

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

Injury No.: 09-059326

Employee: Eleazar Gonzales
Employer: Butterball, LLC
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 August 16, 2013. The award and decision of Administrative Law Judge Karen W. Fisher, issued August 16, 2013, 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 5th day of March 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Eleazar Gonzales

Injury No.: 09-059326

**BEFORE THE DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION**

Employee: Eleazar Gonzales

Injury No.: 09-059326

Employer: Butterball, LLC

Additional Party: Second Injury Fund

Insurer: Ace American Insurance Company, c/o Sedgwick Claims
Management

Hearing Date: April 2, 2013

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? YES
2. Was the injury compensable under Chapter 287? YES
3. Was there an accident under the Law? YES
4. Date of accident: August 7, 2009
5. Location where accident occurred: CARTHAGE, JASPER COUNTY,
MISSOURI
6. Was above employee in employ of above employer at time of alleged accident?
YES
7. Did employer receive proper notice? YES
8. Did accident 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: EMPLOYEE
WAS WORKING ON THE GIZZARD MACHINE IN THE EVISCERATION
DEPARTMENT WHEN HIS HAND BECAME TRAPPED IN THE MACHINE.
12. Did accident cause death? NO
13. Parts of body injured by accident: RIGHT HAND

- 14. Nature and extent of any permanent disability: PERMANENT AND TOTAL DISABILITY
- 15. Compensation paid to-date for temporary disability: NONE
- 16. Value of necessary medical aid paid to date by employer/insurer? \$20,228.69
- 17. Value necessary medical aid not furnished by employer/insurer? NONE
- 18. Employee's average weekly wage: \$491.42
- 19. Employee's weekly compensation rate: \$327.61
- 20. Method wages computation: BY AGREEMENT

COMPENSATION PAYABLE

- 21. Amount of compensation payable:
 - Unpaid medical expenses: NONE
 - Permanent partial disability benefits: NONE
 - Permanent total disability benefits: Yes. Beginning on December 31, 2009 and for the remainder of claimant's lifetime at the rate of \$245.71 a week.
- 22. Second Injury Fund liability: NO.
 - Weeks of permanent partial disability: N/A
 - Uninsured medical/death benefits: N/A
 - Permanent total disability benefits from Second Injury Fund: N/A
- 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 Mr. Gonzales 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 Mr. Gonzales: Jennifer L. Newman

FINDINGS OF FACT and RULINGS OF LAW

Employee: Eleazar Gonzales Injury No.: 09-059326
Employer: Butterball, LLC
Additional Party: Second Injury Fund
Insurer: Ace American Insurance Company, c/o Sedgwick Claims Management
Hearing Date: April 2, 2013

AWARD

On April 2, 2013, the parties appeared before the undersigned Administrative Law Judge, Karen Fisher, for a final hearing. The employer and insurer appeared through their attorney, Mr. Ron Sparlin. Ms. Stephen Freeland appeared on behalf of the Second Injury Fund. Mr. Gonzales appeared in person and with counsel Jennifer L. Newman. Ms. Lisa Lewis served as the interpreter for the hearing.

The parties stipulated that on or about August 7, 2009, Butterball, LLC (hereinafter referred to as “Butterball”) was an employer operating subject to the Missouri Workers’ Compensation Law. The employer’s liability was insured by Ace American Insurance Company, c/o Sedgwick Claims Management. On the injury date of August 7, 2009, Eleazar Gonzales was an employee of the employer, and the claimant was working subject to Missouri Workers’ Compensation Law. The parties agree that on August 7, 2009, claimant sustained an accident which arose out of and in the course and scope of his employment. This accident occurred at his place of employment in Carthage, Jasper County, Missouri. The claimant notified the employer of his injury as required by Section 287.420. The claimant’s claim was filed within the time prescribed

by Section 287.430. At the time of the accident, Mr. Gonzales' average weekly wage with the employer was \$491.42, sufficient to allow a temporary total and permanent total disability rate of \$327.61 and a compensation rate of \$327.61 for permanent partial disability benefits. The employer/insurer have not paid any temporary total disability benefits to the employee to date. The employer/insurer have paid any medical expenses in the amount of \$20,228.69 in this claim to date. The attorney fee sought is 25%.

ISSUES:

1. What is the nature and extent of the claimant's permanent disability?
2. Whether the employer/insurer is entitled to a credit for the time period the claimant returned to work from November 3, 2009 through December 30, 2009 if the claimant is permanently and totally disabled?
3. Whether a safety penalty should be assessed?
4. Whether the claimant is entitled to compensation for the disfigurement to his right hand?

FINDINGS OF FACT:

Claimant was born May 3, 1947 in Guatemala and is 66 years old. He is right hand dominant. Claimant resides in Joplin, Missouri. He performed poorly in school and left school in Guatemala in 3rd grade. Claimant did not obtain a GED.

Claimant worked several jobs in Guatemala before moving to the United States. Claimant worked as a shoe manufacturer in Guatemala and used a sewing machine to sew the heel and sides of shoes. Claimant testified that this was hand intensive.

Claimant was also employed with a textile company in Guatemala. He used an operating machine and worked with cloths and fabrics. Claimant testified that this was a hand intensive job.

In Guatemala, claimant was also employed as a guard with the government police department. Claimant testified this was a physical job.

Claimant came to the United States originally in 1969 but returned to Guatemala for several years. He returned to the United States in 1975 or 1976 and resided in California. Claimant returned to Guatemala in 1985 when his mother died. Claimant returned to the United States in 1986 and then moved back to Guatemala in 1994. He moved to the United States on a permanent basis in 1995. Claimant testified that he is a citizen of the United States.

Claimant's native language is Spanish. Claimant is limited in the English language. He does not read and write English and is able to communicate very little in English. Claimant attended school in Joplin in 2000 to learn English. However, he was working and was too tired to complete the program. Claimant has had no other training.

Claimant's first job in the United States was working in construction in California. He worked with cement mixtures. Claimant also worked as a manual laborer with plastic and metal companies. Both of these jobs were hand intensive and required heavy lifting. Claimant was also employed as a laborer in soldering, where he worked with electronic parts. Claimant soldered small electronic parts. This was a hand intensive position. Claimant testified that all of the employment positions he has held in the United States have been hand intensive.

Claimant began employment with Butterball in January, 2001. On August 7, 2009, Mr. Gonzales was working full-time on the line in the evisceration department at Butterball. Mr. Gonzales' job responsibilities in August, 2009 included taking the guts, eggs, and hearts out of turkeys. Claimant also cut out the gizzard and other parts of the turkey.

On August 7, 2009, Mr. Gonzales' supervisor, Mr. Cacio Mario, sent him to work on the only machine located in the evisceration department. This machine is used to sort and clean gizzards. His responsibilities while working on the gizzard machine included cleaning and separating the gizzards that were cut and not cut, hanging up the gizzards, and pushing the gizzards into the machine with his right hand.

The claimant testified that he was wearing Four (4) gloves while working on the machine on August 7, 2009. He wore gloves made of steel mesh, plastic, and fabric. He was also wearing a security glove. There were no guards or safety warning labels on the gizzard machine at any time while working at Butterball. Mr. Gonzales testified that he followed all of the employer's rules and protocols at Butterball at all times while using and operating the gizzard machine.

However, while pushing the gizzards into the machine with his right hand, the roller grabbed the tip of claimant's glove. All Four (4) of the claimant's fingers on his right hand were stuck in the gizzard machine. The right thumb was not trapped in the machine. The claimant is right hand dominant. The claimant tried to pull his right hand out of the machine and was unsuccessful.

