

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

Injury No.: 11-111102

Employee: Barbara Fuller
Employer: Elementis Specialties, Inc.
Insurer: ACE American Insurance Company
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 May 5, 2016. The award and decision of Administrative Law Judge Edwin J. Kohner, issued May 5, 2016, 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 January 2017.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee:	Barbara Fuller	Injury No.:	11-111102
Dependents:	N/A		Before the
Employer:	Elementis Specialties, Inc.		Division of Workers'
Additional Party:	Second Injury Fund		Compensation
Insurer:	ACE American Insurance Company		Department of Labor and Industrial
Hearing Date:	March 9, 2016		Relations of Missouri
			Jefferson City, Missouri
		Checked by:	EJK/mk

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: August 29, 2011
5. State location where accident occurred or occupational disease was contracted: City of St. Louis, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee worked in heavy manual labor performing repetitive gripping and grasping.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Both thumbs and hands
14. Nature and extent of any permanent disability: 15% permanent partial disability of each wrist with a 10% load and 4 weeks for disfigurement
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer: None

- 17. Value necessary medical aid not furnished by employer/insurer? Not determined
- 18. Employee's average weekly wages: \$1,217.60
- 19. Weekly compensation rate: \$811.73/\$425.19
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Unpaid medical expenses:	Hold Harmless
37 5/7 weeks of temporary total disability (or temporary partial disability)	\$30,613.82
57.75 weeks of permanent partial disability from Employer	\$24,554.72
4 weeks of disfigurement from Employer	\$ 1,700.76

- 22. Second Injury Fund liability: Yes

22.84 weeks of permanent partial disability from Second Injury Fund	\$ 9,711.34
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TOTAL: \$66,580.64

- 23. Future requirements awarded: None

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: Dean L. Christianson, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Barbara Fuller	Injury No.: 11-111102
Dependents:	N/A	Before the
Employer:	Elementis Specialties, Inc.	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	ACE American Insurance Company	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
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This workers' compensation case raises several issues arising out of a work-related injury in which the claimant, a machine operator, developed CMC (carpometacarpal) arthritis in both hands. The issues for determination are: (1) Future medical care, (2) Temporary Disability, (3) Permanent disability and disfigurement, and (4) Second Injury Fund Liability. The evidence compels an award for the claimant for temporary and permanent disability benefits. The parties stipulated on the record that the defense will hold the claimant harmless for any medical bills from medical services in connection with this occurrence.

At the hearing, the claimant testified in person and offered depositions of David T. Volarich, D.O., and J. Stephen Dolan, M.A., C.R.C., records from the Division of Workers' Compensation, medical bills, correspondence between legal counsel regarding additional medical care, and voluminous medical records. The defense offered depositions of the claimant and W. Christopher Kostman, M.D., records from the Missouri Division of Workers' Compensation, records of a prior workers' compensation settlement in Illinois, records of the defense payments in the case, a medical report from Andrew M. Wayne, M.D., and personnel records from the employer.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the occupational disease occurred in Missouri. Any markings on the exhibits were present when offered into evidence.

SUMMARY OF FACTS

On August 25, 2011, this then 59-year-old claimant, a machine operator, was diagnosed with CMC arthritis and surgery was recommended. She testified she began working for this employer as a packer filling bags with pigment for four or five years. As she did this job, she developed pain in her thumbs and hands. She then performed other jobs, but continued to have pain in the thumbs. In 2000, the claimant returned to the packing job and the painful condition in her thumbs worsened over the next several months. In 2010, she consulted her primary care physician, who referred her to an orthopedic surgeon, Dr. Ungacta. On August 10, 2011, Dr. Ungacta performed injections into her thumbs, though she received no significant relief. See Exhibit 18. Dr. Ungacta referred her to Dr. Goldfarb. On August 25, 2011, Dr. Goldfarb

diagnosed CMC arthritis. See Exhibit 22. On August 31, 2011, Dr. Goldfarb performed a right thumb trapezial excision, suspensionplasty with FCR tendon, and interposition arthroplasty, and he performed the same procedure on the claimant's left thumb on December 14, 2011. See Exhibit 22. The claimant then received extensive physical therapy. The claimant worked up until the first surgery on August 31, 2011, and returned to work on May 21, 2012, after the second surgery. See Exhibits 9, 10, 11, 22.

