

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

Injury No.: 01-161933

Employee: Mitchel Freeman
Employer: General Motors (Settled)
Insurer: General Motors (Settled)
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. We have read the briefs, reviewed the evidence and considered the whole record. We find that the award of the administrative law judge allowing compensation 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, as corrected herein.

On page 14 of the Award, at Finding 2, the administrative law judge states: "Total weeks for preexisting disabilities: 327.25." We correct the sentence to read: "Total weeks for preexisting disabilities: 257.25" The administrative law judge used the correct sum – 257.25 – in his subsequent calculations.

We approve and affirm 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.

The award and decision of Chief Administrative Law Judge Grant C. Gorman, issued January 12, 2011, is attached and incorporated by this reference, except as corrected herein.

Given at Jefferson City, State of Missouri, this 3rd day of August 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Mitchel Freeman

Injury No. 01-161933

Dependents: None

Employer: General Motors (Settled)

Additional Party: Second Injury Fund

Insurer: General Motors (Settled)

Hearing Date: October 12, 2010

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

Checked by: GCG/ch

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: May 21, 2001
5. State location where accident occurred or occupational disease was contracted: St. Charles 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 which led to the development of bilateral carpal tunnel syndrome.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right and left upper extremities at the wrists.
14. Nature and extent of any permanent disability: 20% of the right and left upper extremities at the wrists.
15. Compensation paid to-date for temporary disability: Not applicable
16. Value necessary medical aid paid to date by employer/insurer? Not applicable

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- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: Sufficient to reach maximum rates
- 19. Weekly compensation rate: \$314.26 for PPD/ \$599.96 for total disability benefits
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: (Settled)

22. Second Injury Fund liability: Yes

49.1 weeks of permanent partial disability from Second Injury Fund	\$15,430.16
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TOTAL:	\$15,430.16
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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 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Evan Beatty

Employee: Mitchel Freeman

Injury No. 01-161933

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Mitchel Freeman

Injury No: 01-161933

Dependents: None

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: General Motors (Settled)

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

Additional Party Second Injury Fund

Insurer: General Motors (Settled)

Checked by: GCG/ch

PRELIMINARY STATEMENT

Hearing on the above-referenced case was held before the undersigned Administrative Law Judge on October 12, 2010 at the Division of Workers' Compensation in St. Charles, Missouri. Mitchel Freeman (Claimant) was present, and represented by Evan Beatty. The liability of General Motors (Employer), which is self-insured, was previously settled. Assistant Attorney General Caroline Bean represented the Second Injury Fund. Mr. Beatty requested a fee in the amount of 25%. The parties submitted post-trial briefs.

The parties entered into the following Stipulations:

1. On or about May 21, 2001, Claimant sustained an occupational disease arising out of and in the course of employment that resulted in injury to Claimant. The injury occurred in St. Charles County, Missouri.
2. Claimant was an employee of Employer, had an average weekly wage that qualified Claimant for permanent partial disability (PPD) benefits at the rate of \$314.26 per week and total disability benefits at the rate of \$599.96 per week.
3. Claimant filed his claim in a timely manner and Employer had received proper notice of Injury.
4. Venue is proper in St. Charles County.

The following issue was presented for resolution:

1. Liability of the Second Injury Fund (SIF).

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SUMMARY OF THE EVIDENCE

Only evidence necessary to support this award will be summarized. Any objections not expressly ruled on during the hearing or in this award are now overruled. All of the exhibits offered by the parties were received into evidence without objection. Certain exhibits offered into evidence may contain handwritten markings, underlining and/or highlighting on portions of the documents. Any such markings on the exhibits were present at the time they were offered by the parties. Further, any such notes, markings and/or highlights had no impact on any ruling in this case.

Claimant's date of birth is March 8, 1960 and therefore at the time of the hearing he was 50 years of age. Claimant is married but separated and is currently living alone at his mother's house because his mother is presently in a nursing home. The house is a ranch style home on approximately one quarter of an acre. Claimant pays someone to perform any maintenance on the house and cutting the grass. He does have a number of pets including parrots, as well as, three dogs. With regard to his education, Claimant completed high school and is a certified paramedic and fireman. He also took some classes at Jefferson Community College.