Mr. Mario ordered another employee, possibly by the name of Chris, to shut down the machine. After the machine was turned off, the claimant was not able to remove his

right hand from the machine. Mr. Mario's assistant came over to the machine but was also unable to remove claimant's right hand from the machine.

The mechanics at Butterball disarmed and disassembled the gizzard machine in an attempt to remove the claimant's hand. The claimant testified that this process took some time. However, after disassembling the machine, the mechanics were not successful in removing the claimant's hand.

Following the unsuccessful attempts to remove the claimant's hand from the machine, Butterball called the paramedics. Upon the arrival of the paramedics, the paramedics spent an additional 37 minutes before they were able to remove the claimant's right hand from the gizzard machine. The claimant's hand was caught in the machine for over an hour and a half. The paramedics transported the claimant by ground ambulance to McCune Brooks Hospital in Carthage, Missouri.

After extricating the claimant's hand, the paramedics recorded that claimant's fingers on his right hand were crushed, which did not appear to be perfusing. The ambulance records from McCune Brooks reflected that the claimant's fingers were blue with little sensation and delayed capillary refill. It is also noted in the medical records from McCune Brooks that the claimant was diagnosed with an avulsion injury with controlled bleeding and crepitus, crushed deformity dislocation, ecchymosis and soft tissue swelling of his hand. Claimant had a traumatic crush injury to his right hand. The claimant was transported by helicopter to Freeman Hospital in Joplin, Missouri.

Upon arrival at Freeman Hospital, it is noted that the claimant had lacerations on his right index, ring, and small finger. He had tenderness and limited range of motion and functional deficit. It is noted that there was obvious deformity of claimant's right

hand and a partial amputation of the fifth digit. X-rays revealed a dislocation of the right fifth finger. The claimant's right hand required sutures following the work injury. A post reduction x-ray of the right fifth finger showed reduction of the previously noted dislocation with a tiny avulsion fracture at the base of the distal phalanx. Claimant was diagnosed with fifth phalanx fracture and laceration of the fingers.

On August 10, 2009, Dr. Dennis Estep evaluated claimant. On this date, claimant reported that he was unable to hold any tools with his right hand. On physical examination, claimant had complaints of pain. It is noted that claimant had a significant amount of discomfort associated with trying to remove the dressings on his wounds. Dr. Estep administered a regional block both median and ulnar at the right wrist. Upon removal of the dressings, Dr. Estep diagnosed claimant with a crush injury of the right hand with a moderate amount of edema.

X-rays on August 10, 2009 revealed fractures of the right fourth and fifth digits with a possible fracture of the third digit. There was also a fifth digit dislocation with distal fracture. There were lacerations to the right index, ring, and pinky fingers. Claimant also exhibited degloving injuries to the third, fourth, and fifth digits on the right hand. On August 10, 2009, Dr. Estep released claimant to return to work with restrictions of no use of the right hand, no lifting of more than Ten (10) pounds, and no operating dangerous machinery. Claimant was referred for an evaluation with an orthopedic surgeon.

Dr. Paul Toma, an orthopedic surgeon, evaluated claimant on August 11, 2009. Dr. Toma opined that Mr. Gonzales had sustained a crush injury of his right hand and a degloving injury to the tips of all of the fingers on his right hand. Dr. Toma opined

claimant was to remain on one-handed work only. On August 18, 2009, Dr. Toma referred claimant to a hand therapist.

Claimant treated with IPT Physical therapy from August 20, 2009 through October 12, 2009 for a total of Twenty-three (23) physical therapy visits. During this course of physical therapy, Mr. Gonzales reported a throbbing pain in all Four (4) of the fingers on his right hand. The records also reflect that claimant had a great deal of difficulty performing physical therapy because of the hypersensitivity in his right hand. Claimant's testimony corroborated that he had difficulty performing physical therapy because of the pain in his right hand.

In his evaluation with Dr. Toma on October 13, 2009, it was noted that the claimant did not have a great deal of motion in his right hand. On November 3, 2009, Dr. Toma evaluated the claimant and noted that there was one small area on the right ring finger that had not completely healed. The records indicate that while claimant had active range of motion at the PIP, he did not have active range of motion at the DIP. It was Dr. Toma's opinion that claimant was not a surgical candidate. Dr. Toma opined that claimant was fairly functional on November 3, 2009. Mr. Gonzales had continuing complaints of numbness in his right hand on November 3, 2009. Dr. Toma released claimant to return to work on full duty on November 4, 2009.

The claimant testified that upon returning to work on full duty at Butterball, he was assigned new job duties and was working in a different area. Claimant's job duties upon returning to work in November, 2009 included deplucking the turkeys for a period of approximately Two (2) weeks. While the claimant was released to return to work on

full duty, he was only able to use his left hand because his right hand was not functioning well. Claimant testified that he had very limited use of his right hand.

After Two (2) weeks, the claimant was again assigned new job duties, which included removing the innards, fries, and eggs from the turkeys. Claimant testified that this job required using both hands. However, because of the pain and the lack of functioning in his right hand, claimant was working with only his left hand. Claimant testified that this right hand was not the same. Claimant was not able to complete his job duties because of the continuing pain, loss of motion, and sensitivity in his right hand.

Claimant returned for a final evaluation with Dr. Toma on November 24, 2009. Mr. Gonzales had continuing complaints of pain in his right hand. Dr. Toma noted that the claimant was still very sensitive along the finger pads of the middle and ring finger on his right hand. Dr. Toma opined that the claimant probably did have an avulsion of the FDP of the right ring finger but notes that his FDS was working. Dr. Toma also recorded that the claimant had a very difficult time regaining motion in his right hand. Dr. Toma opined that the claimant had achieved maximum medical improvement on November 24, 2009. The employer/insurer did not schedule any further medical evaluations for the claimant after November 24, 2009.

Dr. Toma assigned impairment ratings on November 24, 2009. Dr. Toma determined that claimant has suffered 10% impairment for scarring and sensory changes in the middle finger as well as 26% impairment for the loss of DIP motion. Dr. Toma noted that this results in a combined impairment of the right middle finger at 36%, which is equal to 7% impairment of the hand or 6% of the upper extremity. The right ring finger also has a 10% impairment due to scarring and sensory change with a 36%

impairment due to loss of motion of the DIP joint. This combined at 46% of the right ring finger, which is equal to 4% impairment of the upper extremity. Dr. Toma noted that these Two (2) finger injuries total 10% impairment of the upper extremity.

Claimant continued to have pain in his right hand and fingers following his release from medical treatment. The employer/insurer did not provide any medical treatment for claimant following his release from Dr. Toma on November 24, 2009. However, claimant continued to seek medical treatment with Dr. Jeff Wool, who prescribed pain medication for claimant's right hand.

Claimant testified that upon returning to work full-time, he was not able to physically perform the job of removing the innards, fries (testicles), and eggs from the turkeys because this job required using both hands. Claimant was physically unable to use his right hand. The claimant testified that the employer forced him to use both hands to complete his assigned job duties. However, he was unable to use his right hand.

Claimant testified that he was called into the office several times and advised that he must use both hands at work. The employer wrote up the claimant on multiple occasions at work for not using both hands. Claimant testified that he was penalized for not using both hands at work. Claimant further testified he did all he could physically do at work and attempted to use his right hand but was unable to do so due to the pain and lack of function in his right hand. On December 30, 2009, Butterball terminated the claimant's employment.

