

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

Injury No.: 07-130066

Employee: John Clifton
Employer: Kupferer Bros. Ornamental Iron Works (Settled)
Insurer: American Family Mutual Insurance Co. (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated October 11, 2012. The award and decision of Administrative Law Judge Linda J. Wenman, issued October 11, 2012, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 1st day of February 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T
Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: John Clifton Injury No.: 07-130066
Dependents: N/A Before the
Employer: Kupferer Bros. Ornamental Iron Works (settled) **Division of Workers' Compensation**
Additional Party: Second Injury Fund Department of Labor and Industrial Relations of Missouri
Insurer: American Family Mutual Ins. Co. (settled) Jefferson City, Missouri
Hearing Date: October 4, 2012 Checked by: LJW

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: June 1, 2007
5. State location where accident occurred or occupational disease was contracted: St. Louis County, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the 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 exposed to occupational noise.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Bilateral ears
14. Nature and extent of any permanent disability: 22.1% PPD referable to the ears at the 180 week level previously paid by Employer.
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: John Clifton

Injury No.: 07-130066

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Sufficient to produce the rates listed below.
- 19. Weekly compensation rate: \$613.63 / \$376.55
- 20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable:

39.78 weeks of permanent partial disability from Employer	Previously paid
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22. Second Injury Fund liability: Yes

17.02 weeks of permanent partial disability from Second Injury Fund	\$6,408.88
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TOTAL:	\$6,408.88
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23. Future requirements awarded: N/A

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments in favor of the following attorney for necessary legal services rendered to the claimant: Colleen Vetter

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	John Clifton	Injury No.: 07-130066
Dependents:	N/A	Before the
Employer:	Kupferer Bros. Ornamental Iron Works (settled)	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
		Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
Insurer:	American Family Mutual Ins. Co. (settled)	Checked by: LJW

PRELIMINARIES

A hearing for a Second Injury Fund final award was held regarding the above referenced Workers' Compensation claim by the undersigned Administrative Law Judge on October 4, 2012. The case was taken under submission on the day of hearing. Attorney Colleen Vetter represented John Clifton (Claimant). Assistant Attorney General Da-Neil Cunningham represented the Second Injury Fund (SIF).

Prior to the start of the hearing, the parties identified the issues for disposition in this case as the liability of SIF for permanent partial disability (PPD) benefits, and whether SIF has liability for PPD benefits when the primary injury was due to occupational disease. Hearing venue is correct, and jurisdiction properly lies with the Missouri Division of Workers' Compensation. Claimant offered Exhibits A-H, and Claimant and SIF offered Exhibit I/I. All exhibits were admitted without objection. Any objections not expressly ruled on in this award are overruled. All markings contained within any exhibit were present when received, and the markings did not influence the evidentiary weight given the exhibit.

STIPULATIONS

1. Claimant has a compensable injury that occurred on June 1, 2007 (primary injury), which produced a stipulation for compromise settlement of 22.1% PPD referable to his ears.
2. Claimant has preexisting injuries that produced the following disability at the time of the primary injury: 20% PPD referable to the right shoulder; and 12.5% BAW PPD referable to his lumbar spine.
3. If Claimant's primary and preexisting injuries combine to produce synergistic disability a load factor should be assigned.

FINDINGS OF FACT

All evidence presented has been reviewed. Only testimony and evidence necessary to support this award will be summarized.

1. Claimant is 67 years old and currently is retired. Claimant has worked as a steel fitter welder since he was 18 years old. Claimant's work duties included using noisy large welding tools, his work environment had low ceilings that intensified the noise, and co-workers performed welding in close proximity to one another. Although ear plugs were occasionally provided by Kupferer Brothers Ornamental (Employer), workers had to hear clearly as large pieces of steel were frequently moved and the workers moved to avoid injury. Over time Claimant noticed his hearing was diminishing. After he retired, Claimant underwent hearing evaluation and was diagnosed with bilateral occupational hearing loss. Claimant settled his case with Employer for 22.1% PPD referable to the 180 week level. As of hearing, Claimant continues to use bilateral hearing aids, and supplements the hearing aids by lip reading.