The claimant testified that she has ongoing pain in the thumb and hand pain worse on the right than on the left. She testified that her thumbs hurt and ache, especially with weather changes. She has difficulty opening packages such as small packets of applesauce. She has trouble twisting the tops off of bottles, such as a soda bottle, and has to use pliers. She testified that her hands make it more difficult for her to perform yard work, and how it took three days for her to plant a bush in her yard. She reduces the pain in her hands by rubbing them, holding them under warm water, or applying ice. She exhibited a 2-inch scar on each of her thumbs at the base of the hand.

David T. Volarich, D.O.

On March 5, 2015, Dr. Volarich examined the claimant, took a medical history, and reviewed her medical records. With regard to the occupational disease of August 29, 2011, Dr. Volarich diagnosed overuse syndrome of the hands, causing irreversible aggravation of thumb CMC arthritis, status post trapezial excision with suspensionplasty and tendon interposition arthroplasty. See Dr. Volarich deposition, page 31. He opined that the claimant's work, leading up to August 29, 2011, was the prevailing factor causing these conditions. See Dr. Volarich deposition, pages 31-32. With regard to the occupational disease of August 29, 2011, he opined that the claimant suffered a 30% permanent partial disability of each hand.

With regard to pre-existing medical conditions, Dr. Volarich diagnosed: (1) Bilateral carpal tunnel syndrome, status post open carpal tunnel releases in 1995; (2) Left elbow ulnar nerve decompression and partial medial epicondylectomy in 1995; (3) Right elbow lateral epicondylitis, status post excision of degenerated common extensor tendon with limited lateral epicondylectomy and muscle flap coverage in 2001; (4) Right long finger laceration and extensor tendon injury, status post arthrotomy at the proximal interphalangeal joint with tendon repair and exploration in 2007; (5) Left shoulder internal derangement, status post arthroscopic biceps tenotomy and subacromial decompression in 2008; and (6) Left knee contusion, resolved in 1999. See Dr. Volarich deposition, pages 38-39. He opined that the claimant suffered the following pre-existing permanent partial disabilities: (1) 25% of the right wrist due to the carpal tunnel surgery and long finger laceration and exploration; (2) 20% of the left wrist due to the carpal tunnel syndrome; (3) 25% of the right elbow due to the lateral epicondylitis; (4) 25% of the left elbow due to the ulnar neuropathy and decompression; and (5) 20% of the left shoulder due to the internal derangement and arthroscopic repair. See Dr. Volarich deposition, pages 40-42. He opined that all of the disabilities combine with each other to create a substantially greater disability than the simple sum and testified extensively how they combine to create synergism. See Dr. Volarich deposition, pages 42-44.

Andrew M. Wayne, M.D.

On June 30, 2015, Dr. Wayne examined the claimant and opined that repetitive job duties were the prevailing factor compelling the claimant's bilateral thumb surgical requirements. He opined that the claimant suffered a 7% permanent partial disability of the right thumb and a 10% permanent partial disability of the of the left upper extremity based on surgery involving the left thumb; separately a 3% permanent partial disability rating at the right upper extremity due to persistent mild pain and stiffness in the right wrist. He did not indicate a need for future medical treatment. See Exhibit 2.

LIABILITY FOR PAST MEDICAL EXPENSES

The statutory duty for the employer is to provide such medical, surgical, chiropractic, and hospital treatment ... as may be reasonably required after the injury. Section 287.140.1, RSMo 1994.