Claimant filed an unemployment claim. The employer disputed claimant's entitlement to unemployment benefits. The unemployment file and a copy of the transcript from the unemployment hearing were introduced into evidence. On March 23,

2010 a hearing was held with the Missouri Division of Employment Security, Appeals Tribunal, with regard to Mr. Eleazar Gonzales' employment with Butterball. The purpose of this hearing was to determine whether Mr. Gonzales was entitled to unemployment benefits following his termination of employment with Butterball in December, 2009. The claimant was denied employment benefits, as the employer's reason for discharge stated the employee engaged in misconduct connected with work.

Ms. Becky Vance testified at the unemployment hearing on behalf of Butterball. Ms. Vance is a line supervisor at Butterball. Ms. Vance supervised Mr. Eleazar Gonzales at Butterball. Ms. Vance testified that on December 30, 2009, Mr. Bill Scott, superintendent of Butterball, discharged Mr. Gonzales from his employment at Butterball. Ms. Vance further testified that Mr. Gonzales was discharged for failure to use both hands to pull fries after being released from the doctor.

Ms. Vance witnessed Mr. Gonzales pulling fries with only one hand. Ms. Vance warned Mr. Gonzales about using only one hand to pull fries. Ms. Vance was questioned about why Mr. Gonzales was using only one hand. Ms. Vance's testimony was that Mr. Gonzales told her that the hand he injured at work still hurt and that was why he was working with only one hand. When questioned about why it is a problem to use One (1) hand rather than Two (2), Ms. Vance testified that "if you don't use two hands, you end up hurting the one that you're using the most more than the one you're not using." Mr. Gonzales' testimony at the workers' compensation hearing, however, was that the employer was not satisfied with the claimant performing work one-handed, as this affected his production levels.

Mr. Gonzales testified at the unemployment hearing on his behalf. Mr. Gonzales testified that he would attempt to use both hands at work. However, due to the pain in his right hand, he cannot stand the pain and is unable to work with that hand. Mr. Gonzales testified that his right hand was caught in the machine for a substantial amount of time and that resulted in the injury to his right hand and his inability to use his right hand now. Mr. Gonzales was unable to secure employment following his termination with Butterball because of the condition of his right hand.

Claimant did not have any difficulty meeting production levels at Butterball prior to his work injury of August 7, 2009.

Claimant applied for other jobs following his employment with Butterball. However, claimant testified that potential employers administered employment tests, and he was unable to pass the tests because of his inability to use his right hand.

Claimant is right hand dominant. Prior to the injury, claimant wrote with his right hand. Following the August, 2009 injury, claimant is able to write very little with his right hand. He uses his left hand for writing following the injury. Claimant testified that he writes with his left hand, but it is not the same as writing with his right hand prior to the injury.

Claimant continues to experience pain in his right hand and fingers. He has increased pain when bending the fingers on his right hand. Claimant is unable to make a fist with his right hand. He is unable to fully extend his fourth and fifth fingers.

Claimant has a great deal of sensitivity in his right hand and fingers. He does not have the ability to grip with his right hand. Claimant is unable to lift anything heavy,

push anything with his right hand, and is basically unable to use his right hand. Claimant testified that even lifting something with little weight causes pain in his right hand.

Claimant used to drive with his right hand prior to the August 7, 2009 injury. However, following this injury, he uses his left hand to drive. He testified that he only uses his right hand as a helper hand when he drives.

Claimant is unable to use his right hand in performing many daily activities such as shaving and buttoning his shirts. Claimant is unable to do many domestic household chores. He testified that he has other people that come to his house to perform the household chores that he is physically unable to do because of his right hand. Claimant is unable to do laundry with his right hand.

Claimant was wearing a button-down shirt on the date of the final hearing. He attempted to unbutton and button his shirt with his right hand but was unable to do so. Claimant eventually had to button his shirt with his left hand after trying unsuccessfully many times to button his shirt with his right hand.

Claimant testified that prior to August 7, 2009, he did not have any injuries or pain in his right hand and fingers. In addition, prior to August 7, 2009, claimant was physically able to perform all required job tasks with his employment with Butterball.

Claimant applied for Social Security Disability benefits and was awarded benefits on his first application without assistance from an attorney. Mr. Gonzales testified that he began receiving SSD benefits approximately Two (2) years ago. A normal day for the claimant now includes going to the library, going for a walk, reading and studying the Bible, and visiting with friends.

Dr. Shane Bennoch evaluated Mr. Gonzales on June 7, 2010. Dr. Bennoch reviewed claimant's medical records and performed an examination of claimant. During the course of the physical examination with Dr. Bennoch, it was noted that with any attempt of pinprick, claimant would withdraw his right hand because of hypersensitivity to the palmar side of all fingers with the exception of the thumb and was also hypersensitive to the dorsum of the hand with fingers Two (2) through Five (5) of the right hand. With the pinwheel testing, claimant was also hypersensitive in the palm and dorsum of the right hand when compared with the unaffected left hand.

Dr. Bennoch noted observation of claimant's right hand showed obvious abnormalities, particularly to the fourth and fifth fingers when compared to the left hand. Dr. Bennoch opined that claimant had muscle atrophy with tapering of the fourth and fifth fingers starting at the PIP joint and extending distally. Dr. Bennoch also recorded that there was an obvious shiny appearance of the fourth and fifth fingers starting at the PIP joints and going distally. The hair was very sparse in the affected area of the claimant's right hand and fingers. It was Dr. Bennoch's opinion that claimant suffers from complex regional pain syndrome, or reflex sympathetic dystrophy (RSD) of the right hand based upon claimant's atrophy, shiny appearance of his hand, and the sparse hair growth in the affected area.

Dr. Bennoch's examination revealed that claimant holds the DIP joint on his fifth finger slightly flexed and was lacking approximately 20 degrees of extension at the DIP. The claimant lacked approximately 3 degrees from full extension at the PIP joint on the fifth finger and lacked approximately 10 degrees extension of the DIP joint on the fourth finger.

The range of motion testing revealed claimant had normal range of motion with regard to the right wrist. The results of the dexterity examination revealed claimant is unable to hold against resistance mainly because of the fourth and fifth fingers on his right hand and also has difficulty attempting to oppose thumb to fifth finger on the right hand. It is also noted in Dr. Bennoch's report that when Mr. Gonzales held the Jamar dynamometer with his right hand, he could only hold it with his index and long finger and kept his ring and fifth fingers somewhat extended.

Claimant continued to have consistent complaints of pain to the right hand and fingers, with the pain being worse on the third, fourth, and fifth fingers particularly on the palmar side at his evaluation with Dr. Bennoch in June, 2010. Claimant reported increased pain when bending the fingers on his right hand. Claimant was unable to make a fist with his right hand. Claimant was unable to fully extend his fourth and fifth fingers. Claimant had a great deal of sensitivity and inability to grip with his right hand. Claimant also reported that the pain in his right hand awakens him at night.

Dr. Bennoch determined that claimant had achieved maximum medical improvement at the time of his evaluation in June, 2010. Dr. Bennoch opined that the accident that occurred on August 7, 2009 was the prevailing cause of the injury to his right hand and resulting impairment. Dr. Bennoch rated claimant's disabilities at 60% of the right hand. This rating takes into account claimant's dramatically reduced function of the right hand and well as his hypersensitivity and inability to make a full grip, which results in dysfunction. In his deposition testimony on September 30, 2011, Dr. Bennoch testified that because the injury of August 7, 2009 was to the claimant's dominant hand, the disability rating would be higher than what he assessed in his report of June, 2010.

Dr. Benncoh testified that a 10% loading factor should be added to his original disability rating of 60% of the right hand.

Dr. Bennoch assigned restrictions upon claimant as a result of his work injury. The restrictions include no lifting or carrying with the right hand, no pushing or pulling with the right hand, no type of work with his right hand on a repetitive basis, no climbing with his right hand, no balancing with his right hand, no handling, fingering, or feeling with his right hand, and vibration and hazards are limited due to his right hand.

