the cervical spine, 50% of the body as a whole from the T12-L2 injury, and 50% of the left ankle. Dr. Volarich also recommended various permanent restrictions for claimant's physical activities. The restrictions he assigned in 2008 were similar to those he assigned in 2000, with the important additional restriction that claimant change positions, rest, and lie down as needed. He also recommended pain management.
41. Regarding claimant's repetitive motion injuries (carpal tunnel syndrome) from Injury No. 07-0040226, Dr. Volarich indicated that he generally rates disabilities similar to the claimant's repetitive motion injuries between 25% and 35%.
42. As to claimant's pre-existing injuries, Dr. Volarich assessed the following permanent partial disabilities: 5% of the body as a whole due to the hernia; 25% of the body as a whole referable to the cervical spine; 10% of the body as a whole referable to the thoracic spine; 15% of the body as a whole referable to the lumbar spine; and 20% of the left shoulder. Dr. Volarich opined that claimant's heart problems and his hypertension are not work-related.<sup>14</sup>
43. Dr. Volarich opined that claimant is permanently and partial disabled due to a combination of his October 2006 injury and his pre-existing conditions. Dr. Volarich indicated that although claimant's repetitive motion injuries added some disability, he believed that claimant was permanently and totally disabled without consideration of the repetitive motion injury or the heart condition.<sup>15</sup>

*Gary Weimholt – Vocational Evaluation*

44. On July 25, 2008, Gary Weimholt evaluated claimant at the request of claimant's attorney. Mr. Weimholt is a certified vocational rehabilitation consultant. He testified by deposition on October 20, 2011. Mr. Weimholt acknowledged that the restrictions of Dr. Lennard and Dr. Hicks might allow sedentary employment in theory, however, he does not believe that any employer in the claimant's labor market would employ claimant due to his pain, his lack of experience in sedentary work, his use of a cane, and his need to lie down.
45. Mr. Weimholt testified that it is his opinion that claimant is unemployable in the open labor market and that no employer in the normal course and scope of employment would

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<sup>14</sup> Exhibit L.

<sup>15</sup> Exhibit L.

hire him.<sup>16</sup> As to whether claimant is unemployable from the last injury alone, or from a combination of the last injury and the pre-existing conditions, Mr. Weimholt indicated that this is a medical opinion and he defers to a medical expert.

*James England – Vocational Expert*

46. On November 25, 2008, James England, a vocational expert, saw claimant on behalf of the employer/insurer. Mr. England testified by deposition in 2009 and 2011. Mr. England opined that if you consider the restrictions of the treating doctors, claimant cannot return to work in the construction industry but could return to work in related activities or in other areas of employment.
47. Mr. England testified that if one assumes the restrictions of Dr. Volarich – which require claimant to recline during the day – then claimant is not employable due to a combination of his October 2006 work injury and his pre-existing disabilities. Mr. England did acknowledge that prior to the October 2006 injury, claimant was working fulltime in a heavy duty job and was not taking narcotic pain medication.
48. On April 25, 2011, Mr. England issued a supplemental report. He did not see claimant again before creating that supplemental report, but he did review additional medical records. In the supplemental report, Mr. England noted that his overall opinions as to claimant's employability did not change from his initial report. He noted that he still believes that based on the restrictions of the treating doctors, claimant is employable in the open labor market.

**CONCLUSIONS OF LAW**

Based upon the findings of fact and the applicable law, I find the following:

**Issue 1: Date of the Injury.**

Unlike an accidental injury that occurs on a particular date, an occupational disease develops and manifests itself over a period of time and is not caused by a single event.<sup>17</sup> Although it may be difficult to establish, the date of an employee's exposure to an occupational disease forms the basis for the determination of an employer's liability.<sup>18</sup> The date of exposure of an employee to an occupational disease is the date of causation; an employee can suffer an injurious exposure prior to becoming disabled, but the injurious exposure does not become compensable until it causes disability to the employee.<sup>19</sup>

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<sup>16</sup> Exhibit J.

