

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

Injury No.: 03-140527

Employee: Paul T. Earnhart, Jr.
Employer: Harrah's St. Louis (Settled)
Insurer: Self-Insured (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: October 1, 2003
Place and County of Accident: St. Louis County

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 8, 2008. The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued February 8, 2008, 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 19th day of September 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee:	Paul T. Earnhart, Jr.	Injury No.:	03-140527
Dependents:	N/A	Before the	
Employer:	Harrah's St. Louis (settled)	Division of Workers'	
Additional Party:	Second Injury Fund	Compensation	
Insurer:	Self Insured (settled)	Department of Labor and Industrial	
Hearing Date:	November 6, 2007	Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	KOB: ms

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
 - 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.
 - Date of accident or onset of occupational disease: October 1, 2003.
 - State location where accident occurred or occupational disease was contracted: St. Louis County
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.
 - Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant performed many repetitive tasks with his left upper extremity, including counting cash, which caused him to develop triggering in his left ring finger.
12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Left upper extremity at the wrist/ring finger.

- Nature and extent of any permanent disability: 6% PPD of the left wrist; PTD due to a combination.

15. Compensation paid to-date for temporary disability: \$0.00

16. Value necessary medical aid paid to date by employer/insurer? \$2,176.44.

Employee: Paul T. Earnhart, Jr.

Injury No.: 03-140527

17. Value necessary medical aid not furnished by employer/insurer? N/A

- Employee's average weekly wages: Not determined.

19. Weekly compensation rate: \$347.05 / \$347.05

20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Previously settled.

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:

A weekly benefit of \$347.05 beginning September 26, 2005 for Claimant's lifetime.

Total:

Indeterminate

23. Future requirements awarded: None, other than permanent, total disability benefits.

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

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Paul T. Earnhart, Jr.

Injury No.: 03-140527

Dependents: N/A

Employer: Harrah's St. Louis (settled)

Additional Party: Second Injury Fund

Insurer: Self Insured (settled)

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: KOB: ms

PRELIMINARIES

Five Workers' Compensation claims of Paul T. Earnhart, Jr. ("Claimant") proceeded to hearing concurrently. Attorney James Hoffmann represented Claimant. Assistant Attorney General Da-Niel Cunningham represented the Second Injury Fund.

With respect to Injury No. 03-140527, a left ring finger injury occurring on or about October 1, 2003 ("Ring Finger Case"), Harrah's St. Louis ("Employer") settled its risk of liability and is not a party to the claim. Claimant and the Second Injury Fund agree that on the date of injury, Claimant was an employee of Employer earning an average weekly wage sufficient to qualify for rate of compensation of \$347.05 for both permanent total disability and permanent partial disability benefits. Venue, notice, timeliness of the claim, and coverage of the Act were not at issue. Employer paid no temporary total disability benefits, but did pay medical benefits totaling \$2,176.44.

The issues to be determined in the Ring Finger Case are:

- Is Claimant's work causally connected to his left ring finger injury;
- Is Claimant permanently and totally disabled; and
- What is the liability of the Second Injury Fund?

The other cases tried with the Ring Finger Case are Injury No. 01-168623, a right shoulder injury occurring on or about June 1, 2001 ("2001 Right Shoulder Case"), Injury No. 01-169157, a Bilateralwrist injury occurring on or about July 31, 2001 ("Bilateral Wrist Case"), Injury No. 02-017287, a right shoulder injury occurring on or about January 3, 2002 ("2002 Right Shoulder Case"), and Injury No. 02-138916, a left elbow injury occurring on or about December 1, 2002, ("Left Elbow Case"). Claimant seeks to recover permanent total disability benefits from the Second Injury Fund.

FINDINGS OF FACT

Claimant's Testimony & Medical Records

Claimant is a 59 year old married man who graduated from high school in 1966, attended St. Ambrose College for two years, and served as an instrument technician in the United States Air Force for four years. As an instrument technician, Claimant was trained to troubleshoot, update, and maintain instrument systems on the F-106 fighter aircraft.