Claimant was employed by General Motors from 1985 until March 11, 2005. At that point he was placed on permanent disability by General Motors and his sources of income include disability benefits through General Motors, as well as, a pension. Claimant's previous employment includes work as a paramedic and volunteer firefighter from 1991 until 1998. He was also previously an estimator for a sod company for approximately seven months in 1988 and was a Deputy County Assessor appraising houses from 1981 until 1985.

While working for General Motors, Claimant's job duties included absentee relief in which he would perform a number of different jobs on the line, using air tools, wrenches, electric guns, hand tools and was required to bend, stoop, kneel, crawl, reach, push and pull on a repetitive basis. Claimant also worked as a repairman for four to five years in which he worked 12 hours a day, 6 days a week. Claimant acted as a team leader for several periods of time while working at General Motors but this did not include any type of supervisory duties but rather, required Claimant to cover jobs on the line for employees when they would have to take time away from their shift.

As a result of the repetitive nature of Claimant's various jobs, he was diagnosed with bilateral carpal tunnel syndrome. Eventually, Claimant underwent surgery by Dr. Feliciano on July 25, 2003 on the left hand and wrist and September 12, 2003 on the right hand and wrist. Following the surgeries, Claimant was placed on light duty and was given one hand work only sorting metal for approximately six to eight weeks. Prior to surgery, Claimant suffered from pain and numbness in his hands which woke him up at night. The pain was constant and was aggravated by activity. The symptoms in his hands continued to worsen between 2001 up until

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the two surgeries in 2003. Claimant noticed improvement with the surgeries with less pain and numbness but his symptoms continued to worsen with any type of activity. Claimant's pain would be anywhere from a 4 up to a 10 depending on activity, on a scale of 1 to 10.

Claimant continues to notice weakness in his grip and a subsequent nerve conduction study was still positive for bilateral carpal tunnel syndrome. Any use of his hands aggravated his symptoms of pain and numbness and he had difficulty lifting. Claimant also experienced problems with dexterity and couldn't hold on to small parts. Claimant testified his symptoms were always worse at the end of the work day. Claimant was given a restriction of no lifting greater than 15 pounds and was given a hoist to help on certain jobs. Claimant settled the claim involving his hands and wrists for 20% permanent partial disability of the left wrist and 20% permanent partial disability of the right wrist with a 10% multiplicity factor.

Claimant began experiencing symptoms in his lower back in 1988 or 1989. Claimant received conservative treatment both through the plant including physical therapy, as well as, narcotic pain medication, such as Darvocet and chiropractic treatment once every other week for several years leading up to 2001. Claimant also indicated he would use a heating pad in an attempt to alleviate the pain. Claimant testified he would miss work at least two days a month leading up to 2001 because of back pain. Claimant continues to have symptoms in his low back which is constantly sore but he also has an occasional sharp stabbing pain in the low back radiating down both legs. The pain was aggravated by any activity at work which included bending, lifting, use of force with tools, as well as, walking on concrete. Claimant attempted to adjust his job duties because of back pain and eventually gave up the repair job because of the physical requirements. The severity of Claimant's pain on average is anywhere from a 1 up to a 7 but two to three times a month will go up to a 10. Claimant can tolerate sitting for up to an hour depending on the chair but is constantly shifting positions. Claimant can stand up to 25 minutes but is either shifting his weight or walking around. Claimant's symptoms are aggravated by bending or lifting and can only lift up to 50 pounds on a one time basis. In order to alleviate his pain, Claimant takes narcotic pain medication including Opana, 20 milligrams twice a day, as well as, Darvocet. Claimant also takes the anti-inflammatory Skelaxin, as well as, Aleve every four hours. He has worn a back brace since 1998. While at General Motors, Claimant indicated he would lie down during breaks on a make shift bed. Claimant testified he must lie down with his feet elevated with a heating pad 50% of his time at home.

