

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

Injury No.: 07-129027

Employee: Stephen L. Green
Employer: Ameristar Casino (Settled)
Insurer: Hartford Fire Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, heard the parties' arguments, reviewed the evidence and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge by this supplemental opinion.

We offer this supplemental opinion to address the primary argument raised in the brief of the Second Injury Fund.

Second Injury Fund Argument

The Second Injury Fund argues that employee's carpal/cubital tunnel syndrome does not qualify as "a subsequent compensable injury" for purposes of triggering Second Injury Fund liability under § 287.220.1 RSMo, which provides, as follows:

...If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, ...receives a subsequent compensable injury resulting in additional permanent partial disability...so that the degree or percentage of disability, ...caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, 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 preexisting disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for.

(Emphasis added).

Employee: Stephen L. Green

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We summarize our understanding of the Second Injury Fund's argument and legal reasoning as applied to the facts of this claim: "Injury" as defined in § 287.020.3 RSMo excludes occupational diseases. Employee's carpal/cubital tunnel syndrome is an occupational disease. Thus, employee's carpal/cubital tunnel syndrome is not an "injury." Employee's carpal/cubital tunnel syndrome is not a "subsequent compensable injury" under § 287.220.1, so the Second Injury Fund is not implicated in this matter.

Discussion

The Second Injury Fund argument fails. The Second Injury Fund fails to give effect to the complete definition of injury in § 287.020.3. The complete definition includes occupational diseases within the definition of "injury" where specifically provided in Chapter 287.

Section 287.020.3(5) RSMo states:

The terms "injury" and "personal injuries" shall mean violence to the physical structure of the body and to the personal property which is used to make up the physical structure of the body, such as artificial dentures, artificial limbs, glass eyes, eyeglasses, and other prostheses which are placed in or on the body to replace the physical structure and such disease or infection as naturally results therefrom. *These terms shall in no case except as specifically provided in this chapter be construed to include occupational disease in any form, nor shall they be construed to include any contagious or infectious disease contracted during the course of the employment, nor shall they include death due to natural causes occurring while the worker is at work.*

(Emphasis Added).

Chapter 287 specifically provides for injuries by occupational disease and specifically says those injuries are compensable.

Section 287.067 RSMo states, in relevant part:

2. An injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

3. An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. An occupational disease due to repetitive motion is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

8. With regard to occupational disease due to repetitive motion, if the exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than three months and the evidence demonstrates that the exposure to the repetitive motion with the immediate prior employer was the prevailing factor in

Employee: Stephen L. Green

causing the injury, the prior employer shall be liable for such occupational disease.

(Emphasis added).

The above sections specifically refer to a condition of ill caused by occupational disease as an "injury." That is, the legislature specifically provided that the term "injury" includes occupational disease and that injuries by occupational disease are compensable.

Based upon the foregoing, we construe the term "injury" as it appears in the phrase "subsequent compensable injury" in § 287.220.1 to include occupational diseases.

Correction

We note what appears to be a clerical error in the administrative law judge's award: on page 3, in the first paragraph, last sentence, the administrative law judge states: "The evidence compels an award for the defense." We correct the foregoing to read as follows: "The evidence compels an award for the employee."

Conclusion

We affirm and adopt the award of the administrative law judge as supplemented herein. We approve and affirm the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

The award and decision of Administrative Law Judge Edwin J. Kohner, issued September 13, 2011, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 8th day of March 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Stephen L. Green

Injury No.: 07-129027

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Ameristar Casino (Settled)

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

Additional Party: Second Injury Fund

Insurer: Hartford Fire Insurance Company (Settled)

Hearing Date: August 10, 2011

Checked by: EJK/lsn

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: October 15, 2007
5. State location where accident occurred or occupational disease was contracted: St. Charles County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
The claimant, a food service worker, developed carpal tunnel syndrome in his right wrist and cubital tunnel syndrome in his right elbow.
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: Right elbow and wrist
14. Nature and extent of any permanent disability: 17.5% Permanent partial disability to the right wrist and 22% permanent partial disability to the right elbow
15. Compensation paid to-date for temporary disability: \$192.27
16. Value necessary medical aid paid to date by employer/insurer: \$10,965.74