Over the years, Claimant's vocational history has consisted mostly of management positions in the food service industry and work as a cashier. In the mid to late 1990's, Claimant worked as a manager at various restaurants, including a Pizza Hut in Illinois. Thereafter, he worked several months as a Convenience Food Mart cashier where he sold cigarettes, checked out customers, mopped the floor, and stocked shelves.

Before 1998, Claimant underwent a series of surgical interventions to his shoulders. Treatment of the left shoulder by Dr. Serot included a July 21, 1986 arthroscopy to repair a frayed rotator cuff; surgical treatment for left shoulder impingement syndrome on February 6, 1987; and an August 26, 1987 surgery to repair a torn rotator cuff and labrum. On September 23, 1986, on the right shoulder, Dr. Serot performed a surgical arthroscopy, open acromionplasty with excision of outer end of clavical and release of coroco acromion to address the diagnosed impingement syndrome. According to Dr. Kappel, in September 1986, Dr. Serot debrided inflamed tissue, but did not repair Claimant's torn right rotator cuff.

Claimant testified that following the series of surgeries in the mid 1980's, he was able to return to work at full duty with no restrictions, discomfort, or problems. However, in 1995, when staffing problems required him to do heavy work at Pizza Hut, Claimant saw his personal doctor for right shoulder pain. He testified with conservative treatment and a return to his normal duties, the pain in his right shoulder resolved. Away from work, Claimant testified that he was able to do all activities he needed. For example, prior to 1998, Claimant washed windows, cleaned ceiling fans, and dusted corners in his house. His hobby was assembling electronic kits, and he cooked for his family. He did various types of yard work, including cutting the grass, planting, gardening, and decorating for every holiday.

In November of 1998, Claimant began working for Employer as a cashier in the main cage, where his job was to wait on guests getting or exchanging tokens. In the beginning, he worked forty hours per week with some overtime, and had no physical restrictions. The job required him to use his upper extremities to push or pull up to ten pounds, lift up to forty pounds, stand, reach above his head, bend and twist, perform work quickly, and process cash transactions. When a customer turned in his or her winnings, Claimant dumped the coins to the jet sort machine for sorting. Claimant bent down to seal the filled bag, picked it up, and stored it in a cabinet behind him or placed it on a cart, which he pushed to the vault. Claimant testified he filled up to 130 bags a day, and lifted each bag once or twice, depending on how busy he was. Most of the lifting was performed at or below waist level.

In addition to lifting coin bags, Claimant had to use his upper extremities to comply with Employer's "high-five" policy. The high-five policy required an employee to raise his or her hand to strike another's raised hand as a form of greeting or congratulations. Giving a high-five to fellow employees as part of the pre-shift routine was always mandatory, but beginning in 2001, it became company policy for employees to high-five customers as well. Claimant testified he averaged one hundred high-fives per shift.

With the lifting and high-five activities, Claimant started to develop right shoulder pain in late 2000 and early 2001 (the 2001 Right Shoulder Case). Claimant told his supervisors the activities aggravated his symptoms, but Employer did not provide Workers' Compensation benefits. Claimant saw Dr. Kruse on June 12, 2001, who referred him to Dr. Kappel for his shoulder. An MRI of the right shoulder revealed a large rotator cuff tear, and after trying injections, Dr. Kappel performed surgery to repair the tear on September 19, 2001. Following his 2001 right shoulder surgery, Claimant returned to his same job in the cashier's booth. On December 10, 2001, Dr. Kappel imposed restrictions of no lifting or reaching over head.

In addition to sending Claimant to a shoulder surgeon, Dr. Kruse also referred Claimant to a neurologist, Dr. Berger, for his hands. Claimant had noticed hand numbness, worse at night. In July 2001, Dr. Berger diagnosed bilateral carpal tunnel. Employer ultimately accepted liability, and authorized treatment with Dr. David Brown. After unsuccessful conservative treatment, Dr. Brown performed carpal tunnel releases on June 3 and 17, 2005. Dr. Brown placed Claimant at MMI as of September 26, 2005, and released Claimant to full duty without restrictions. Employer paid all benefits in the primary portion of the Bilateral Wrist Case, including medical treatment and a Compromise Lump Sum Settlement in an amount representing 17½% PPD of each upper extremity at the wrist. Claimant testified that following surgery, his hands were not as good as before he started working for Employer. He has trouble picking things up, and experiences swelling in his hands.