2. Claimant has the following preexisting injuries/conditions that do not meet the necessary statutory thresholds for SIF liability:

1991 right knee – during 1991 a 60 pound weight struck Claimant's right knee. Claimant was diagnosed with a contusion and sprain. Claimant settled his case with Employer for 7% PPD referable to his knee.

1997 left ankle and both feet – during 1997 a heavy metal door struck Claimant's left ankle. Claimant was diagnosed with an ankle contusion. While receiving medical care, Claimant developed bilateral heel pain and was diagnosed with plantar fasciitis. He was provided shoe orthotics. Claimant settled his case with Employer for 2 1/4th % PPD referable to his ankle.

2002 left foot - During 2002, Claimant suffered a crush injury to his left foot. Claimant was diagnosed with a contusion and sprain, and a chip fracture at the base of his left great toe. Claimant settled his case with Employer for 8% PPD referable to the 150 week level.

3. Claimant has preexisting injuries to his lumbar spine and right shoulder that meet the statutory threshold for SIF liability. During the 1980's Claimant fell 16 feet onto concrete injuring his low back. Claimant was hospitalized for several days and missed approximately one month from work. Throughout the years, Claimant continued to work with low back pain wearing a back brace. During 2006, Claimant's internist obtained a MRI of his back that demonstrated an old wedge compression fracture, disc bulges at L1-2 and L2-3, borderline stenosis, and a syrinx involving the entire T-spine. Claimant continued to wear his back brace, was provided narcotic pain medication, and epidural steroid injections were recommended. Before retiring, Claimant's internist attempted to restrict his work hours, but Employer could not accommodate the restriction and Claimant continued to work full-time. On occasion Claimant would leave work early due to low back pain. As of hearing, Claimant continues to experience difficulty bending forward and kneeling. During 2005, Claimant injured his right shoulder at work. Claimant was diagnosed with impingement, biceps tendonitis, and a partial rotator cuff tear. Claimant underwent surgery for subacromial decompression and rotator cuff repair. Claimant settled his case with Employer for 20% PPD referable to the right shoulder. As of hearing, Claimant continues to experience right shoulder pain, loss of shoulder motion, and shoulder weakness. Claimant testified after his shoulder surgery Employer placed him close to a jib crane to allow him assistance with lifting. Claimant continues to take pain medication for his shoulder.

4. Dr. Volarich examined Claimant at his request on January 30, 2012. During examination, Dr. Volarich noted the following abnormalities related to Claimant's hearing, low back, and right shoulder as follows: use of bilateral hearing aids; decreased lumbar range of motion; low back pain with forward flexion; decreased right shoulder range of motion; mild positive right shoulder impingement testing; and atrophy of the right deltoid and rotator cuff. Dr. Volarich rated the primary injury at 22.1% BAW PPD referable to binaural loss. Dr. Volarich rated the preexisting injuries as follows: 17.5% BAW PPD referable to the lumbar spine; and 25% PPD referable to the right shoulder.¹ Dr. Volarich found Claimant's disabilities combined to create a substantially greater disability than the simple sum, and that the disabilities were a hindrance or obstacle to obtaining or maintaining employment.

RULINGS OF LAW WITH SUPPLEMENTAL FINDINGS

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

Issues related to SIF liability for PPD benefits in occupational disease cases

SIF alleges that due to the application of "strict construction" following the 2005 amendments to Chapter 287 RSMo., a primary injury caused by occupational disease can no longer be considered a "subsequent injury" subject to SIF liability. SIF has raised this argument in numerous cases, and its argument was recently considered by the Labor & Industrial Relations Commission (LIRC) and rejected in multiple cases.² The LIRC set forth its argument as follows:

"The Second Injury Fund argues that employee's right wrist injury does not qualify as "a subsequent compensable injury" for purposes of triggering Second Injury Fund liability under § 287.220.1 RSMo, which provides, as follows:

...If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed,...receives a subsequent compensable injury resulting in additional permanent partial disability...so that the degree or percentage of disability,...caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions

¹ Dr. Volarich also rating other preexisting injuries that are not found to meet the statutory thresholds for SIF liability.