The intent of the statute is obvious. An employer is charged with the duty of providing the injured employee with medical care, but the employer is given control over the selection of a medical provider. It is only when the employer fails to do so that the employee is free to pick his own provider and assess those against his employer. However, the employer is held liable for medical treatment procured by the employee only when the employer has notice that the employee needs treatment, or a demand is made on the employer to furnish medical treatment, and the employer refuses or fails to provide the needed treatment. Blackwell v. Puritan-Bennett Corp., 901 S.W.2d 81, 85 (Mo.App. E.D. 1995).

The method of proving medical bills was set forth in Martin v. Mid-America Farmland, Inc., 769 S.W.2d 105 (Mo. banc 1989). In that case, the Missouri Supreme Court ordered that unpaid medical bills incurred by the claimant be paid by the employer where the claimant testified that her visits to the hospital and various doctors were the product of her fall and that the bills she received were the result of those visits.

We believe that when such testimony accompanies the bills, which the employee identifies as being related to and are the product of her injury, and when the bills relate to the professional services rendered as shown by the medical records and evidence, a sufficient, factual basis exists for the Commission to award compensation. The employer, may, of course, challenge the reasonableness or fairness of these bills or may show that the medical expenses incurred were not related to the injury in question. Id. at 111, 112.

As stated in Sickmiller v. Timberland Forest Products, Inc., 407 S.W.3d 109, 121 (Mo. App. S.D. 2013), "[S]ection 287.140.1 'does not require a finding that the workplace accident was the prevailing factor in causing the need for particular medical treatment.'" (quoting Tillotson v. St. Joseph Medical Center, 347 S.W.3d 511, 517 (Mo. App. W.D. 2011)). "Where a claimant produces documentation detailing his past medical expenses and testifies to the relationship of such expenses to the compensable workplace injury, such evidence provides a

sufficient factual basis for the Commission to award compensation.” Id. (quoting Treasurer of Missouri v. Hudgins, 308 S.W.3d 789, 791 (Mo. App. W.D. 2010)).

In determining whether medical treatment is “reasonably required” to cure or relieve a compensable injury, it is immaterial that the treatment may have been required because of the complication of pre-existing conditions, or that the treatment will benefit both the compensable injury and a pre-existing condition. Tillotson v. St. Joseph Medical Center, 347 S.W.3d 511, 519 (Mo.App. W.D 2011). Rather, once it is determined that there has been a compensable accident, a claimant need only prove that the need for treatment and medication flow from the work injury. Id. The fact that the medication or treatment may also benefit a non-compensable or earlier injury or condition is irrelevant. Id. Application of the prevailing factor test to determine whether medical treatment is required to treat a compensable injury is reversible error. Id. at 521.

The claimant sustained her burden of proof in establishing the medical treatment was reasonable and necessary; with it noted that the Employer/Insurer has stipulated they will hold the claimant harmless relating thereto. So ordered.

FUTURE MEDICAL CARE

Pursuant to Section 287.140.1, an employer is required to provide care "as may be reasonably required to cure and relieve from the effects of the injury." This includes allowance for the cost of future medical treatment. Pennewell v. Hannibal Regional Hospital, 390 S.W.3d 919, 926 (Mo. App. E.D. 2013) citing Poole v. City of St. Louis, 328 S.W.3d 277, 290-91 (Mo. App. E.D. 2010). An award of future medical treatment is appropriate if an employee shows a reasonable probability that he or she is in need of additional medical treatment for the work-related injury. Id. Future care to relieve [an employee's] pain should not be denied simply because he may have achieved [maximum medical improvement]. Id. Therefore, a finding that an employee has reached maximum medical improvement is not necessarily inconsistent with the employee's need for future medical treatment. Id.

To receive an award of future medical benefits, a claimant need not show "conclusive evidence" of a need for future medical treatment. ABB Power T & D Co. v. Kempker, 236 S.W.3d 43, 52 (Mo.App. W.D. 2007). Instead, a claimant need only show a "reasonable probability" that, because of her work-related injury, future medical treatment will be necessary. Id. A claimant need not show evidence of the specific nature of the treatment required. Aldridge v. Southern Missouri Gas Co., 131 S.W.3d 876, 883 (Mo.App. S.D. 2004); Stevens v. Citizens Memorial Healthcare Foundation, 244 S.W.3d 234, 237 (Mo.App. S.D. 2008).