On January 3, 2002, Claimant was standing at his window waiting for customers, when his co-worker, Katrina Jones, began to throw a punch at him as a form of greeting. The punch was headed towards Claimant's injured right arm, so in an attempt to avoid the blow, he jerked his right arm away, and immediately felt an intense stabbing pain. This incident is the basis of the 2002 Right Shoulder Case. His supervisor observed the event, came to his aid, and

told him to see Dr. Kappel. An MRI taken on February 18, 2001, showed a complete re-tear of the rotator cuff as well as new tear of the deltoid. After a February 27, 2002 visit to Concentra, Claimant consulted with Dr. Galatz, a shoulder specialist from Washington University. On March 9, 2002, Dr. Galatz restricted Claimant's right upper extremity use, and told him he needed a shoulder fusion. Claimant notified Employer, but got no response. Employer requested second opinions from Dr. Kopp and Dr. Rottmann, but neither doctor provided treatment. Employer continued to deny liability for the 2002 Right Shoulder Case.

Despite the restrictions, Claimant's right shoulder was getting weaker, he had trouble lifting, and he treated conservatively. He continued to work through the year 2002, but he felt his right arm was useless to him, except for signing his name and holding items in place. On March 6, 2003, Dr. Galatz performed a shoulder fusion involving an autograft of bone from his hip and the placement of a 15 inch plate and 10 screws to markedly reduce range of motion of the right shoulder. Claimant was off work from March 6, 2003, to May 29, 2003, but he received short term disability. Following his surgery, Claimant was under restrictions of no use of his right upper extremity, no lifting, but arm to remain at side with the left arm operating to assist any motion of the right.

Both the Left Elbow Case and the Ring Finger Case arose while Claimant continued to work under the strict right upper extremity restrictions of Dr. Galatz. Claimant had to use his left hand for nearly all activities, including accepting payment, picking up money, and making computer entries. Having to rely on his non-dominant, left arm, Claimant noticed an increase in symptoms in his left arm at the elbow. Dr. Brown, the authorized treating physician, diagnosed medial epicondylitis, attempted conservative treatment, and ultimately performed surgery on March 12, 2004. Employer accepted responsibility for the Left Elbow Case, paid medical and temporary total disability benefits, and made a compromise payment representing permanent partial disability of 17½% of the left elbow. Dr. Brown placed Claimant at maximum medical improvement for the Left Elbow Case on July 13, 2004, and released Claimant with restrictions consistent with a ProRehab functional capacity exam ("FCE") finding Claimant could work heavy demand but not work full time as casino cashier.

Also during the time he worked as a cashier with right arm restrictions, Claimant developed triggering of his left ring finger, which he attributed to counting cash with his left hand. Employer accepted responsibility for the Ring Finger Case, and again authorized Dr. Brown to perform surgery. Claimant underwent a left ring finger tendon release on April 2, 2004. Employer settled its portion of the Ring Finger Case for the equivalent of 6% of the left hand. Dr. Brown placed Claimant at maximum medical improvement for the Ring Finger Case on July 13, 2004, and released Claimant to full duty with restrictions consistent with the FCE.

Following this series of surgeries, Employer transferred Claimant to a customer service position, which involved work with the hands. He had to sort paper and make computer entries. Claimant felt he was overusing his arms in customer service. Thereafter, Employer transferred Claimant to the income control department, which he found harder because he had to use his upper extremities to scan coupons. Claimant attempted to sort coins in the coin vault. However, due to difficulty gripping, he often dropped coins which raised security issues. He also found his left elbow was getting knocked on the table. At these jobs, Claimant's left hand was getting worse and he had to take increasing levels of pain medication.

In September 2004, Employer gave Claimant an ultimatum. Supervisors told him he could not do his job as a cashier, and he had thirty days to find another job within Harrah's or be terminated. Employer offered no assistance in finding a new job within his restrictions, and despite his efforts, Claimant could find no one within Harrah's willing to give him a job. On October 15, 2004, Employer terminated Claimant due to his permanent medical restrictions and inability to find a position at Harrah's within his restrictions. Following his termination by Employer, Claimant has not worked. He admitted to being depressed due to his medical issues and his treatment by Employer. He considered position at Wal-Mart, but did not apply because he was told if he could not work at Harrah's, he could not work at Wal-Mart.