Claimant also injured his left knee prior to 2001. Claimant indicated he first hurt his left knee right after high school. Eventually he underwent two surgeries, the first of which was in 1997 involving a partial lateral meniscectomy and post surgical cortisone injections. Then on March 12, 2001 he underwent a second arthroscopic surgery on his left knee. Leading up to the injury to his hands and wrists, Claimant continued to complain of pain and swelling daily, as well as, popping in the left knee. His symptoms were aggravated by walking on concrete at work plus kneeling and crawling and walking on uneven ground. Claimant indicated walking up and down

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stairs was even worse. When working at General Motors, Claimant wore a knee brace on his left knee. Claimant's pain in his knee will go up to a 7 or 8 out of 10 depending on activity. As a result of the problems with his left knee, Claimant also indicated he had problems with his right knee prior to 2001 in which he would experience pain and swelling but did not have surgery on the knee until 2004.

In 1998, Claimant injured his right ankle. He was initially treated with physical therapy but continued to have swelling in the ankle and the pain was constant. He also experienced instability in the ankle and his symptoms were aggravated by walking, especially on uneven ground, going up and down steps and walking on concrete. Eventually, Claimant underwent two surgeries on his right ankle in 2004. Claimant's pain goes anywhere from a 5 up to a 10 depending on activity. Including the difficulty he had with his knees, as well as, his right ankle, Claimant has periodically used a cane from 1997 through the present.

Claimant initially injured his neck in a car accident in 1979. After receiving physical therapy, he recovered without any additional problem but then on February 25, 1998 he was kicked in the face by a thoroughbred horse. He was diagnosed with a fracture at the level of C2, as well as, facial fractures. He also developed seizures, migraines and short term memory loss. Claimant began having seizures within a month of the incident and constantly felt nauseous and would shake uncontrollably for 1 to 2 minutes, 6 to 10 times a day. Claimant was off work for a couple of years following this incident and was placed on Social Security Disability. Eventually, he returned to work because the seizures were under control. Claimant is currently on Trilipal, an anti-seizure medication. He indicated he does not take migraine medication regularly any longer, only when he experiences a headache. The last migraine was about 18 months ago.

Up to 2001, Claimant continued to experience pain in his neck with catching and popping in the neck. The pain will radiate into both hands and he has restricted range of motion in the neck and as a result of pain, the neck will lock up. He will notice an extreme sharp pain when sneezing. He has difficulty looking up which is painful and is restricted from looking from side to side. At least once a month the pain in his neck will reach a 10 rendering him unable to function. On average it is anywhere from a 5 to an 8. Claimant continues to see a chiropractor because of neck pain. He will also use a heating pad on a regular basis including during breaks at work. Claimant was given a permanent restriction of no work on ramps, no work above shoulder level, no floor conveyors and was limited from lifting anything greater than 50 pounds.

Claimant also suffered from a congenital disorder, familial hypokalemia, which is a disorder resulting in the loss of all potassium in the body. Claimant first experienced symptoms related to this disorder in 1997 with headaches, nausea and pressure in his chest. At one point he was hospitalized. He then had a second episode in 1999 and a total of 6, with the last one in 2002. At that point he was put on a potassium supplement, Dyazide which he must take daily

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and every two to three years must have a stress test. He testified this condition is controlled by medication.

Claimant also suffers from post traumatic stress related to an incident in 1997 while working as a paramedic. Claimant answered a call to a one vehicle accident. The vehicle had overturned and struck a utility pole. There were two young boys 5 or 6 years of age which were ejected and lying in a field near the vehicle. Claimant was instructed to use the "jaws of life" to extricate the driver. After removing the driver, Claimant noticed what he thought was a shoe laying on the ceiling of the overturned vehicle. On closer inspection he noticed it was a little girl approximately 7 to 8 years old which was similar to the age of his daughter at the time. Claimant noticed the little girls head was out the window but underneath the trunk which had collapsed. Claimant performed a maneuver where he elicited a pain response from the little girl and thought she was alive. At that point claimant discovered the little girl had passed away. Claimant knew the girl's grandfather, who came to the scene of the accident. Upon seeing what had happened the grandfather had a heart attack and had to be treated at the scene.