In determining whether medical treatment is “reasonably required” to cure or relieve a compensable injury, it is immaterial that the treatment may have been required because of the complication of pre-existing conditions, or that the treatment will benefit both the compensable injury and a pre-existing condition. Tillotson v. St. Joseph Medical Center, 347 S.W.3d 511, 519 (Mo.App. W.D 2011). Rather, once it is determined that there has been a compensable accident, a claimant need only prove that the need for treatment and medication flow from the work injury. Id. The fact that the medication or treatment may also benefit a non-compensable or earlier injury or condition is irrelevant. Id. Application of the prevailing factor test to determine whether medical treatment is required to treat a compensable injury is reversible error. Id. at 521.

In this case, none of the forensic experts identified any additional medical care or surgical procedures flowing from the 2011 occurrence, and the claimant did not sustain her burden of proof in establishing a need for future medical treatment as the result of the 2011 occurrence. Therefore, none is awarded.

TEMPORARY DISABILITY

Compensation must be paid to the injured employee during the continuance of temporary disability but not more than 400 weeks. Section 287.170, RSMo 1994. Temporary total disability benefits are intended to cover healing periods and are unwarranted beyond the point at which the employee is capable of returning to work. Brookman v. Henry Transp., 924 S.W.2d 286, 291 (Mo.App. E.D. 1996). Temporary awards are not intended to compensate the Employee after the condition has reached the point where further progress is not expected. Id.

When an employee is injured in an accident arising out of and in the course of his employment and is unable to work as a result of his or her injury, Section 287.170, RSMo 2000, sets forth the TTD benefits an employer must provide to the injured employee. Section 287.020.7, RSMo 2000, defines the term "total disability" as used in workers' compensation matters as meaning the "inability to return to any employment and not merely mean[ing the] inability to return to the employment in which the employee was engaged at the time of the accident." The test for entitlement to TTD "is not whether an employee is able to do some work, but whether the employee is able to compete in the open labor market under his physical condition." Thorsen v. Sachs Electric Company, 52 S.W.3d 611, 621 (Mo.App. W.D. 2001). Thus, TTD benefits are intended to cover the employee's healing period from a work-related accident until he or she can find employment or his condition has reached a level of maximum medical improvement. Id.

The plain language of section 287.149.1 does not mandate the commission arbitrarily rely on the maximum medical improvement date to deny TTD benefits, if the claimant is engaged in the rehabilitative process. Instead, whether a claimant is engaged in the rehabilitative process is the appropriate statutory guidepost to determine whether he or she is entitled to TTD benefits under the plain language of section 287.149.1. It is plausible, and likely probable, that the maximum medical improvement date and the end of the rehabilitative process will coincide, thus, marking the end of the period when TTD benefits can be awarded. However, when the commission is presented with evidence, as here, that a claimant has reached maximum medical improvement yet seeks additional treatment beyond that date for the work-related injury in an attempt to restore himself or herself to a condition of health or normal activity by a process of medical rehabilitation, the commission must make a factual determination as to whether the additional treatment was part of the rehabilitative process. If the commission determines the additional treatment was part of the claimant's rehabilitative process, then he or she is entitled to TTD benefits pursuant to section 287.149.1 until the rehabilitative process is complete. Once the rehabilitation process ends, the commission then must make a determination regarding the permanency of a claimant's injuries. Greer v. Sysco Food Services, 475 S.W.3d 655, 668-69 (Mo. Banc 2015).

The claimant was off work from her first surgery on August 31, 2011, and eventually returned to work on May 21, 2012. The claimant sustained her burden of proof in establishing entitlement to temporary total disability benefits from August 31, 2011, through May 21, 2012, 37 5/7 weeks. Therefore, the claimant is awarded 37 5/7 weeks of temporary total disability benefits.