Claimant's current symptoms primarily involve his right arm. He cannot reach or move it back and forth. He has to use his left hand to move his right in order to perform any activity. Claimant's mobility is limited to being able, with assistance from his left hand, to move his right hand to cover his heart. Claimant needs help dressing and with showers. He has trouble sleeping, because he needs to prop his fused arm on a pillow. His range of motion is

markedly decreased. He does not have the strength to lift a gallon of milk, and cannot start a car with his right hand, which affects his ability to drive. Claimant testified that his right shoulder is painful, his left elbow still hurts, and he still has some triggering and pain in his left hand. Claimant takes pain medication for all his injured extremities. Claimant believes his right shoulder alone may keep him from working.

Employer produced **Matthew McCreary**, a safety risk manager, as its corporate designee to give a deposition answering several specific questions posed by Claimant's attorney. Mr. McCreary was unable to directly answer most of the substantive questions, and based much of his testimony on what he was told by another employee. Although he initially denied Employer had a written, formal high-five policy, documents in Claimant's personnel file confirmed Claimant's department had written expectations and goals requiring employees in general, and Claimant in particular, to high-five fellow employees and customers. Claimant acknowledged an understanding of these expectations in writing on April 18, 2001. According to his file, Claimant was dependable and gave a noteworthy performance in his job leading up to 2004.

Medical Expert Testimony

Dr. Stephen Kappel of Orthopedic & Sports Medicine gave a deposition on November 25, 2003, detailing his treatment of and conclusions regarding Claimant's right shoulder to date. On July 10, 2001, Dr. Kappel initially diagnosed a possible re-tear of the right rotator cuff, but after review concluded the tear was chronic and the symptoms were acute. On September 19, 2001, Dr. Kappel performed a surgical repair of a massive tear of right rotator cuff with acromioplasty, and he testified the charges totaling \$10,869.00 were reasonable. In the four months that followed, Claimant did well, reported improved sleep, and experienced a reduction of pain. However, on January 14, 2002, Claimant reported problems to Dr. Kappel stemming from a punching incident at work. A February 18, 2002 MRI showed complete tears of infraspinatus and supraspinatus tendons with new edema within the deltoid.

Regarding causation, Dr. Kappel concluded that while Claimant's initial right rotator cuff tear was chronic and existed since 1986, any motion overhead could aggravate the subacromial area causing symptoms. Thus, while the high-fives did not cause the rotator cuff to tear in 2001, the high-five activity was a substantial factor causing symptoms that required the surgery of September 19, 2001, in light of no other activity over the shoulder. As for the 2002 Right Shoulder Case, Dr. Kappel believed the injury at work where Claimant was struck in arm, flinched, and pulled away from the blow was substantial cause of the re-tear of the rotator cuff, because he had been able to function well to that time.

Dr. Leesa Galatz, a board certified orthopedic surgeon specializing in treatment of the shoulder and elbow, testified by deposition on August 12, 2003. On March 12, 2002, Dr. Galatz examined Claimant, and diagnosed 1)unstable os acromiale from a prior surgery with not enough bone for fixation; 2)massive rotator cuff tear with retraction; and 3) anterior deltoid insufficiency. Claimant was not a candidate for muscle transfer, and she recommended a fusion, which she performed on March 6, 2003. As of the deposition date, Dr. Galatz was still treating Claimant, and she expected him to reach MMI one year after his fusion surgery.

On the issue of causation, Dr. Galatz could only opine regarding the 2002 Right Shoulder Case. She acknowledged massive tears such as Claimant's generally have a high rate of recurrence. However, she felt the punching incident at work was a substantial factor in the re-tear of the rotator cuff requiring the surgery she performed. Her conclusion was based on the fact the punching incident was a turning point in his post-operative care; whereas he was doing well and could work in the months following the September 19, 2001 surgery by Dr. Kappel, after the punching incident, Claimant was in severe pain and was unable to work. Dr. Galatz gave restrictions of no use of the right upper extremity except for non-weight bearing activities with his arm at his side, no overhead motion, and no repetitive motion or activities with the arm outstretched.

