

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

Injury No.: 09-005055

Employee: Jeffrey Farny  
Employer: Ameren UE (Settled)  
Insurer: Self-Insured (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 November 1, 2011. The award and decision of Chief Administrative Law Judge Grant C. Gorman, issued November 1, 2011, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 12th day of April 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING  
\_\_\_\_\_  
William F. Ringer, Chairman

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

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

Attest:

\_\_\_\_\_  
Secretary

## AWARD

Employee: Jeffrey Farny

Injury No. 09-005055

Dependents: None

Employer: Ameren UE (settled)

Additional Party: Second Injury Fund

Insurer: Settled

Hearing Date: August 1, 2011

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

Checked by: GCG/ln

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: January 14, 2009
5. State location where accident occurred or occupational disease was contracted: Franklin County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant performed repetitive tasks with his hands in the course and scope of employment.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right and left wrists
14. Nature and extent of any permanent disability: Primary: 17.5% right wrist and 15% left wrist. Pre-existing: 22.5% right shoulder, 40% left shoulder and 27.5% body as a whole for the low back.
15. Compensation paid to-date for temporary disability: \$2,207.22
16. Value necessary medical aid paid to date by employer/insurer? \$8,865.40

Employee: Jeffrey Farny

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- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: Undetermined
- 19. Weekly compensation rate: \$772.53 TTD/\$404.66 PPD
- 20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

21. Amount of compensation payable: Settled

22. Second Injury Fund liability: Yes

46.78 weeks of permanent partial disability from Second Injury Fund \$18,929.99

TOTAL: \$18,929.99

23. Future requirements awarded: None

Said payments to begin as of the date of this award and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 20% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Ann Dalton

Employee: Jeffrey Farny

Injury No. 09-005055

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

Employee: Jeffrey Farny

Injury No: 09-005055

Dependents: None

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Employer: Ameren UE (settled)

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

Additional Party Second Injury Fund

Insurer: Settled

Checked by: GCG/ln

### **PRELIMINARY STATEMENT**

The parties appeared before the undersigned Administrative Law Judge on August 1, 2011 for a final hearing to determine the liability of the Second Injury Fund in the matter of Jeffrey Farny ("Claimant"). Attorney Ann Dalton represented Claimant. Assistant Attorney General Jennifer Sommers represented the Second Injury Fund. The Employer, Ameren UE, and its Insurer previously settled with Claimant and did not participate in the hearing. The parties submitted post-trial briefs.

The parties stipulated to the following:

1. On or about 1-14-09, Claimant sustained an occupational disease arising out of and in the course of employment that resulted in injury to Claimant's right and left hands. The accident occurred in Franklin County.
2. Claimant was an employee of Employer pursuant to Chapter 287 RSMo.
3. Venue is proper in Franklin County, MO.
4. Employer received proper notice of the claim.
5. Claimant filed the claim within the time allowed by law.
6. The average weekly wage at the date of injury was enough to result in rates of \$772.53 for total disability (TTD), and \$404.66 for permanent partial disability (PPD).
7. Employer paid \$2,207.22 in TTD benefits, representing 2 6/7 weeks and \$8,865.40 in medical benefits.
8. The parties stipulated that the Claimant sustained 17 1/2% PPD of the right hand and 15% PPD of the left hand as a result of the injury of the 1-14-09 claims.

Employee: Jeffrey Farny

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9. The parties also stipulated that Claimant had 22 ½% PPD of the right shoulder, 40% PPD of the left shoulder and 27 ½% PPD of the body as a whole pre-existing the 1-14-09 injury.

The sole issue to be determined is:

1. What is the liability of the Second Injury Fund?

### **SUMMARY OF THE EVIDENCE**

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

#### ***Exhibits***

Claimant offered the following exhibits, which were received into evidence without objection:

#### **CLAIMANT'S EXHIBIT A: Records re: 01-14-09 right and left wrist Injury:**

- Claim for Compensation and Stipulation for Compromise Settlement (3 pages)
- James T. Doll, D.O.: 2-16-09, 2-17-09, 3-10-09 (12 pages)
- Henry G. Ollinger, M.D.: 3-12-09, 6-5-09, 6-19-09, 7-1-09, 7-15-09, 7-29-09, 10-19-09, 11-16-09 (15 pages)
- Frontenac Surgery and Spine Care Center: 6-5-09, 6-19-09 (7 pages)
- Pro-Rehab (physical therapy): 2-17-09 through 3-26-09 (15 pages)

#### **CLAIMANT'S EXHIBIT B: Records re: 05-16-02 right and left shoulder Injury (SIF):**

- Report of Injury and Stipulation for Compromise Settlement (2 pages)
- Thomas Matthews, M.D.: 5-24-02, 6-4-02, 6-28-02, 8-6-02, 8-13-02, 8-16-02, 9-27-02 (7 pages)
- Healthsouth: 8-8-02 (1 page)
- Richard E. Hulsey, M.D.: 10-18-02 (3 pages)
- Des Peres Square Imaging Center: 11-11-02, 11-15-02, 2-10-03, 5-16-03, 2-25-04, 3-1-04 (11 pages)
- Herbert A Haupt, M.D.: 11-11-02, 11-13-02, 11-15-02, 11-26-02, 12-17-02, 1-9-03, 2-5-03, 2-10-03, 2-20-03, 3-10-03, 3-31-03, 4-21-03, 5-12-03, 5-16-03, 5-27-03, 6-17-03, 7-3-03, 7-24-03, 7-30-03, 11-14-03, 1-21-04, 2-11-04, 2-25-04, 3-3-04, 4-7-04 (45 pages)

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**CLAIMANT'S EXHIBIT C: Records re: 01-12-07 low back Injury (SIF):**