Dr. Bennoch opined that claimant has been temporarily and totally disabled since the time of the accident on August 7, 2009, minus the Six (6) weeks that he attempted to return to work and worked mainly with his left hand. Dr. Bennoch determined that the claimant's temporary total disability has continued up to the present time. Finally, Dr. Bennoch opined that the claimant is permanently and totally disabled since the prognosis for his right hand is very poor.

Dr. Allen Pamet evaluated the claimant at the request of the employer/insurer on April 14, 2011. Dr. Parmet's report references the injury date as August 26, 2009, which is contrary to the medial records. Dr. Parmet recorded that claimant had a scar at the DIP joints, and the skin was somewhat shiny.

Dr. Parmet's report reflected that the claimant had limited motion in the right shoulder and that the claimant guarded his right hand. Dr. Parmet's report also reflected that claimant was unable to fully extend the second, fourth, and fifth fingers on his right hand. Dr. Parmet's exam revealed marked diminished grip strength on the right hand, with effort limited due to pain. Dr. Parmet noted that the claimant had complaints of severe pain in all fingers on his right hand when touched.

Dr. Parmet agreed with Dr. Toma's rating of claimant at 10% of the right hand and opined claimant had achieved maximum medical improvement in November of 2009. Dr. Parmet determined, however, that claimant has developed disuse atrophy due to his guarding and lack of use of his right hand. Dr. Parmet opined that claimant's current limitations may be as high as 25% permanent partial disability of the right hand. Dr. Parmet concluded that claimant has a partially functioning hand, which although not as good as at the time of maximum medical improvement, is still functioning at least as a helper hand. Dr. Parmet concluded that claimant is not permanently and totally disabled and that even one-armed individuals are capable of regular employment.

Dr. Parmet authored a supplemental report dated October 4, 2011. His findings from his April, 2011 report remain unchanged. Dr. Parmet supported Dr. Toma's findings and concluded that while claimant's right hand is somewhat worse than Dr. Toma's findings, he does significantly disagree with the findings of Dr. Bennoch and Mr. Eldred. It was Dr. Parmet's opinion that claimant is able to return to work at the light level and probably the medium or higher level.

Dr. Toma had referred claimant for a Functional Capacity Evaluation ("FCE"). However, the employer/insurer never authorized or scheduled an FCE for claimant. Mr. Cory Carr, licensed physical therapist in Springfield, Missouri, evaluated claimant and performed an FCE on claimant on June 1, 2012. Claimant had complaints of sharp, shooting pain in his right shoulder and primarily in his right hand at the time of his evaluation with Mr. Carr. Claimant had pain with light touch to his right hand and fingers. Claimant was also continuing to experience hypersensitivity in his right hand and right shoulder at the time of his evaluation with Mr. Carr in June, 2012.

It is noted in Mr. Carr's report that claimant had pain in his right hand and right shoulder with each activity. Claimant had limited grip strength in his right hand when compared to the left and experienced pain with grabbing. Claimant also had decreased flexion, abduction, and extension in his right shoulder, elbow, and fingers. Mr. Carr assigned restrictions of no lifting, pressing, carrying, pushing, or pulling of more than ten (10) pounds. Mr. Carr concluded that claimant is limited by a pain dysfunction in his right shoulder, which extends to his right hand. Pain and hypersensitivity to touch limits his strength and ability to reach, grab, push, pull, and lift anything more than ten (10) pounds. Mr. Carr testified that claimant is unable to grab objects weighing less than ten (10) pounds because of the hypersensitivity in his right hand. Mr. Carr further testified that claimant would be unable to use fine motor skills and work with small objects that weigh much less than ten (10) pounds because of the nerve damage in his right hand. Mr. Carr's restrictions are similar to those of Dr. Bennoch in that this places claimant at the less than sedentary work level.

Mr. Carr testified that claimant is right hand dominant and that an injury to a dominant hand has a greater impact than an injury to a non-dominant hand. Mr. Carr testified that while claimant is right handed, claimant now uses his left hand to do most everything following the work injury. Mr. Carr testified that claimant does not have a fully functioning right hand.

Ms. Michelle Sprecker, is a vocational rehabilitation counselor. She performed a vocational evaluation on Mr. Gonzales on August 16, 2011 on behalf of the employer/insurer. Ms. Sprecker testified by way of deposition on March 20, 2012. She met with claimant, obtained information with regard to claimant's personal background,

education, and work history. Ms. Sprecker used that information to conduct a transferable skills analysis. She did not perform any vocational testing upon claimant.

Ms. Sprecker testified with regard to the claimant's educational background. Ms. Sprecker's testimony was that Mr. Gonzales reported difficulty with math in school in Guatemala. Mr. Gonzales reported to Ms. Sprecker that he passed only one math class in all of his years of school.

Ms. Sprecker testified that Mr. Gonzales injured his right hand, which is his non-dominant hand. This is contrary to all of the medical records and the claimant's testimony. Mr. Sprecker further testified that if claimant had injured his dominant hand, this would not change her vocational opinion in any way. Her report noted that the claimant uses his left hand for many daily activities, including shaving, writing, doing laundry. Claimant also uses his left hand when he attempts to type on a computer. Her report also included that claimant avoids using his right hand as much as possible.

Ms. Sprecker was unable to confirm how many of claimant's fingers were trapped in the machine in the work injury in August, 2009. She further testified that the number of fingers trapped in the machine were not relevant to claimant's permanent physical restrictions. Ms. Sprecker confirmed that the claimant takes pain medication following the August, 2009 work injury. Her report noted that claimant has limited use of the right hand and has increased pain in his right hand when attempting to lift anything with the right hand.

Ms. Sprecker testified that Dr. Parmet had the same medical opinion as Dr. Toma with regard to the claimant's right hand. When directed to Dr. Parmet's note of April 16, 2011 "He has a partially functioning right hand, which although not as good as at the

time of maximum medical improvement, it's still functioning, at least, as the helper hand," it remained Ms. Sprecker's opinion that Dr. Parmet had the same opinion as when Dr. Toma released the claimant in November, 2009. Ms. Sprecker concluded that Dr. Parmet's note one year and five months after Dr. Toma released claimant at maximum medical improvement, when claimant had a partially functioning hand and used his right hand as a helper hand supports Dr. Toma's opinion of no restrictions.

Ms. Sprecker categorized claimant's work at Butterball as heavy work, which was entry level, unskilled labor. She testified that claimant's prior employment falls in the medium and heavy work categories. Ms. Sprecker testified that claimant's work as a poultry eviscerator with Butterball falls into the light work category. On cross-examination, however, she was unable to identify any of the physical requirements associated with claimant's position at the time of his August, 2009 injury.

Ms. Sprecker's opinion was that claimant could return to work in his pre-injury position at Butterball assuming the restrictions of Dr. Toma and Dr. Parmet. However, Ms. Specker further testified that taking into consideration Dr. Parmet's October, 2011 report, the claimant would not retain the physical ability to return to work at Butterball. Assuming Dr. Bennoch's restrictions, claimant would not be able to return to work.

In further questioning, it was Ms. Sprecker's opinion that claimant could return to work at Butterball because on November 24, 2009, Dr. Toma had released claimant to return to work on full duty and claimant was working on full duty. Ms. Sprecker was directed to Dr. Toma's last medical note dated November 24, 2009 where claimant had continuing complaints of pain in his right hand, loss of motion, and sensitivity in his right hand. Ms. Sprecker did not discuss with claimant whether he was able to perform his job

responsibilities upon returning to work in November, 2009. However, she did testify that claimant required assistance from other co-workers to complete his job duties following the August, 2009 injury. It was further Ms. Sprecker's opinion that she would need further clarification from Dr. Parmet after his last medical note of October , 2011 before she can determine whether claimant can return to his pre-injury position with Butterball.