Claimant testified he almost immediately began having nightmares and flashbacks of the scene. This brought on extreme bouts of anger. Claimant was also suffering from depression and was diagnosed with post traumatic stress disorder. Claimant missed approximately 2 months of work following this incident. Claimant underwent group therapy and individual therapy. He has been under some type of psychiatric care since August, 1997. He still sees a counselor every other week. Claimant is also prescribed antidepressants by his personal medical doctor, as well as, Ambien and Restoril for sleep. For the most part, Claimant's nightmares are controlled with the sleep medications. Claimant continues to suffer from depression isolating himself on a frequent basis. He testified he cannot be around others and wants to sleep all the time. Claimant indicated he has no motivation. Claimant missed work anywhere from 2 to 3 times a week as a result of depression up to his last date of work at General Motors in 2005. Claimant indicated this incident has affected all his relationships with friends and family, including his children.

In March, 2005 Claimant was present in the GM cafeteria when a co-worker indicated she had left a party in a drunken state and put her two children in the back seat without restraints and told the three year old to hang on to the one year old, and drove home. Claimant indicated he had a flashback to the accident scene of 1997 when he had to cut the little girl out of the car. He became angry and felt he would hurt the co-worker if he did not "get out of there." He told his supervisor, and went to the plant medical area. That was the last day he actually performed work at GM. He took one week of vacation time, then went on temporary disability for one year, and took a permanent disability pension and a retirement pension beginning March 2006.

As far as his daily activities, Claimant will get out of bed at approximately 8:00 a.m. and will watch television or visit with his daughter. As indicated before, he will lie on a heating pad approximately 50% of the time. He will drive less than 50 miles per week. He will cook

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occasionally but mostly will order food or use the microwave. He will occasionally go grocery shopping but will keep the items in small, lighter bags. He does very little cleaning around the house but will do some mopping and dusting. He does have a computer but uses it very little. Claimant also testified he has side effects from all of his medications which include feeling “foggy”, as well as the inability to focus.

Deposition of Dr. David Volarich

Dr. Volarich examined Claimant at the request of Claimant’s attorney on July 5, 2006. Dr. Volarich reviewed medical records, took a history and performed a physical examination. Dr. Volarich testified in conformity with his written report.

Dr. Volarich testified regarding the disability ratings for the primary injury and the preexisting disabilities. Dr. Volarich rated Claimant’s right hand and wrist at 35% permanent partial disability and 35% permanent partial disability of the left upper extremity at the wrist. Dr. Volarich also felt there was a 15% permanent partial disability to the body as a whole as a multiplicity factor. With regard to the preexisting disabilities, Dr. Volarich rated Claimant’s disability to his right ankle at 20% permanent partial disability, 20% permanent partial disability of the right knee, 40% permanent partial disability of the left knee, 20% permanent partial disability of the low back, 30% permanent partial disability of the body as a whole at the cervical spine, 25% permanent partial disability of the body as a whole as it relates to the partial complex seizure disorder and migraine headaches and 20% permanent partial disability of the body as a whole due to Claimant’s diagnosis of Hypokalemic Periodic Paralysis. Dr. Volarich also felt Claimant was suffering from depression, anxiety and post traumatic stress disorder but deferred to a psychiatrist for evaluation and assessment.

Following his evaluation, Dr. Volarich had the opportunity to review the report of Dr. Anderson, a board certified psychiatrist. Subsequent to the review of Dr. Anderson’s report, Dr. Volarich provided an opinion that Claimant was permanently and totally disabled as a direct result of the work-related injury sustained leading up to May 21, 2001 in combination with his preexisting medical conditions, including the psychiatric illness. Dr. Volarich further opined that Claimant’s disability as it relates to the primary claim involving the hands and wrists combines with the aforementioned preexisting disabilities to create a substantially greater disability than the simple sum or total of each separate injury or illness and a loading factor should be added.