Dr. David Volarich examined Claimant, issued a report and testified by deposition in September 2006 on behalf of Claimant. He took histories of the five accidents at issue which were consistent with the evidence at hearing. With regard to the 2001 Right Shoulder Case, Claimant experienced pain in the previously operated right shoulder after repetitively lifting bags of coin and putting them behind him on a cart. Furthermore, the revised high-five policy effective in April 2001 caused an increase in symptoms. As for the 2002 Right Shoulder Case, Dr. Volarich

understood Claimant reinjured his recently operated right shoulder when he tried unsuccessfully to avoid a punch from a coworker. Dr. Volarich explained how the mechanics of Claimant's lifting stressed his shoulder, even when the lifting was at or below waist level. He also made clear the mechanics of injury with the high-five policy and the punch/avoidance maneuver. Regarding the remaining left upper extremity injuries, Dr. Volarich considered Claimant did a variety of hand intensive tasks at work, including counting money, stamping coupons, writing, gripping, pinching, lifting, and giving high-fives. He also factored in the risk of overuse when, as here, there is a problem with the opposite extremity. The histories regarding the left upper extremities were not as extensive because Claimant had settled those cases with Employer.

The examination Dr. Volarich performed was consistent with the evidence and supported all diagnoses he made. Dr. Volarich concluded Claimant's repetitive trauma in lifting coin and performing high-fives were substantial factors in the 2001 Right Shoulder Case, and the punching incident (blunt trauma and flinching) was a substantial factor in the 2002 Right Shoulder Case. Repetitive counting of coins, writing, gripping and pinching were the substantial factors in the Bilateral Wrist Case, and repetitive gripping and lifting were the substantial factors in the Ring Finger Case. Similarly, over use of the left upper extremity due to job activities was the substantial factor in the Left Elbow Case. Dr. Volarich gave significant restrictions on the right upper extremity (no weight greater than a writing implement or utensil), the left shoulder (i.e. avoid overhead work, prolonged use of arm or lifting over one to three pounds away from body, ...), and the left elbow/forearm/wrist/hand (i.e., minimize repetitive actions, avoid impact and vibratory trauma, limit weight lifted,...).

With respect to permanent partial disability, Dr. Volarich assigned the following percentages of disability: 25% of the right upper extremity for the 2001 Right Shoulder Case; 40% of the right upper extremity for the 2002 Right Shoulder Case; 17 ½ % of each wrist for the Bilateral Wrist Case; 17 ½ % of the elbow for the Left Elbow Case, and 6% of the left hand for the Trigger Finger Case. Regarding preexisting disability, Dr. Volarich found disability of 25% of the right upper extremity and 50% of the left upper extremity from the surgeries Claimant had in the 1980's. He affirmed Claimant's treatment was consistent with the standard of care for each injury, the charges incurred were reasonable, and he is at maximum medical improvement, but will need ongoing pain management. Finally, Dr. Volarich concluded Claimant was permanently and totally disabled as a result of the combination of the June 2001, July 2001, November 2002, December 2002 and October 2003 injuries.

Dr. Mitchell Rotman evaluated Claimant twice on behalf of Employer, in March 2002 and July 2006. Dr. Rotman took a history each time that was consistent with the evidence at hearing. In 2002, the physical exam was positive for right shoulder crepitus, suspected atrophy and a positive drop arm test, and Dr. Rotman made no mention of symptom magnification. However, in 2006, after his shoulder fusion, Dr. Rotman concluded Claimant grossly magnified his subjective complaints, which therefore could not be trusted. Dr. Rotman concluded Claimant has suffered from a chronic, progressive disease called rotator cuff arthropathy since the 1980's. Dr. Rotman concluded neither the high-fives, nor the coin lifting, nor the punching incident were substantial factors in the 2001 or 2002 Right Shoulder Cases. Rather, Dr. Serot never repaired the tear in 1986, and the repair performed by Dr. Kappel in 2001 was doomed to failure. In Dr. Rotman's opinion, none of Claimant's shoulder problems were related to his work activities.