In her September, 2011 report, Ms. Sprecker identified two (2) positions for claimant in the event that he is not able to return to his pre-employment positions with Butterball. The first job identified by Ms. Sprecker was a packer at Safeway. This job requires lifting up to Thirty (30) pounds. It is Ms. Sprecker's opinion that claimant is able to perform this job based upon Dr. Toma's findings. Claimant would not be able to perform the Safeway position based upon Dr. Parmet's October, 2011 restrictions and the restrictions from Dr. Bennoch and Mr. Carr. This packer position was available through Penmac. Ms. Sprecker was not familiar with Penmac, however, it is a temporary employment agency and may not be permanent employment.

The other position she identified for claimant was the position of production. Ms. Sprecker was not able to identify the physical requirements of this identified job. However, she testified that based upon Dr. Toma not assigning any restrictions for claimant, claimant would be able to perform this job. Ms. Sprecker was unclear on whether claimant would be able to perform the production position based upon Dr. Parmet's October, 2011 restrictions. She testified that she would need further information from the employer with regard to required job responsibilities. Claimant would be unable to perform this job based upon the restrictions for Dr. Bennoch and Mr. Carr.

Ms. Sprecker prepared a supplemental report dated December 13, 2011. In her December, 2011 report, Ms. Sprecker identified Four (4) occupations that claimant can perform. The positions include laundry worker, light assembler, maid/housekeeping cleaner, and dry clean presser.

It was Ms. Sprecker's opinion that laundry worker falls within the light category of work. Ms. Sprecker testified on cross-examination that the claimant reported that he is unable to use his right hand at home when getting clothes in and out of the washer and dryer. Ms. Sprecker testified that it is not common for laundry workers to use only one hand when getting clothes in and out of the washer. Yet, it remains Ms. Sprecker's opinion that claimant is able to perform the job of laundry worker utilizing Dr. Parmet's restrictions in his October, 2011 report.

The second identified job for claimant is light assembler. It is Ms. Sprecker's testimony that this position is in the category of light level of work. She testified that an assembly job would require the use of both hands. She testified that it would depend on the job as to the amount of fine motor skills this job will require.

The third identified job is maid/housekeeping. On cross-examination, she testified that this is a job within the light level of work category, although this job requires flipping mattresses. She further testified that it is common for those working in this position to use both hands in changing the sheets on a bed.

The fourth position identified for claimant is a dry clean presser. Ms. Sprecker did not know whether this position requires the use of fine motor skills.

Ms. Sprecker did not perform any vocational testing and did not recommend any formal job retraining due to the claimant's age. She did, however, review Mr. Eldred's

findings. With regard to claimant's testing of fine motor skills ranking in the less than 1st percentile, Ms. Sprecker testified that these findings did not change her opinion with regard to claimant's employability. She did not perform her own independent testing of claimant's dexterity. However, she testified that older people, such as claimant, generally may have more difficulty with dexterity than younger people.

Mr. Phil Eldred is a vocational rehabilitation expert that testified by deposition and live at the hearing. He examined claimant at the request of claimant's attorney. Mr. Eldred performed a vocational evaluation upon claimant on September 28, 2010. Mr. Eldred reviewed claimant's medical records, took a history from the claimant, and performed vocational testing on the claimant prior to issuing his report. Mr. Eldred also took into consideration claimant's past work history, claimant's education, claimant's intellect, claimant's ability to maneuver small objects, claimant's age, and claimant's transferable skills.

Mr. Eldred testified that he considered the restrictions imposed on claimant by Dr. Jimmy Morgan at Freeman Hospital, Dr. Dennis Estep, Dr. Paul Toma, Dr. Jeff Wool, Dr. Shane Bennoch, and Mr. Cory Carr. Dr. Morgan gave restrictions of no use of the right hand, which places claimant at the sedentary work level. Dr. Toma did not assign claimant any restrictions with regard to his right hand. Dr. Wool gave no restrictions but stated, "he could even be left with permanent disability from pain." Dr. Estep gave restrictions at the sedentary work level. Dr. Bennoch assigned restrictions at the less than sedentary work level. Mr. Carr also assigned restrictions at the less than sedentary work level.

Mr. Eldred opined that claimant has restrictions at the less than sedentary work level. Mr. Eldred concluded that claimant was unable to perform sedentary work as defined by the United States Department of Occupational Titles. There are no jobs at the less than sedentary work level in the open labor market. Mr. Eldred concluded that claimant was permanently and totally disabled as a result of the injuries sustained in isolation on August 7, 2009. Mr. Eldred identified no pre-existing disabilities that posed a hindrance or obstacle to employment or re-employment.

Mr. Eldred examined the 20 physical demands that, in addition to strength, are defined in the Dictionary of Occupational Titles. Based upon the assigned physician restrictions, Mr. Eldred testified that claimant is restricted from lifting, carrying, climbing, kneeling, reaching, handling, fingering, and feeling with his right hand and arm. Claimant is also restricted with regard to working in proximity to moving mechanical parts, working in high exposed places, and working with explosives.

Mr. Eldred testified that significant limitations with regard to reaching, handling, fingering, and feeling eliminate a large number of occupations that an individual could otherwise perform. Mr. Eldred testified that reaching involves extending the hands and arms in any direction, while handling entails seizing, holding, grasping, turning, or otherwise working primarily with the whole hand(s). Reaching and handling are activities required in almost all jobs. Fingering encompasses picking, pinching, or otherwise working primarily with fingers. Fingering is needed to perform most unskilled sedentary jobs. Mr. Eldred further testified that the loss of manual dexterity narrows the sedentary and light ranges of work much more than it does medium, heavy, or very heavy ranges of work.

Mr. Eldred performed the Purdue Pegboard test, which determines a person's dexterity. It is especially insightful with regard to people who might work on assembly lines, packing lines, operating certain machines, and other types of manual jobs. Claimant's scores place him in the less than 1st percentile with regard to his right hand, both hands, right left, and both hands, and the assembly task. The claimant's score with regard to his left hand place him in the first percentile. This means that 99% of the population who undergo this testing perform better than the claimant.

Mr. Gonzales attended school in his home country of Guatemala but only completed the 3rd grade. Claimant did not obtain a GED. Claimant attended school in Joplin in 2000 to learn English, however, he was working and was too tired to complete the program. Claimant has had no other training.

Mr. Eldred performed a variety of tests upon claimant. One of these tests was the Wide Range Achievement Test 4 (WRAT-4). The WRAT-4 evaluates basic academic skills in word reading, sentence comprehension, spelling, and math computation. Claimant was not tested in the areas of reading and spelling because he does not read and write English. Claimant's scores on the math computation scored in the 6th percentile, which is equivalent to the equivalent of the 4th grade. This means that Mr. Gonzales scored below 94% of people in his age group. Claimant's scores are not indicative of a candidate for advanced training. Claimant would not be expected to successfully complete re-training or vocational training.

Mr. Eldred testified that the claimant's relevant past work history included poultry eviscerator, hand packager, meat dresser, grain farmer, casting machine operator,

furniture assembler, and hand filer. The poultry eviscerator occupation took into account claimant's last position with his employer, Butterball.

Mr. Eldred opined that claimant's past relevant occupations were precluded by the assigned medical restrictions placed upon him. Mr. Eldred testified that the potential to be placed in a job is separate and distinct from a worker's ability to perform essential job functions. In considering claimant's pain, physical impairments, medical restrictions, use of narcotic pain medication, marginal education, limited ability to read and write English, advancing age, his physical inability to perform hand intensive skills, and history of manual type work that it was unlikely that an employer would consider hiring claimant.