<sup>17</sup> Garrone v. Treasurer of State of Missouri, 157 S.W.3d 237 (Mo.App. E.D. 2004).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

A stipulation by parties as to the exact date of an injury is not a stipulation as to the date of exposure; conversely, a stipulation as to a date of exposure is not a stipulation as to a date of disability.<sup>20</sup>

The claimant was not advised by a physician that he had sustained a work-related repetitive motion occupational disease injury until at least May 1, 2007. Even though the claimant's last exposure to the repetitive motion that is the prevailing factor in the cause of his repetitive motion injury was October 18, 2006 (which is also the date of the 2006 accident), the claimant did not complain of any symptoms potentially attributable to the repetitive motion injury until several weeks after the 2006 accident. Whether this delay is possibly due to the masking of the symptoms by the pain and symptoms attributable to the claimant's injuries resulting from the 2006 accident, or from the medication and treatment he was receiving for those injuries, is irrelevant to my determination of the proper date to assign to the claimant's repetitive motion injury.

I find that the date of the claimant's repetitive motion injury is May 1, 2007, the date the medical condition was diagnosed.

**Issue 2: Nature and extent of permanent partial disability or permanent total disability.**  
**Issue 3: Second Injury Fund liability, if any.**

The Workers' Compensation Law provides compensation to those employees who become totally disabled on a permanent basis as a result of an otherwise compensable claim.<sup>21</sup> Section 287.020.7, RSMo, provides that "total disability" is the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident.<sup>22</sup> The main factor in this determination is whether, in the ordinary course of business, any employer would reasonably be expected to employ the employee in this present physical condition and reasonably expect him to perform the duties of the work for which he was hired.<sup>23</sup> The test for permanent and total disability is whether the claimant would be able to compete in the open labor market.<sup>24</sup>

When the claimant is disabled by a combination of the work-related event and pre-existing disabilities, the responsibility for benefits lies with the Second Injury Fund.<sup>25</sup> If the last injury in and of itself renders a claimant permanently and totally disabled, the Second Injury Fund has no liability and the employer is responsible for the entire compensation.<sup>26</sup> That is, Second Injury Fund liability exists only if the employee suffers from a pre-existing permanent partial disability that combines with a compensable injury to create a disability greater than the simple sum of disabilities.<sup>27</sup> When such proof is made, the Second Injury Fund is liable only for

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<sup>20</sup> *Id.*

<sup>21</sup> Section 287.200.1, RSMo.

<sup>22</sup> See also *Houston v. Roadway Express, Inc.*, 133 S.W.3d 173, 178 (Mo.App. S.D. 2004).

<sup>23</sup> *Reiner v. Treasurer of the State of Missouri*, 837 S.W.2d 363, 367 (Mo.App. 1992).

<sup>24</sup> *Id.*

<sup>25</sup> Section 287.200.1, RSMo.

<sup>26</sup> *Nance v. Treasurer of Missouri*, 85 S.W.3d 767 (Mo.App. W.D. 2003).

<sup>27</sup> Section 287.220.1, RSMo.; *Anderson v. Emerson Elec. Co.*, 698 S.W.2d 574, 576 (Mo. App. 1985).

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the difference between the combined disability and the simple sum of the disabilities.<sup>28</sup> In order to find permanent total disability against the Second Injury Fund, it is necessary that the employee suffer from a permanent partial disability as the result of the last compensable injury, and that the disability has combined with a prior permanent partial disability to result in total disability.<sup>29</sup>

I find that claimant was credible and persuasive. His appearance, attitude, and demeanor at the hearing were appropriate and he testified forthrightly and candidly. His testimony was not impeached, and was consistent with the accounts in the medical records and in the depositions of Dr. Volarich, Mr. England, and Mr. Weimholt.