PERMANENT DISABILITY

Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. Sanders v. St. Clair Corp., 943 S.W.2d 12, 16 (Mo.App. S.D. 1997). A disability is "permanent" if "shown to be of indefinite duration in recovery or substantial improvement is not expected." Tiller v. 166 Auto Auction, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997).

Workers' compensation awards for permanent partial disability are authorized pursuant to Section 287.190. "The reason for [an] award of permanent partial disability benefits is to compensate an injured party for lost earnings." Rana v. Landstar TLC, 46 S.W.3d 614, 626 (Mo. App. W.D. 2001). The amount of compensation to be awarded for PPD is determined pursuant to the "SCHEDULE OF LOSSES" found in Section 287.190.1. "Permanent partial disability" is defined in Section 287.190.6 as being permanent in nature and partial in degree. Further, "[a]n actual loss of earnings is not an essential element of a claim for permanent partial disability." Id. A permanent partial disability can be awarded notwithstanding the fact the claimant returns to work, if the claimant's injury impairs his efficiency in the ordinary pursuits of life. Id. "[T]he Labor and Industrial Relations Commission has discretion as to the amount of the award and how it is to be calculated." Id. "It is the duty of the Commission to weigh that evidence as well as all the other testimony and reach its own conclusion as to the percentage of the disability suffered." Id. In a workers' compensation case in which an employee is seeking benefits for PPD, the employee has the burden of not only proving a work-related injury, but that the injury resulted in the disability claimed. Id.

In a workers' compensation case, in which the employee is seeking benefits for PPD, the employee has the burden of proving, inter alia, that his or her work-related injury caused the disability claimed. Rana, 46 S.W.3d at 629. As to the employee's burden of proof with respect to the cause of the disability in a case where there is evidence of a pre-existing condition, the employee can show entitlement to PPD benefits, without any reduction for the pre-existing condition, by showing that it was non-disabling and that the "injury cause[d] the condition to escalate to the level of [a] disability." Id. See also, Lawton v. Trans World Airlines, Inc., 885 S.W.2d 768, 771 (Mo. App. 1994) (holding that there is no apportionment for pre-existing non-disabling arthritic condition aggravated by work-related injury); Indelicato v. Missouri Baptist Hospital, 690 S.W.2d 183, 186-87 (Mo. App. 1985) (holding that there was no apportionment for pre-existing degenerative back condition, which was asymptomatic prior to the work-related accident and may never have been symptomatic except for the accident). To satisfy this burden, the employee must present substantial evidence from which the Commission can "determine that the claimant's preexisting condition did not constitute an impediment to performance of claimant's duties." Rana, 46 S.W.3d at 629. Thus, the law is, as the appellant contends, that a reduction in a PPD rating cannot be based on a finding of a pre-existing non-disabling condition,

but requires a finding of a pre-existing disabling condition. Id. at 629, 630. The issue is the extent of the appellant's disability that was caused by such injuries. Id. at 630.

Dr. Volarich examined the claimant and diagnosed overuse syndrome of the hands, causing irreversible aggravation of thumb CMC arthritis, status post trapezial excision with suspensionplasty and tendon interposition arthroplasty. See Dr. Volarich deposition, page 31. With regard to the occupational disease of August 29, 2011, he opined that the claimant suffered a 30% permanent partial disability of each hand.

Dr. Wayne examined the claimant and opined that repetitive job duties were the prevailing factor compelling the claimant's bilateral thumb surgical requirements. He opined that the claimant suffered a 7% permanent partial disability of the right thumb and a 10% permanent partial disability of the left upper extremity based on surgery involving the left thumb; separately a 3% permanent partial disability rating at the right upper extremity due to persistent mild pain and stiffness in the right wrist. He did not indicate a need for future medical treatment. See Exhibit 2.

Based on the evidence as a whole, the claimant is awarded a 15% permanent partial disability of each hand with a 10% load for multiplicity and an additional 4-weeks for disfigurement. None of the evidence creates an inference that the claimant is permanently and totally disabled solely as a result of the January 2011 accident alone.