Mr. Phil Eldred testified live at the hearing. He testified that his opinions had not changed since his deposition of June 2, 2011. Following his deposition, Mr. Eldred reviewed additional records including reports from Dr. Hughes, Dr. Parmet Ms. Michelle Sprecker, and Mr. Cory Carr as well as the depositions of Ms. Sprecker and Mr. Carr.

Mr. Eldred disagreed with Ms. Sprecker's testimony that claimant's injury was to his non-dominant hand. Mr. Eldred testified the records corroborate an injury to claimant's right hand, which is his dominant hand. Mr. Eldred agreed with the testimony of Dr. Bennoch and Mr. Carr that an injury to a person's dominant hand has a much greater impact than an injury to a non-dominant hand.

Mr. Eldred testified about the job positions (1) laundry worker, (2) assembler, (3) maid/housekeeping, and (4) machine/dry clean presser. Mr. Eldred was provided with documentation from the Dictionary of Occupational Titles with regard to the position of laundry worker. He testified that this documentation shows laundry work falling into the medium level of work. It was also Mr. Eldred's position that laundry worker is a medium

level of work. The medium level of work requires exerting 20 to 50 pounds occasionally, or up to 1/3 of the time, and/or 10 to 25 pounds frequently, which is defined as 1/3 to 2/3 of the time, and/or greater than negligible up to 10 pounds of force constantly, which is more than 2/3 of the time.

Mr. Eldred testified that the laundry worker position includes tasks such as loading articles into washers and dryers, turning valves to fill washers, lifting articles from washers and dryers, lubricating machines, using grease gun and oil cans, mending torn articles using needle and thread, sorting and counting articles to verify quantities on laundry lists, and mixing dyes and bleaches according to formulas. Mr. Eldred testified that claimant would not be able to perform the position of laundry worker utilizing the restrictions of Dr. Bennoch, and Mr. Carr. Claimant would also be unable to perform this job according to Dr. Parmet, who opined claimant is capable of only performing work in the light category.

Mr. Eldred testified about the job position of an assembler, which is classified as light level of work. Light work is defined as exerting up to 20 pounds of force occasionally, or up to 1/3 of the time, and/or 10 pounds of force frequently and or a negligible amount of force constantly, or 2/3 or more of the time. The Dictionary of Occupational Titles notes that even though the weight lifted may only be a negligible amount, a job should be rated as light work:

- (a) when it requires walking or standing to a significant degree; OR
- (b) when it requires sitting most of the time but entails pushing and/or pulling of arm or leg controls; AND/OR
- (c) when the job requires working at a production rate pace entailing the constant, 2/3 of the time or more, pushing and/or pulling of materials even though the weight of those materials may be negligible. NOTE: The constant, 2/3 of the time

or more, stress and strain of maintaining a production rate pace, especially in an industrial setting, can be and is physically demanding of a worker even though the amount of force exerted is negligible.

Mr. Eldred testified that the job of assembler requires using hand tools and inspecting parts for defects. Mr. Eldred concluded that claimant would not be able to perform the job of assembler because this is hand intensive, and the medical experts do not recommend hand intensive work for claimant. In addition, claimant would be unable to perform the job of assembler based upon the restrictions from Dr. Bennoch and Mr. Carr.

Mr. Eldred testified that cleaning and housekeeping jobs require sorting, counting, folding and carrying linens; making beds; and replenishing supplies. Housekeeping positions require moving furniture, hanging drapes, and rolling carpet, which claimant is unable to do based upon the restrictions from Dr. Bennoch and Mr. Carr. Claimant is unable to perform a job in the light work classification based upon the restrictions from Dr. Bennoch and Mr. Carr.

Claimant's attorney provided Mr. Eldred with documentation from the Dictionary of Occupational Titles with regard to the position of machine presser. Mr. Eldred testified that this documentation shows that the position of machine presser falls into the medium level of work. It was also Mr. Eldred's position that employment in the area of machine presser is a medium level of work.

Mr. Eldred testified that the requirement of a machine presser include operating machines, ironing, steaming flattening seams, and shaping articles. This involves spreading articles to be pressed, pulling pressing heads onto articles, pressing buttons to release steam, rearranging articles and repeating process until pressing is complete,

applying pressure to articles to be ironed, pushing levers to release steam, pushing an iron back and forth over articles to be ironed and shifting the articles under the iron until article is pressed. This position also requires hanging garments and articles on wire hangers, operating Two (2) presses simultaneously, and may use hand irons to finish pressing garments. Mr. Eldred testified that claimant would not be able to perform the position of machine presser utilizing the restrictions of Dr. Bennoch and Mr. Carr. Claimant would also be unable to perform this job according to Dr. Parmet, who opined claimant is capable of only performing work in the light category.

Mr. Ceasar Vasquez testified on behalf of the claimant. Mr. Vasquez is claimant's friend and he attends church with claimant. Mr. Vasquez has known claimant approximately Five (5) years. Following claimant's injury of August, 2009, Mr. Vasquez testified that claimant had difficulty using his right hand and fingers. He also observed that claimant was unable to use his right hand to write and began using his left hand to write. He observed that Claimant is unable to use his right hand to drive following the work injury, and he now drives using his left hand. Mr. Vasquez testified that claimant has difficulty performing certain tasks, such as changing his clothes and ironing. Claimant also uses his left hand to eat and drink following the August, 2009 injury. Claimant is unable to reach and lift heavy things.

Ms. Maria Reyes testified on behalf of the claimant. Ms. Reyes was employed with Butterball from 2008-2010. Her position involved working on the gizzard machine in the evisceration department. Ms. Reyes testified that there was only One (1) machine in the evisceration department while she was employed with Butterball.

Ms. Reyes sustained an injury to her right hand while working on the gizzard machine at Butterball on November 6, 2008. While working, the gizzards became stuck in the machine. She testified that the machine grabbed her hand while she was pulling gizzards to get them out even though she did not reach into the machine. Ms. Reyes was wearing Three (3) gloves made of metal, fabric, and plastic at the time she was injured. Ms. Reyes testified that she was using the machine correctly and was following the company safety rules at the time of her injury. There were no safety guards on the gizzard machine at the time of her injury in November, 2008.

Ms. Susanne Berryhill testified on behalf of the employer/insurer. Ms. Berryhill worked as the company nurse at Butterball from 2008 through 2011. Ms. Berryhill testified that she was responsible for completing the accident reports at Butterball when an employee is injured. Ms. Berryhill recalled claimant's injury of August, 2009. She testified that she completed the Report of Injury with regard to claimant's injury in August, 2009. While Ms. Berryhill recalled the claimant's August 7, 2009 injury to his right hand, the Report of Injury she completed notes claimant sustained an injury to his lower extremities.

Ms. Carmen Garcia testified on behalf of the employer/insurer. Ms. Garcia is employed in the Training department at Butterball and has worked for employer for Eleven (11) years. Ms. Garcia trained employees, including claimant, on safety issues. She trained employees not to reach into a machine if it were to become jammed. Ms. Garcia trained employees on how to use the machines at Butterball, however, she has never used any of the machines.

On cross examination, Ms. Garcia testified that she did not know how many machines were located in the evisceration department. She did not know whether the machine that claimant was working on in August, 2009 was functioning properly. She did not have any information as to whom, when, or how the machines are serviced or maintained at Butterball. Ms. Garcia testified that it is possible that the machines at Butterball malfunction.