Mr. Timothy Lalk is a vocational expert who met with Claimant, reviewed records, administered testing, issued a report dated October 16, 2006, and testified by deposition on March 2, 2007. The information he gleaned from Claimant was very detailed and consistent with the evidence at hearing. Testing revealed Claimant had high school reading ability and 8th grade math aptitude. When he considered the restriction of Dr. Galatz for the right upper extremity, Mr. Lalk thought Claimant could possibly work in some unskilled sedentary or near sedentary position like a convenience store cashier, information clerk or telephone customer service representative. However, when he considered Dr. Volarich's restrictions with Claimant's symptoms, limitations and presentation, Mr. Lalk concluded Claimant is not able to secure and maintain employment in the open labor market. With such difficulties, Claimant could not function on a regular basis for any employer, and vocational rehabilitation services would not benefit Claimant.

Ms. Donna Kisslinger Abram is a vocational expert who received permission to meet with Claimant, reviewed records and reached a conclusion concerning his level of employability. The meeting occurred on November

21, 2006, the report was dated January 21, 2007, and the deposition occurred on July 18, 2007. Considering her interview, the records, and the other expert opinions, Ms. Abram concluded Claimant has “employability,” or the skills necessary to do or learn jobs in the open labor market. Such jobs might include clerk, salesman or consultant, as long as he does not have to move merchandise. However, when taking into account Claimant’s entire situation, including subjective factors, Ms. Abram was not sure Claimant had “placeability,” or the ability to secure and maintain employment.

RULINGS OF LAW

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:

- Claimant’s Ring Finger injury is causally connected to his work.

Claimant must also establish, generally through expert testimony, the probability that the claimed occupational disease was caused by conditions in the work place. *Kelley v. Banta & Stude Const. Co., Inc.* 1 S.W.3d 43, 48 (Mo.App. E.D. 1999)(citations omitted). Claimant must prove “a direct causal connection between the conditions under which the work is performed and the occupational disease.” *Id.* A single medical opinion will support a finding of compensability even where the causes of the disease are indeterminate. *Id.* Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. *Id.*

The credible medical evidence establishes a direct causal connection between the conditions under which the work is performed and the occupational disease. Leading up to October 2003, Claimant was working under severe restrictions to his right arm. As a result, he was using his left arm and hand almost exclusively for all tasks, including accepting payment, picking up money, stamping coupons, and making computer entries. In particular, Claimant had to use his left ring finger in counting cash, one of his primary job duties. As of March 8, 2004, Dr. Brown, the authorized treating physician, found Claimant’s job to be repetitive, and considered the job to be a significant contributing factor in the development of his trigger finger. Dr. Volarich concurred. There is no evidence to the contrary. I find Claimant’s Ring Finger injury is causally connected to his work.

Based on the substantial and competent evidence of record, I find the permanent partial disability which resulted from the Ring Finger Case is equivalent to 6% of the left hand at the wrist.

2. Claimant is permanently and totally disabled.

Claimant seeks to recover permanent total disability benefits under the Missouri Workers Compensation Law. “Total disability” is statutorily defined as 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. § 287.020.7. The test for permanent total disability is the worker's ability to compete in the open labor market. *Sutton v. Vee Jay Cement Contracting Co.*, 37 S.W.3d 803, 811 (Mo. App. 2000). The critical question is whether, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition. *Id.*; *Gassen v. Lienbengood*, 134 S.W.3d 75, 80 (Mo. App. 2004).

I find the overwhelming weight of the credible evidence, including the expert medical evidence, treatment records, vocational opinions, and Claimant’s testimony, presentation and complaints, establishes Claimant is not able to compete for and maintain employment in the open labor market. The function of Claimant’s right arm is so limited by virtue of the doctor imposed restrictions and the fusion surgery that it is of no vocational use whatsoever. The left upper extremity is not so restricted, but it has been operated upon multiple times and has permanent disability. Claimant’s pain, and the medications he takes to control it, are vocational detriments. After extensive review of the case, Dr. Volarich reached the conclusion Claimant was permanently and totally disabled. Of the vocational experts, I find Mr. Lalk to be more persuasive than Ms. Abram, although even Ms. Abram concludes Claimant would find it very difficult to maintain a job given his current status. Mr. Lalk takes into account the restrictions of Dr. Volarich, who is

the only medical expert to consider all Claimant's disabilities, and concludes Claimant is permanently and totally disabled. I find Claimant is unable to compete in the open labor market.