In the Award in Injury No. 06-099227, I found that claimant is permanently and totally disabled as a result of the October 18, 2006 injury alone (the lumber accident). Thus, by the time claimant was diagnosed with the carpal tunnel condition, in May 2007, claimant was already permanently and totally disabled from conditions unrelated to that carpal tunnel syndrome. The claimant has not worked since October 18, 2006 (the date of the lumber accident), and has been awarded compensation for the loss of his earning capacity since that time in the form of temporary total disability and permanent total disability benefits. Thus, claimant did not suffer a reduction in, or loss of, his earning or earning capacity due to the occupational disease. I find that claimant is not entitled to any benefits for his occupational disease. Thus, neither the employer/insurer nor the Second Injury Fund is liable for disability benefits in Injury No. 07-40226.

**Issue 4: Future Medical Treatment.**

Subsection 1 of RSMo Section 287.140 states, in pertinent part, as follows:

In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability to cure and relieve from the effects of the injury.

The employee need only show that he is likely to need additional treatment “as may reasonably be required . . . to cure and relieve . . . the effects of the injury . . . that flow from the accident [or disease].”<sup>30</sup> This has been interpreted to mean that an employee is entitled to compensation for care and treatment that gives comfort, i.e., relieves the employee’s work-related injury, even though a cure or restoration to soundness is not possible, if the employee establishes a reasonable probability that he or she needs additional future medical care.<sup>31</sup> “Probable” means founded on reason and experience that inclines the mind to believe but leaves

<sup>28</sup> *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo. App. 1990).

<sup>29</sup> Section 287.220.1, RSMo.; *Brown* at 482; *Anderson* at 576.

<sup>30</sup> *Sullivan v. Masters and Jackson Paving*, 35 S.W.2d 879, 888 (Mo.App. 2001).

<sup>31</sup> *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).

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room for doubt.<sup>32</sup> Claimant need not show evidence of the specific nature of the treatment required, but only that treatment is going to be required.<sup>33</sup>

Although Dr. Volarich, Dr. Dale, and Dr. Lennard are each reasonably certain that the claimant will require pain management in the form of medication and physical therapy in order to relieve his injuries related to the 2006 accident, neither they nor Dr. Pruitt recommend any further medical aid that would cure or relieve the claimant's repetitive motion injury. I find that claimant is not entitled to receive future medical aid in order to cure or relieve his repetitive motion injuries.

**Issue 5: Whether the employer is entitled to a credit for temporary total disability benefits paid to claimant.**

The employer/insurer provided temporary total disability benefits to the employee in regard to his work-related repetitive motion injuries for the period beginning October 2, 2008 and ending February 23, 2009. Instead of awarding a credit to the employer for these payments, I found in the Award in Injury No. 06-099227 that the claimant is not eligible for permanent total disability benefits during the period he received temporary total disability benefits – i.e., the period of October 21, 2008 through February 23, 2009. As claimant has and will receive only temporary total disability benefits for this period, there has been no overpayment and no credit is due to the employer.

**SUMMARY**

The issues and their resolution are as follows:

1. The date of claimant's injury by occupational disease.  
*The date of injury for the occupational disease is May 1, 2007.*
2. Nature and extent of permanent partial disability or permanent total disability.  
*Claimant is not entitled to any additional permanent partial or permanent total disability benefits in this case.*
3. Second Injury Fund liability, if any.  
*There is no Second Injury Fund liability.*
4. Liability of the employer/insurer for payment for future medical treatment.  
*The employer/insurer is not liable for any future medical treatment.*
5. Whether the employer is entitled to a credit of the temporary total disability benefits paid to claimant in the amount of \$12,939.66, for the 18 week period beginning October 21, 2008 and ending February 23, 2009.  
*No, the employer is not entitled to a credit.*

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<sup>32</sup> *Rana* at 622, citing *Sifferman v. Sears, Roebuck & Co.*, 906 S.W.2d 823, 828 (Mo.App. 1995).

<sup>33</sup> *Aldredge v. Southern Missouri Gas*, 131 S.W. 3<sup>rd</sup> 786 at 833 (Mo. App. D. D. 2004).

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Any pending objections not expressly ruled on in this award are overruled.

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

**Vicky Ruth**  
*Administrative Law Judge*  
*Division of Workers' Compensation*