SECOND INJURY FUND

To recover against the Second Injury Fund based upon two permanent partial disabilities, the claimant must prove the following:

1. The existence of a permanent partial disability pre-existing the present injury of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed. Section 287.220.1, RSMo 2000; Leutzinger v. Treasurer, 895 S.W.2d 591, 593 (Mo.App. E.D. 1995).
2. The extent of the permanent partial disability existing before the compensable injury. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).
3. The extent of permanent partial disability resulting from the compensable injury. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).
4. The extent of the overall permanent disability resulting from a combination of the two permanent partial disabilities. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).
5. The disability caused by the combination of the two permanent partial disabilities is greater than that which would have resulted from the pre-existing

disability plus the disability from the last injury, considered alone. Treasurer of the State of Missouri v. Witte, 414 S.W.3d 455, 466, 467 (Mo. Banc 2010).

6. In cases arising after August 27, 1993, the extent of at least one of the pre-existing permanent partial disability injuries must equal a minimum of fifty weeks of disability to "a body as a whole" or fifteen percent of a major extremity unless they combine to result in total and permanent disability. Section 287.220.1, RSMo 2000; Treasurer of the State of Missouri v. Witte, 414 S.W.3d 455 466, 467 (Mo. Banc 2010).

To analyze the impact of the 1993 amendment to the law, the courts have focused on the purposes and policies furthered by the statute:

The proper focus of the inquiry as to the nature of the prior disability is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition. That potential is what gives rise to prospective employers' incentive to discriminate. Thus, if the Second Injury Fund is to serve its acknowledged purpose, "previous disability" should be interpreted to mean a previously existing condition that a cautious employer could reasonably perceive as having the potential to combine with a work-related injury so as to produce a greater degree of disability than would occur in the absence of such condition. A condition satisfying this standard would, in the absence of a Second Injury Fund, constitute a hindrance or obstacle to employment or reemployment if the employee became unemployed. Wuebbeling v. West County Drywall, 898 S.W.2d 615, 620 (Mo.App. E.D. 1995).

Section 287.220.1, RSMo 1994, contains four distinct steps in calculating the compensation due an employee, and from what source:

1. The employer's liability is considered in isolation- "the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no pre-existing disability;"
2. Next, the degree or percentage of the employee's disability attributable to all injuries existing at the time of the accident is considered;
3. The degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the combined disability; and
4. The balance becomes the responsibility of the Second Injury Fund. Nance v. Treasurer of Missouri, 85 S.W.3d 767, 772 (Mo.App. W.D. 2002).

Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. Sanders

v. St. Clair Corp., 943 S.W.2d 12, 16 (Mo.App. S.D. 1997). A disability is “permanent” if “shown to be of indefinite duration in recovery or substantial improvement is not expected.” Tiller v. 166 Auto Auction, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997).

Based on the entire record, the claimant suffered a compensable work-related injury in 2011 resulting in a 15% permanent partial disability of each hand (52.5 weeks). Based on the evidentiary record, at the time the last injury was sustained, the claimant had: (1) a 17 ½% pre-existing permanent partial disability to each wrist (61.25 weeks), (2) a 17 ½% pre-existing permanent partial disability to her right elbow due to lateral epicondylitis (36.75 weeks), (3) a 15% pre-existing permanent partial disability to her left elbow due to the ulnar neuropathy and decompression (31.5 weeks), and (4) a 20% pre-existing permanent partial disability of the left shoulder due to internal derangement and arthroscopic repair (46.4 weeks). The permanent partial disability from the last injury synergistically combines with the pre-existing permanent partial disability to create an overall disability that exceeds the simple sum of the permanent partial disabilities by 10%.

The credible evidence establishes that the last injury, combined with the pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. The claimant testified credibly about significant ongoing complaints associated with these injuries. The claimant changed how she performs many activities both at home and at work due to the combination of the problems.

Therefore, the Second Injury Fund bears liability for 22.84 weeks of permanent partial disability benefits.

Made by: _____
EDWIN J. KOHNER
Administrative Law Judge
Division of Workers' Compensation