At the hearing I examined claimant's right hand and fingers. His right hand is shiny in appearance and claimant has disfigurement to the fingers on his right hand. As a result of the injury to claimant's right hand injury, I would assess 4 weeks of disability for disfigurement if claimant was permanent and partially disabled.

I find that claimant reached maximum medical improvement on November 24, 2009, the last date on which Dr. Toma evaluated claimant and found him to be at maximum medical improvement.

As to credibility, all of the doctors agree that claimant sustained a crush injury to his right hand, which was caused by the August 7, 2009 work injury. Dr. Parmet and Dr. Bennoch both concluded that claimant has a partially functioning right hand. I find the medical records support the opinions of Dr. Bennoch. To the extent that Dr. Bennoch and Dr. Parmet disagree, I find the independent medical opinion of Dr. Bennoch more credible and persuasive. I also find the vocational opinion of Mr. Phil Eldred more credible and persuasive in this case for the reasons discussed below.

CONCLUSIONS OF LAW

A claimant in a workers' compensation claim has the burden of proving all elements of a claim to a reasonable probability. Cardwell v. Treasurer of State of Missouri, 249 S.W.3d 902, 911 (Mo. App. E.D. 2008). When a claimant has alleged permanent and total disability, he must prove his inability to return to any employment and not merely mean ability to return to the employment in which the employee was engaged at the time of the accident. § 287.020.6 RSMo Cum. Supp. 2005. In determining whether claimant can return to employment, Missouri law allows consideration of an employee's age, education, along with physical disabilities. BAXI v. United Technologies Automotive, 956 S.W.2d 340 (Mo. App. E.D. 1997). The central question is whether, in the ordinary course of business, would an employer reasonably be expected to hire claimant in his physical condition. Ransburg v. Great Plains Drilling, 22 S.W.3d 726, 732 (Mo. App. W.D. 2000), overruled on other grounds by Hampton v. Big Boy Steel Erection, 121 S.W.2d 220 (Mo. Banc 2003).

Claimant has a limited education and no GED. He does not read or write the English language. Claimant is also unable to communicate much in English. Claimant has limited math skills.

Claimant is not able to work using his right dominant hand. He is not able to perform hand intensive jobs. I find and conclude that claimant is not physically capable of performing the identified jobs of (1) laundry worker, (2) assembler, (3) maid/housekeeper, and (4) machine/dry clean presser. Ms. Sprecker mistakenly testified that the claimant's injury was to his non-dominant hand. She testified that it would not change her opinions if claimant sustained an injury to his dominant hand. This

diminishes the credibility of Ms. Sprecker. To the extent that Ms. Sprecker and Mr. Eldred disagree, I find that the evidence supports the findings of Mr. Eldred.

Given all of the facts of this case, and seriously considering all of the employment opportunities that are available, I find that there is substantial and competent evidence to conclude that it is not reasonable to expect an employer to hire claimant in the open labor market. He is permanently and totally disabled from the August 7, 2009 injury, alone. His permanent and total disability is a direct result of the injuries to his right hand and fingers on August 7, 2009.

Mr. Gonzales attempted to return to work following the August 7, 2009 for the time period of November 3, 2009 through December 30, 2009. Therefore, I find and conclude that there is substantial and competent evidence that the employer/insurer is entitled to a credit for the period the claimant returned to work from November 3, 2009 through December 30, 2009.

The employer/insurer is alleging that claimant violated safety protocol at Butterball when he was injured on August 7, 2009. There is evidence that the claimant attended safety training for this machine and should have been aware of employer's safety policy to call a supervisor if the gizzards were stuck rather than trying to correct it on his own. There was also testimony by a coworker that most employees followed this protocol. I find and conclude that there is substantial and competent evidence that a safety penalty should be assessed. Therefore, the claimant's permanent and total disability benefits shall be reduced in the amount of 25%.

Section 287.190.4 RSMo, provides that if an employee is seriously and permanently disfigured about the head, neck, or arms, the Division may allow up to 40

weeks of disability for the disfigurement. At the time of the hearing, not having an opportunity to review all of the evidence, I advised the parties that claimant's disfigurement would be equal to 4 weeks of disability. Now, having completed a review of the entire record and having concluded that claimant is permanently and totally disabled, claimant, by law is not entitled to an additional amount for disfigurement. See Akers v. Warson Garden Apartments, 961 S.W.2d 50, 57-58 (Mo. 1998) overruled on other grounds Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. 2003) (holding that an additional amount of disfigurement may be awarded only when disability is partial in degree).

I hereby order beginning December 31, 2009, and continuing for the remainder of claimant's lifetime, employer/insurer shall pay to claimant the weekly sum of \$245.71, for permanent total disability arising from the work-related injuries claimant sustained on August 7, 2009.

As claimant was working and receiving regular pay, the employer/insurer is entitled to a credit for the time period claimant attempted to return to work from November 3, 2009 to December 30, 2009.

A safety penalty is assessed in the amount of 25% for claimant's failure to follow employer's safety rules. This results in a 25% reduction in claimant's benefits with regard to his permanent total disability. Claimant's compensation rate at the time of the August 7, 2009 injury was \$327.61. The 25% reduction in benefits equates to a new rate of \$245.71 with regard to permanent and total disability benefits the employer/insurer owe claimant.

The claimant has disfigurement to his right hand and fingers resulting from the August 7, 2009 injury. Claimant is permanently and totally disabled. Therefore, under Missouri law, claimant is not entitled to additional compensation for disfigurement. No disfigurement is awarded to claimant.

As a result of my finding the claimant permanently and totally disabled as a result of the last injury alone, I find no liability against the Second Injury Fund.

Mr. Gonzales' attorney, Jennifer L. Newman, shall have a lien of 25% on all amounts awarded as a reasonable fee for necessary legal services rendered to claimant. Interest shall be paid as provided by law.

Made by: _____
Karen Fisher
Administrative Law Judge
Division of Workers' Compensation
Signed 8/16/13

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

Injury No.: 09-072569

Employee: Eleazar Gonzales
Employer: Butterball, LLC
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 August 16, 2013. The award and decision of Administrative Law Judge Karen W. Fisher, issued August 16, 2013, 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 5th day of March 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Eleazar Gonzales

Injury No.: 09-072569

**BEFORE THE DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION**

Employee: Eleazar Gonzales

Injury No.: 09-072569

Employer: Butterball, LLC

Additional Party: Second Injury Fund

Insurer: Ace American Insurance Company, c/o Sedgwick Claims
Management

Hearing Date: April 2, 3013

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? YES
2. Was the injury compensable under Chapter 287? YES
3. Was there an accident under the Law? YES
4. Date of accident: June 26, 2009
5. Location where accident occurred: CARTHAGE, JASPER COUNTY,
MISSOURI
6. Was above employee in employ of above employer at time of alleged accident?
YES
7. Did employer receive proper notice? YES
8. Did accident 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: EMPLOYEE
WAS LIFTING AND LOADING A TURKEY WHEN HE SUSTAINED AN
INJURY TO HIS CHEST.
12. Did accident cause death? NO
13. Parts of body injured by accident: CHEST

- 14. Nature and extent of any permanent disability: NONE
- 15. Compensation paid to-date for temporary disability: NONE
- 16. Value of necessary medical aid paid to date by employer/insurer? NONE
- 17. Value necessary medical aid not furnished by employer/insurer? \$19,655.91
- 18. Employee's average weekly wage: \$513.05
- 19. Employee's weekly compensation rate: \$342.03
- 20. Method wages computation: BY AGREEMENT

COMPENSATION PAYABLE

- 21. Amount of compensation payable:
 - Unpaid medical expenses: \$19,655.91
 - Temporary Total Disability benefits: \$342.03
 - Permanent partial disability benefits: NONE
- 22. Second Injury Fund liability: No.
 - Uninsured medical/death benefits: NONE
- 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 Mr. Gonzales 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 Mr. Gonzales: Jennifer L. Newman

FINDINGS OF FACT and RULINGS OF LAW

Employee: Eleazar Gonzales Injury No.: 09-072569
Employer: Butterball, LLC
Additional Party: Second Injury Fund
Insurer: Ace American Insurance Company, c/o Sedgwick Claims Management
Hearing Date: April 2, 3013

CORRECTED AWARD

On April 2, 2013, the parties appeared before the undersigned Administrative Law Judge, Karen Fisher, for a final hearing. The employer and insurer appeared through their attorney, Ron Sparlin. Assistant Attorney General, Stephen Freeland, appeared on behalf of the Second Injury Fund. Mr. Gonzales appeared in person and with attorney, Jennifer L. Newman. Ms. Lisa Lewis served as the interpreter for the hearing.