- Report of Injury (1 page)
- Charles Keefe, M.D.: 1-31-07, 2-7-07 (4 pages)
- St. John's Mercy Hospital: 1-31-07 (1 page)
- James T. Doll, D.O.: 2-8-07, 2-15-07, 2-22-07, 3-1-07, 3-14-07, 3-20-07, 4-4-07, 4-10-07, 4-16-07, 5-10-07, 6-21-07 (28 pages)
- Advanced Ambulatory Surgical Care: 2-22-07, 3-20-07, 4-10-07 (3 pages)
- Pro-Rehab (physical therapy): 2-12-07 through 4-16-07 (13 pages)

**CLAIMANT'S EXHIBIT D: Records re: 06-04-04 low back Injury (SIF):**

- Report of Injury and Stipulation for Compromise Settlement (2 pages)
- David B. Robson, M.D.: 7-2-04, 7-22-04, 8-3-04, 9-8-04, 10-20-04, 12-16-04, 2-22-05, 5-17-05, 9-14-05, 10-5-05, 11-17-05 (16 pages)
- Patricia A. Hurford, M.D.: 7-26-04, 9-14-04, 10-7-04, 12-23-04 (6 pages)

**CLAIMANT'S EXHIBIT E: Records re: 11-12-93 low back Injury (SIF):**

- Report of Injury and Stipulation for Compromise Settlement (2 pages)
- Jesse Susi, M.D.: 11-19-93 (2 pages)
- David B. Fagan, M.D.: 11-24-93, 12-22-93, 1-19-94, 2-14-94 (6 pages)
- Healthsouth (physical therapy): 11-29-93 (3 pages)

**CLAIMANT'S EXHIBIT F: Dr. David T. Volarich Report**

The Second Injury Fund did not offer any exhibits.

*Live Testimony*

1. Claimant testified live. His testimony was credible. He is a 48 year old man who worked for Employer as a welder/certified repairman for 28 years.
2. Up to 1-14-09, Claimant sustained an occupational disease arising out of and in the course of employment that resulted in injury to Claimant's right and left hands. The injury occurred as a result of the constant and repetitive use of his upper extremities.
3. Claimant received medical care as described in **Exhibit A**. He had bilateral open carpal tunnel releases.
4. Claimant settled his claim for 17 ½% PPD of the right hand and 15% PPD of the left hand and the settlement was approved by the Division on 12-20-10.
5. After the 1-14-09 injuries, Claimant continued to experience pain, numbness and diminished grip strength in his hands.

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6. Prior to the 1-14-09 date of injury, it was agreed that Claimant had the following disabling injuries or conditions as described in Exhibits B, C, D, E and F:
  - a) 22 ½% PPD of the right shoulder as a result of an arthroscopic repair of a partially torn rotator cuff with impingement.
  - b) 40% PPD of the left shoulder as a result of three separate surgical repairs.
  - c) 27 ½% PPD of the body as a whole as a result of a disc herniation at L5-S1 that required surgery.
7. Because of the combining effects of the bilateral hand injuries, the bilateral shoulder problems and the limitations in the claimant's back, he had more difficulty working and gave up overtime when it was not mandatory.

### *Opinion Evidence*

8. Dr. David Volarich (Exhibit F) examined Claimant on August 2, 2010, took a history, and issued a report. He provided ratings consistent with those to which the parties stipulated and opined that they combined to create a substantially greater disability. Dr. Volarich further opined each pre-existing injury or condition constituted a hindrance or obstacle to employment.

### **FINDINGS OF FACT & RULINGS OF LAW**

Claimant has established a right to recover from the Second Injury Fund. A claimant in a workers' compensation proceeding has the burden of proving all elements of his claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 W.W.3d 902, 911 (Mo.App. E.D. 2008). In order for a claimant to recover against the SIF, she must prove that she sustained a compensable injury, referred to as "the last injury," which resulted in permanent partial disability. Section 287.220.1 RSMo. A claimant must also prove that she had a pre-existing permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to her employment or reemployment should she become unemployed; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15% for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo.App. E.D. 2008)(Citations omitted). These conditions were met by the agreement of the parties.

In order for a claimant to be entitled to recover permanent partial disability benefits from the Second Injury Fund, he must prove that the last injury, combined with his pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. *Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 138 S.W.3d 714, 717-18 (Mo. banc 2004). Claimant has met this burden.

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

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

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

1. Claimant’s testimony, and other evidence supporting his claim, is credible.
2. Claimant sustained a compensable last injury, which resulted in permanent partial disability equivalent to 17 ½% of the right hand and 15% PPD of the left hand (56.875 weeks).
3. As of the time the last injury was sustained, Claimant had the following pre-existing permanent partial disabilities, which meet the statutory thresholds and were of such seriousness as to constitute a hindrance or obstacle to employment or reemployment:
  - a) 22 ½% of the right shoulder (52.2 weeks).
  - b) 40% of the left shoulder (92.8 weeks).
  - c) 27 ½% of the body as a whole (110 weeks)

Total weeks for pre-existing disabilities: 255 weeks

4. The credible evidence establishes that the last injury, combined with the pre-existing permanent partial disabilities, causes 15% greater overall disability than the independent sum of the disabilities.

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5. The Second Injury Fund liability is calculated as follows: 56.875 weeks for last injury + 255 weeks for pre-existing injuries = 311.875 weeks x 15% = 46.78 weeks of overall greater disability.  $46.78 \times \$404.66 = \$18,929.99$ .

### CONCLUSION

The Second Injury Fund is liable to Claimant for \$18,929.99 in permanent partial disability benefits. Attorney Ann Dalton shall be entitled to an attorney fee of 20% of this award for necessary legal services provided.

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