3. The Second Injury Fund is liable for permanent total disability benefits.

Claimant seeks to recover permanent total disability benefits from the Second Injury Fund. In deciding whether the Second Injury Fund has any liability, the first determination is the degree of disability from the last injury. *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo.App. E.D.,2000)(citations omitted). Until that disability is determined, it is not known whether the second injury fund has any liability. *Id.* Accordingly, a claimant's preexisting disabilities are irrelevant until employer's liability for the last injury is determined. *Id.*, citing *Kizior v. Trans World Airlines*, 5 S.W.3d 195, 201 (Mo.App. W.D.1999). If a claimant's last injury in and of itself rendered the claimant permanently and totally disabled, then the Second Injury Fund has no liability and employer is responsible for the entire amount. *Id.*

There is no credible evidence to suggest Claimant's Ring Finger injury is permanently and totally disabling in degree. In this case, the weight of the evidence establishes Claimant's last injury to his left ring finger is permanently and partially disabling, in a degree equivalent to approximately 6% of the left hand. This injury, in and of itself, does not totally disable Claimant. Thus, the inquiry into Second Injury Fund liability continues.

To prevail against the Second Injury Fund on a claim for permanent total disability, a claimant must establish that: (1) she had a permanent partial disability at the time she sustained the work-related injury and (2) the preexisting permanent partial disability was of such seriousness as to constitute a hindrance or obstacle to her employment. § 287.220.1 RSMo 2000; *Motton v. Outsource Intern.*, 77 S.W.3d 669, 673 (Mo.App. E.D.2002), as cited in *Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 634 -635 (Mo.App. E.D. 2007). Claimant's preexisting permanent partial disabilities have been the subject of the companion cases, and are well discussed in this and the related awards. I find Claimant's preexisting disabilities to the bilateral upper extremities at the shoulders and wrists, as well as the left elbow, existed at the time of the Ring Finger Case injury, and were of such seriousness as to constitute a hindrance or obstacle to employment. On this point, Claimant prevails.

Finally, Claimant bears the burden of showing that he is permanently and totally disabled due to the combination of his primary and preexisting disabilities. Without repeating the discussion above regarding total disability, I will reiterate the finding Claimant is permanently and totally disabled due to a combination of disabilities. I find Claimant is permanently and totally disabled as of September 26, 2005, the day Claimant reached MMI from his Bilateral Wrist Case. The point at which no further improvement is expected is referred to as the point of "maximum medical improvement." *Herring v. Yellow Freight System, Inc.*, 914 S.W.2d 816, 821 (Mo.App. W.D.1995)(overruled on other grounds in *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 227 (Mo. banc 2003)); *Harris v. Treasurer of State*, 192 S.W.3d 531, 533 (Mo.App. E.D. 2006). Claimant cannot be found permanently disabled due to a combination of disabilities until all such disabilities have reached the point at which no further improvement was expected. Thus, even though the Bilateral Wrist Case is a separate claim, I find Claimant is not permanently and totally disabled until he is at MMI for his last actively treated disability. There is no differential. The Second Injury Fund's liability for permanent total disability compensation at a weekly rate of \$347.05 will commence as of September 26, 2005.

CONCLUSION

Claimant is permanently and totally disabled due to the combination of his last left hand injury and the multiple disabilities to his bilateral upper extremities. The Second Injury Fund is liable for permanent total disability benefits as described in this Award. This Award is subject to a lien of 25% in favor of attorney James Hoffmann.

Date: _____

Made by: _____

Karla Ogrodnik Boresi
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey W. Buker
Director
Division of Workers' Compensation

Attorney Julie Hovermale represented Employer in the 2001 Right Shoulder Case and the 2002 Right Shoulder Case.
Mr. Lalk produced a subsequent report on May 14, 2007, and testified by deposition on July 17, 2007. His opinions were unchanged.