The parties stipulated that on or about June 26, 2009, Butterball, LLC (hereinafter referred to as “Butterball”) was an employer operating subject to the Missouri Workers’ Compensation Law. The employer’s liability was insured by Ace American Insurance Company, c/o Sedgwick Claims Management. On the injury date of June 26, 2009, Eleazar Gonzales was an employee of the employer, and the claimant was working subject to Missouri Workers’ Compensation Law. This employment occurred in Carthage, Jasper County, Missouri. The claimant’s claim was filed within the time prescribed by Section 287.430. At the time of the accident, Mr. Gonzales’ average weekly wage with the employer was \$513.05, sufficient to allow a temporary total

disability rate of \$342.03 and a compensation rate of \$342.03 for permanent partial disability benefits. The employer/insurer have not paid any temporary total disability benefits to the employee to date. The employer/insurer have not paid any medical expenses in this claim to date. The claimant is not alleging any permanent partial disability resulting from the June 26, 2009, injury. The attorney fee sought is 25%.

ISSUES:

1. Whether employee sustained an accident on June 26, 2009?
2. Whether the claimant's accident of June 26, 2009, caused the claimant's injury to his chest?
3. Whether the alleged accident of June 26, 2009, arose out of and in the course and scope of the claimant's employment?
4. Whether the claimant notified the employer of the June 26, 2009, injury?
5. Whether the employer/insurer owes medical bills in the amount of \$19,655.91 for medical treatment related to the claimant's work injury of June 26, 2009?
6. Whether the employer/insurer owes the claimant TTD benefits for the time period of June 27, 2009, through July 2, 2009?

FINDINGS OF FACT:

On June 26, 2009, Mr. Gonzales was working in the evisceration department at Butterball. Claimant began employment with Butterball in January, 2001. Mr. Gonzales' job responsibilities in the evisceration department included picking up and lifting live and dead turkeys and putting them in canisters, weighing the turkeys, taking the turkeys to

machines to grind them, and cleaning the line. The turkeys could weigh as much as eighty (80) pounds. Mr. Gonzales testified that while on duty, he was lifting an approximately 80 pound turkey when he felt a pull in his chest area.

Mr. Gonzales testified that he immediately notified Mr. Cacio Mario of his injury on June 26, 20209. Mr. Mario is a layman that assists the supervisor, Mateo. Mr. Mario took claimant to the infirmary, where the company nurse evaluated Mr. Gonzales. Mr. Gonzales' supervisor, Mateo, was present in the infirmary, and Mr. Gonzales notified Mateo of his injury. Mr. Mario requested Mateo bring a dry shirt to Mr. Gonzales because he was hot and sweating. The employer called an ambulance for Mr. Gonzales, and claimant was taken by ambulance to McCune Brooks Hospital in Carthage, Missouri.

Upon arriving at McCune Brooks Hospital, an EKG and CPK were performed. Mr. Gonzales was transported to Freeman Hospital in Joplin, Missouri. Claimant underwent a cardiac catherization and had normal coronary arteries with normal LV function. Dr. Stauffer opined that this was likely secondary to early repolarization. On June 26, 2009, claimant was prescribed Vicodin for pain for his musculoskeletal injury.

On June 27, 2009, an appropriate interpreter was provided to Mr. Gonzales. At that time, Mr. Gonzales advised his treating physicians that he picked up a heavy turkey and was attempting to place it on an upper shelf. Claimant experienced a sudden onset of chest pain, which was worse with aspiration and movement of the ribs.

A series of rib and chest x-rays revealed normal results. An examination on June 27, 2009, revealed a slightly swollen area over the claimant's rib cage that was determined to be secondary to lifting up a heavy turkey. Mr. Gonzales was discharged from Freeman Hospital in stable condition on June 27, 2009. Claimant's final diagnosis

was noncardiac chest pain with rib pain. The treating physician at Freeman Hospital opined that claimant was to remain off work for one (1) week and no lifting of more than twenty-five (25) pounds for two (2) weeks. Claimant did not seek any further medical treatment following his discharge from Freeman hospital on June 27, 2009. Following his discharge from the hospital, claimant returned to work full-time in the evisceration department at Butterball.

Dr. Shane Bennoch evaluated Mr. Gonzales at the request of his attorney. Dr. Bennoch performed an examination of Mr. Gonzales on June 7, 2010. Dr. Bennoch opined that as a result of the June 26, 2009, injury, claimant sustained a chest wall muscle strain secondary to the heavy lifting of a turkey. In his deposition, Dr. Bennoch testified that the lifting injury the claimant sustained on June 26, 2009, was the prevailing cause of the claimant's chest injury. Dr. Bennoch determined that Mr. Gonzales achieved maximum medical improvement for the June 2009 injury. As Mr. Gonzales' chest pain following the June 26, 2009, injury resolved, Dr. Bennoch did not assign any permanent impairment for the June, 2009, injury.

The employer/insurer has not paid any medical bills with regard to the claimant's injury of June 26, 2009. Mr. Gonzales' medical bills for the June, 2009 injury total \$19,655.91. Dr. Bennoch testified that the medical bills the claimant incurred for his work injury of June 26, 2009, were fair, reasonable, and customary. The medical bills in the amount of \$19,655.91 were related to his injury of June 26, 2009. In addition, the treatment incurred was necessary to cure and relieve the effects of the June 26, 2009, injury. I hereby order \$19,655.91 be paid to claimant by employer/insurer for past medical.

CONCLUSIONS OF LAW:

There is substantial and competent evidence based upon the medical records, Dr. Bennoch's testimony, and the claimant's testimony to find that the claimant's accident of June 26, 2009, caused the employee's injury to his chest.

I find the claimant's testimony credible and persuasive. There is substantial and competent evidence to find that the claimant's accident of June 26, 2009 arose out of and in the course and scope of employment with Butterball.

There is substantial and competent evidence to find that the claimant provided the employer with notice of his injury on June 26, 2009.

I find and conclude that there is competent and substantial evidence that the claimant is owed TTD benefits for the one (1) week he was unable to return to work from June 27, 2009 through July 2, 2009. I find and order that the employer/insurer owes TTD benefits to the claimant for the time period of June 27, 2009, through July 2, 2009, which totals \$342.03. As a result of the employee making no claim for permanent partial disability as to this injury, I find there is no liability against the Second Injury Fund.

Mr. Gonzales' attorney, Jennifer L. Newman, is awarded an attorney fee of 25%, which shall be a lien on all of the proceeds until paid. Interest shall be paid as provided by law.

MADE BY: _____

Signed 8/16/13

Karen Fisher
Administrative Law Judge
Division of Workers' Compensation