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Stephen L. Green	Injury No.:	07-129027
Dependents:	N/A	Before the	
Employer:	Ameristar Casino (Settled)	Division of Workers'	
		Compensation	
Additional Party:	Second Injury Fund	Department of Labor and Industrial	
		Relations of Missouri	
Insurer:	Hartford Fire Insurance Company (Settled)	Jefferson City, Missouri	
		Checked by: EJK/lsn	

This workers' compensation case raises several issues arising out of an alleged work related injury in which the claimant, a food service worker, suffers from carpal tunnel syndrome in his right wrist and cubital tunnel syndrome in his right elbow. The sole issue for determination is Second Injury Fund liability. The evidence compels an award for the defense.

At the hearing, the claimant testified in person and offered a deposition of David T. Volarich, D.O., Dr. Volarich's curriculum vitae and medical reports, two workers' compensation settlements, and medical records from Paul Sheehan, M.D., Terrence L. Piper, M.D., Anthony E. Sudekum, M.D, and David M. Brown, M.D. The defense offered no evidence beyond cross examination of the claimant's witnesses.

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 was contracted in Missouri. Any markings on the exhibits were present when offered into evidence.

SUMMARY OF FACTS

On October 15, 2007, the claimant developed an occupational disease arising out of his work activities as a sous chef. Dr. Ollinger diagnosed right carpal tunnel syndrome and right cubital tunnel syndrome and performed a right carpal tunnel release and transposition of the ulnar nerve on July 10, 2009. Dr. Ollinger released the claimant from care in December 2009. The claimant returned to his previous job with this employer. The claimant testified that after his release from medical care, he continues to have ongoing numbness and tingling at the present time in his right hand, that his grip strength is significantly reduced, that he is unable to lift the heavy skillets or pots at work without using both hands, that he has difficulty holding on to the knives he uses at work. The claimant testified that he has severe pain in his hand and elbow with activities, that he is unable to perform at the same pace at his job as he did prior to the surgery, that he is unable to fish or shoot pool without pain and discomfort, and that these were activities he performed regularly before he developed the problems with his right hand and arm. The claimant settled his workers' compensation claim arising out of the injury to his right hand on the basis of a 17.5 % permanent partial disability of the right wrist and a 22% permanent partial

disability to the right elbow.

The claimant suffered pre-existing conditions with his left wrist and left eye. In 2004, Dr. Howard performed a carpal tunnel release on the claimant's left wrist. The claimant is also blind in his left eye and wears a prosthetic left eyeball. The claimant complains of pain and weakness associated with his left hand and a 100% loss of vision in his left eye making working on his left side more difficult.

Dr. Meyers

Dr. Meyers evaluated the claimant on February 8, 2011, and opined that the claimant's work activities were the prevailing factor for the 2007 right wrist and elbow condition. Dr. Meyers also diagnosed pre-existing left wrist and left eye conditions. Dr. Meyers opined that as a result of the claimant's 2007 right hand and elbow reparative surgical procedure and continuing symptoms and functional impairments he sustained a 17.5% permanent partial disability to the right hand and a 22% permanent partial disability to his right elbow. In addition, he opined that the claimant sustained a 25% pre-existing permanent partial disability to the left wrist and a 100% pre-existing permanent partial disability to the left eye. Dr. Myers opined that the combination of the claimant's past and present disabilities produced a synergistic effect, which is greater than their simple arithmetic sum.

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 1994; 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. Searcy v. McDonnell Douglas Aircraft, 894 S.W.2d 173, 177 (Mo.App. E.D. 1995).

6. In cases arising after August 27, 1993, the extent of both the pre-existing permanent partial disability and the subsequent compensable injury 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 1994; Leutzinger, supra.

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 contains four distinct steps in calculating the compensation due an employee, and from what source, in cases involving permanent disability: (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 preexisting 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).

However, the Second Injury Fund has taken the position that the 2005 changes to the Workers' Compensation Act preclude liability against the Fund where the last injury was due to an occupational disease. In support of its position the Fund argues that one of the elements

establishing its liability is a showing that the injured worker sustained “a subsequent compensable injury.” Section 287.220.1, RSMo Supp. 2009. According to the Fund, if one strictly construes Section 287.020.3(5), which defines the term “injury”, occupational diseases are specifically excluded.