Deposition of Dr. Richard Anderson

Dr. Anderson is a board certified psychiatrist and has been in the practice of psychiatry for 16 years. Dr. Anderson evaluated Claimant at Claimant’s attorney’s request on June 19, 2007. In addition to Dr. Anderson’s review of the medical records and interview with Claimant, he also administered an MMPI-II and the Beck Depression Inventory. Dr. Anderson had taken a

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history from Claimant regarding the incident in 1997, when, while working as a paramedic, he was called to a serious motor vehicle accident and as a result of the accident a young child had passed away. Dr. Anderson noted Claimant's diagnosis of post traumatic stress disorder and described it as an anxiety disorder that is brought on by exposure to experiencing personally or witnessing severely traumatic events, usually life threatening events. A person suffering from post traumatic stress disorder will have symptoms of exaggerated startle responses, vivid recollection of the event, often including nightmares or flashbacks, sensitivity toward themselves or other people and depression which will interfere with their general life functioning. Dr. Anderson reviewed the records of Dr. Khojasteh, a psychiatrist, including the outpatient program consisting of group therapy, individual therapy and medication. Dr. Anderson also noted that Claimant was seeing a psychotherapist, Rick Cavins, as part of the outpatient program. Claimant indicated he was currently taking Lexapro, Cymbalta, Xanax, Ambien and Trazodone which are all medications used to treat symptoms of post traumatic stress disorder and depression. Dr. Anderson felt this was a significant amount of medication.

Regarding disability, Dr Anderson testified as follows:

Q All right then, again, Doctor, based on your review of the medical records and the history given to you by Mr. Freeman, do you have an opinion within a reasonable degree of medical certainty as to whether Mr. Freeman would be able to sustain meaningful employment?

A Yes.

Q What is that opinion?

A My opinion was at the time I evaluated him he was one hundred percent psychiatrically disabled, independent of any other medical diagnosis. Additionally, as attempts to work, to return to work in both of his jobs had been unsuccessful despite a considerable amount of treatment and despite a considerable amount of reported success with that treatment, yet his inability to return to work despite that I feel that he is one hundred percent psychiatrically disabled and unlikely to be able to return to his employment.

Q All right, and then, Doctor, as you know, based on the history that Mr. Freeman had given you that while working for General Motors he had suffered an injury to his hands and which he had his hand operated on for bilateral carpal tunnel syndrome; did you attribute any of his psychiatric disability to that injury?

A It's hard to know for sure, I -- to be honest with you I didn't specifically consider that because I felt that the post-traumatic stress disorder was so substantially involved with the symptoms that were being reported to me.

Q All right, and therefore all the psychiatric disability that you have assessed here predated 2001?

A Yes.

On cross-examination, Dr. Anderson testified that symptoms of post traumatic stress disorder can show up many years later and the symptoms can wax and wane. Dr. Anderson

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further testified it was unlikely the event which occurred in 2005 would have risen to the level of the kind of trauma that is usually associated with the development of post traumatic stress disorder. Dr. Anderson opined the incident in the General Motors cafeteria could have exacerbated the post traumatic stress disorder.

Deposition of Delores Gonzalez

Delores Gonzalez is a vocational rehabilitation counselor who was asked to evaluate Claimant by Claimant's attorney on September 5, 2006. Ms. Gonzalez interviewed Claimant in person and felt this was important in that she could evaluate Claimant with regard to how he would present in a job interview, as well as delve into more detail regarding the information contained in the medical records and how they are currently doing in relation to any injuries or disabilities they may have. With regard to Claimant's work history, Ms. Gonzalez testified that only the last 15 years of employment should be considered when determining whether a person has transferable skills because beyond that, as a result of computerization and how a person loses skill and ability over a period of years, it is not vocationally relevant. Ms. Gonzalez testified Claimant does not possess transferable skills from any vocationally relevant past jobs that could be used in other jobs within his residual functional capacity. Residual functional capacity is described as the ability to function given the person's physical or mental restrictions.