² See *Steirs v. SIF*, Injury No.:08-095300; *Kitson v. SIF*, Injury No.: 09-000988; and *Peters v. SIF*, Injury No.: 07-114673.

existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for. (Emphasis added).

We summarize our understanding of the Second Injury Fund's argument and legal reasoning as applied to the facts of this claim: "Injury" as defined in § 287.020.3 RSMo excludes occupational diseases. Employee's right wrist injury is an occupational disease. Thus, employee's right wrist injury is not an "injury." Employee has failed to prove she suffered a "subsequent compensable injury" under § 287.220.1, so the Second Injury Fund is not implicated in this matter.

The Second Injury Fund argument fails. The Second Injury Fund fails to give effect to the complete definition of injury in § 287.020.3. The complete definition includes occupational diseases within the definition of "injury" where specifically provided in Chapter 287. Section 287.020.3(5) RSMo states:

The terms "injury" and "personal injuries" shall mean violence to the physical structure of the body and to the personal property which is used to make up the physical structure of the body, such as artificial dentures, artificial limbs, glass eyes, eyeglasses, and other prostheses which are placed in or on the body to replace the physical structure and such disease or infection as naturally results therefrom. *These terms shall in no case except as specifically provided in this chapter be construed to include occupational disease in any form*, nor shall they be construed to include any contagious or infectious disease contracted during the course of the employment, nor shall they include death due to natural causes occurring while the worker is at work. (Emphasis added).

Chapter 287 specifically provides for injuries by occupational disease and specifically says those injuries are compensable. Section 287.067 RSMo states, in relevant part:

2. An injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

3. An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. An occupational disease due to repetitive motion is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing

both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

8. With regard to occupational disease due to repetitive motion, if the exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than three months and the evidence demonstrates that the exposure to the repetitive motion with the immediate prior employer was the prevailing factor in causing the injury, the prior employer shall be liable for such occupational disease. (Emphasis added).

The above sections specifically refer to a condition of ill caused by occupational disease as an “injury.” That is, the legislature specifically provided that the term “injury” includes occupational disease and that injuries by occupational disease are compensable. Based upon the foregoing, we construe the term “injury” as it appears in the phrase “subsequent compensable injury” in § 287.220.1 to include occupational diseases.”

Kitson v. SIF, Injury No.: 09-000988

I adopt the legal reasoning and conclusions set forth by the LIRC, and find Claimant’s primary occupational disease injury is a subsequent compensable injury as required by statute for consideration of SIF liability.

Issues related to SIF liability for PPD benefits

Section 287.220.1 RSMo., provides SIF is implicated in all cases of permanent partial disability where there has been previous disability that created a hindrance or obstacle to employment or re-employment, and the primary injury along with the pre-existing disability(s) reach a threshold of 50 weeks (12.5%) for a body as a whole injury or 15% of a major extremity. The combination of the primary and preexisting conditions must produce additional disability greater than the simple sum of the conditions.

Claimant’s primary injury settled by compromise and produced PPD disability of 22.1% PPD referable to binaural hearing loss at the 180 week level. The parties stipulate to this level of disability, and I adopt this PPD percentage when considering Claimant’s SIF claim. Claimant’s documented preexisting disability is to his lumbar spine and right shoulder. The parties stipulated Claimant’s lumbar spine disability represents 12.5% BAW PPD, and the right shoulder disability represents 20% PPD. I adopt these percentages when considering Claimant’s SIF PPD claim. I further find the conditions to have been a hindrance or obstacle to his employment or reemployment.

Taking into account Claimant’s preexisting disabilities, and combining these disabilities with his work related hearing loss; I find the combination synergistically produces a disability greater than the simple sum. Applying a 12.5% load factor, I find SIF to be liable for 17.02 weeks of PPD disability or \$6,408.88.

CONCLUSION

Claimant's work at Employer was the prevailing factor in causing binaural hearing loss. Claimant has preexisting disability to his lumbar spine and right shoulder that meet the statutory threshold for SIF liability. SIF is liable for PPD benefits in the amount of \$6,408.88. Claimant's attorney is entitled to a 25% lien.

Date: _____

Made by: _____

LINDA J. WENMAN
Administrative Law Judge
Division of Workers' Compensation