It was Ms. Gonzalez's opinion that Claimant is unable to compete on the open labor market as a result of his residual functional capacity, both mental and physical. Ms. Gonzalez did not feel Claimant's diagnosis of bilateral carpal tunnel syndrome by itself alone would result in Claimant being permanently and totally disabled. It was also Ms. Gonzalez's opinion that it is a combination of adverse vocational factors including all of the preexisting conditions, as well as, the primary injury to the hands and wrists which would preclude Claimant from employment currently and in the future. Ms. Gonzalez did not feel Claimant was able to perform even sedentary work. In order to perform sedentary work, a person must be able to work competitively by staying on task throughout the work day and Claimant has to take frequent rest periods secondary to fatigue or to change positions frequently and therefore would not qualify for sedentary work.

On cross-examination, Ms. Gonzalez was asked regarding Claimant's return to work until March, 2005 and she opined that this was an unsuccessful work attempt. Ms. Gonzalez was unaware of the incident in the GM cafeteria or the circumstances of Claimant ending his work at General Motors.

Deposition of James M. England

James England is a rehabilitation counselor who was asked to review records related to the treatment of Claimant and prepared a report in February, 2009. Mr. England also reviewed

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the deposition of Claimant. Based on his review of the restrictions provided by Dr. Feliciano and Dr. Tucker, Mr. England did not feel there were any restrictions on Claimant's upper extremities and therefore would be able to do a variety of sedentary to light work, including cashier, security, courier and a variety of entry level jobs. In reviewing Dr. Volarich's restrictions, Claimant would be further limited but there would still be some jobs he could perform, such as, job security positions, parking lot cashier and night clerk in a motel. Mr. England also felt Claimant's past work as a paramedic could be utilized as an admissions clerk in a hospital or dispatcher for an ambulance. Mr. England opined that based on Dr. Anderson's findings, Claimant would be totally disabled from a psychiatric standpoint regardless of any of his physical problems.

On cross-examination Mr. England admitted he did not personally meet with Claimant. Mr. England testified it is important when providing vocational rehabilitation services to personally interview someone to see how they would come across in an interview, evaluate their personal appearance and ask questions of Claimant regarding the ongoing problems Claimant was having after reviewing the various doctors' reports and records. Mr. England also admitted that Dr. Volarich was the only doctor to evaluate all of Claimant's physical problems and that Dr. Volarich offered the opinion Claimant was permanently and totally disabled.

FINDINGS OF FACT AND RULINGS OF LAW

Based on the competent and substantial evidence presented, including the testimony of Claimant, my personal observations, expert medical and vocational testimony, and all other exhibits received into evidence, I find:

Under Missouri law, it is well-settled that the claimant bears the burden of proving all the essential elements of a workers' compensation claim, including the causal connection between the accident and the injury. *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo.App. W.D.2002); see also *Davies v. Carter Carburetor*, 429 S.W.2d 738, 749 (Mo.1968); *McCoy v. Simpson*, 346 Mo. 72, 139 S.W.2d 950, 952 (1940). While the claimant is not required to prove the elements of his claim on the basis of "absolute certainty," he must at least establish the existence of those elements by "reasonable probability." *Sanderson v. Porta-Fab Corp.*, 989 S.W.2d 599, 603 (Mo.App. E.D.1999) (citing *Cook v. Sunnen Prods. Corp.*, 937 S.W.2d 221, 223 (Mo.App. E.D.1996)). However, the employee must prove the nature and extent of any disability by a reasonable degree of certainty. *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo. App. 1995); *Griggs v. A. B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. 1974).

PERMANENT TOTAL DISABILITY

Claimant suffered a work related occupational disease on May 21, 2001. The occupational disease resulted in injury to both of Claimant's wrists which required surgery to cure and relieve the effects of the injury. Based on the testimony of Claimant, the medical evidence, and other evidence, including but not limited to the stipulation for compromise settlement, I find Claimant suffered a permanent partial disability of 20% of the right and left

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upper extremities at the wrists as a result of the injury of May 21, 2001. These injuries are not totally disabling in and of themselves.

In computing permanent and total disability in the situation where claimant suffers from a previous disability, the ALJ ... first determines the degree of disability as a result of the last injury. *Garcia v. St. Louis County*, 916 S.W.2d 263, 266 (Mo.App. E.D. 1995). The ALJ ... then determines “the degree or percentage of employee's disability that is attributable to *all injuries or conditions existing at the time the last injury was sustained....*” § 287.220.1, RSMo. Cases have repeatedly held the nature and extent of the preexisting disability is measured as of the date of the primary injury. See, i.e. *Gassen v. Lienbengood* 134 S.W.3d 75, 80 -81 (Mo.App. W.D., 2004), citing *Carlson v. Plant Farm*, 952 S.W.2d 369, 373 (Mo.App.1997); and § 287.220.1. (“In order to calculate Fund liability, the [fact finder] must determine the percentage of the disability that can be attributed solely to the preexisting condition *at the time of the last injury.*”) [T]he claimant must establish that an actual or measurable disability existed at this time. *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 214 (Mo.App.1999 *Id*; see also *Tidwell v. Kloster Co.*, 8 S.W.3d 585, 589 (Mo.App. 1999).

Regarding Claimant’s familial hypokalemia and seizures, the medical evidence indicates both conditions are controlled by medication. Claimant also testified both of these conditions are controlled by medication. There does not exist a sufficient factual basis to find that either of these conditions is a hindrance or obstacle to employment or re-employment.

The evidence demonstrates Claimant’s neck injury had worsened by the time he stopped working in 2005 and Dr. Volarich’s exam in 2006. Claimant’s own testimony was that the condition has progressively gotten worse. Based on the competent and substantial evidence presented, I find that at the time of the May 21, 2001 work injury, Claimant had a 15% permanent partial disability to the cervical spine. This finding takes into account the testimony of Claimant, the medical records and objective tests in evidence, and the opinions of physicians.

Claimant had a preexisting injury to the lumbar spine. Based on the competent and substantial evidence presented, I find that at the time of the May 21, 2001 work injury, Claimant had a 12.5% permanent partial disability to the lumbar spine. This finding takes into account the testimony of Claimant, the medical records and objective tests in evidence, and the opinions of physicians.

Claimant had a preexisting injury to the left knee. Based on the competent and substantial evidence presented, I find that at the time of the May 21, 2001 work injury, Claimant had a 25% permanent partial disability to the left knee. This finding takes into account the testimony of Claimant, the medical records and objective tests in evidence, and the opinions of physicians.

Claimant had a preexisting injury to the right knee. Based on the competent and substantial evidence presented, I find that at the time of the May 21, 2001 work injury, Claimant had a 15% permanent partial disability to the right knee. This finding takes into account the testimony of Claimant, the medical records and objective tests in evidence, and the opinions of physicians.

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Claimant had a preexisting injury to the right ankle. Based on the competent and substantial evidence presented, I find that at the time of the May 21, 2001 work injury, Claimant had a 15% permanent partial disability to the right ankle. This finding takes into account the testimony of Claimant, the medical records and objective tests in evidence, and the opinions of physicians.

Dr. Anderson, in his opinion that Claimant is permanently and totally disabled from a psychiatric standpoint alone, specifically did not take into account the primary injury of May 21, 2001. His testimony was at the time of his exam Claimant was permanently and totally disabled. He was then asked if all of the psychiatric disability predated 2001, to which he replied "Yes." The exact meaning of this is unclear, but if Dr. Anderson is of the opinion that Claimant was permanently and totally disabled prior to the work injury, then the May 21, 2001 work injury is obviously not a factor in his disability opinion. That also means Claimant worked for four years until March, 2005 while allegedly permanently and totally disabled, which of course casts doubt on Dr. Anderson's opinion. Ultimately, the time frame is irrelevant, since Dr. Anderson attributes his permanent total disability rating to the effects of PTSD alone, and not in combination with the primary injury.

The incident in the General Motors cafeteria in 2005 precipitated Claimant's departure from GM and ultimately the work force. This is evident as that was the last day Claimant worked and the medical information in the GM disability forms is from Dr. Khojasteh, and pertains only to psychiatric conditions. This is supported by Claimant's own expert, Dr. Anderson, in that his opinion is the 2005 event exacerbated the PTSD, and that Claimant's psychiatric condition alone renders Claimant permanently and totally disabled.

The relevant time for the inquiry is the time of the injury. Claimant continued to work for four years after he developed carpal tunnel syndrome, and almost two years after the surgeries. Further, he did not testify that he left work because he was unable to perform his job duties at GM due to any physical disability. The relevant inquiry is not whether he could perform a physically demanding job like working the production line at GM, which he in fact did, but whether he could perform any job in the open labor market on May 21, 2001. That question was answered by the fact that Claimant worked on the GM production line for an additional four years.

Dr. Volarich, in his initial report indicated he would defer to a psychiatrist on the issue of disability related to PTSD. After reviewing the report of Dr. Anderson, a psychiatrist retained by Claimant, which indicates that Claimant is permanently and totally disabled as a result of the PTSD alone, Dr. Volarich issues a supplemental report contradicting Dr. Anderson's opinion in that Dr. Volarich finds Claimant disabled as a result of the combination of preexisting injuries and the primary injury. Dr. Volarich's reports and testimony are not credible regarding Claimant's condition and disability at the time of the primary work injury.

Ms. Gonzalez' vocational opinion is not credible. Ms. Gonzalez opined that Claimant left work in 2005 as a result of an unsuccessful attempt to return to work. However, she was unaware of the incident in the General Motors cafeteria in 2005. The fact that Claimant

Employee: Mitchel Freeman

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continued to work for four years can hardly be classified as an unsuccessful return to work, and she did not have knowledge of the circumstances of his leaving GM and the reason he was placed on disability by GM. Mr. England's vocational opinions are more credible because they more accurately reflect Claimant's condition at the time of the last injury in May, 2001.

Claimant's testimony is credible; however, Claimant's own expert evidence is contradictory, and does not accurately reflect his condition at the time of the last injury. Further, Dr. Anderson's opinion militates against SIF liability for total disability due to a combination of the last injury and preexisting disabilities.

If Claimant is permanently and totally disabled it is due to the post injury worsening of the neck, knee, ankle and particularly the PTSD. The Second Injury Fund is not liable for permanent total disability benefits when a Claimant's inability to work is due to the subsequent deterioration of preexisting conditions unrelated to the primary injury. Claimant has failed to meet his burden of proof that he is permanently and totally disabled as a result of the combination of the May 21, 2001 work injuries and his preexisting illness and injuries.

SIF LIABILITY

Claimant has met his burden of proof regarding SIF liability for permanent partial disability. 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 sustained compensable last injuries which resulted in permanent partial disability equivalent to 20% of the right and left wrists. (70 weeks)
2. As of the time the last injury was sustained, Claimant had the following preexisting 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. 15% of the cervical spine. (60 weeks).
 - b. 12.5% of the lumbar spine. (50 weeks).
 - c. 15% of the body for depression. (60 weeks).
 - d. 25% of the left knee. (40 weeks).
 - e. 15% of the right knee (24 weeks).
 - f. 15% of the right ankle. (23.25 weeks).

Total weeks for preexisting disabilities: 327.25

3. The credible evidence establishes that the last injury, combined with the preexisting permanent partial disabilities, causes 15% greater overall disability than the independent sum of the disabilities. The Second Injury Fund liability is calculated as follows: 70 weeks for last injuries + 257.25 weeks for preexisting injuries = 327.25 weeks x 15% = 49.1 weeks of overall greater disability.

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The Second Injury Fund is liable to Claimant for \$15,430.16 in permanent partial disability benefits.

Attorney Evan Beatty is entitled to a lien in the amount of 25% of all sums recovered as and for attorney fees for necessary legal services provided.

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

This award is dated and attested to this 12th day of January, 2011.

/s/ NAOMI PEARSON
Naomi Pearson
Division of Workers' Compensation