Thus, if the term “injury” specifically excludes occupational diseases, then an occupational disease cannot constitute “a subsequent compensable injury” for purposes of Fund liability. The Fund does not dispute that prior to 2005, it had liability even when the primary work injury was due to an occupational disease. Of particular note is the fact that the 2005 amendment to the Act did not change any of the sections that the Fund relies on in making this argument, other than Section 287.800 that now requires the Act to be strictly construed. The Fund is not suggesting that there were any substantive changes to the Act that eliminated its liability where the primary injury is an occupational disease. On the contrary, it is merely arguing that the same language that imposed liability on the Fund for occupational diseases prior to the 2005, now should be interpreted differently to relieve it of liability.

When Missouri first enacted the Workers’ Compensation Act it only covered injuries by accidents. Occupational diseases were specifically excluded from coverage. Prior to the addition of occupational disease claims to the Act in 1931, the definition of “injury” or “personal injuries” was essentially identical to what it is today. Staples v A. P. Green Fire Brick Company, 307 S.W.2d 457, 459-60 (Mo. 1957). In the original enactment, as is true today, the Act stipulated that the “terms ‘injury’ and ‘personal injuries’ ...shall in no case except as specifically provided in this chapter be construed to include occupational disease in any form...” Section 287.020.3(5) RSMo. The legislature did not amend the definition of “injury” or “personal injury” when it added coverage for occupational disease claims. Renfro v Pittsburgh Plate Glass Co., 130 S.W.2d 165 (Mo. App. 1939).

In the eighty years since occupational disease claims have been added to the Act, Missouri Courts have addressed the apparent incongruity between the definition of injury and its application to occupational disease claims in other parts of the Act. See Staples at 459-60; Renfro at 171; Marie v. Standard Steel Works, 319 S.W.2d 871, 874-75 (Mo. 1959). In Renfro the Court noted:

The Workmen's Compensation Act, as it was originally passed in this State, expressly excluded occupational disease and covered accidental injuries only. The words "accident," "injury," and "personal injuries" were carefully defined in the original Act, but, of course, were not intended to apply to occupational disease in any form because such disease was specifically excluded from the operation of the Act. [Sec. 3305, R.S. Mo. 1929 (Mo. Stat. Anno., sec. 3305, pp. 8238, 8239).] In 1931 the Legislature amended the above section of the Act by providing that an employer could elect to come under the Act as to occupational diseases. The amendment, however, did not change the definitions contained in said section and did not define "occupational diseases." It is, therefore, the duty of the courts to determine and apply the meaning of the terms mentioned in the above section in connection with occupational disease cases, even though they were not originally intended to apply to such cases. Renfro at 171.

In Renfro, the Court was faced with the issue of construing the term “injury” in the context of applying the statute of limitations to an occupational disease claim. Since the statute of limitations required a determination of the date of injury the Court concluded by implication the term “injury” applied to occupational disease claims. Id. The Court referred to cases that decided the issue in accident claims and it noted:

It has been held that an injury is not an accident but the result of an accident; and that the Statute of Limitations provided for in the compensation act does not begin to run until it becomes reasonably discoverable and apparent that a compensable injury has been sustained. [Wheeler v. Missouri Pacific R. Co., 328 Mo. 888, 42 S.W. (2d) 579; Kostron v. American Packing Co., 227 Mo. App. 34, 45 S.W. (2d) 871. See also Bridges v. Fruin-Colnon Const. Co., (Mo. App.), 52 S.W. (2d) 582.]

The last above-cited cases were decided upon the law as it existed before the "occupational disease" amendment of 1931 was in force, but the rule they apply with respect to the time of the "injury" we think is applicable to an occupational disease case in the absence of a definition in the amendment of 1931 as to the "time of the injury" in that kind of a case.” Id.

Thus the Renfro Court concluded that the term “compensable injury” includes occupational disease claims, at least to the extent of determining the statute of limitations.

The Missouri Supreme Court reaffirmed this concept in Staples v. A. P. Green Fire Brick Company. 307 S.W.2d 457 (Mo. 1957). The Court noted that by virtue of the addition of occupational disease claims to the Act it assumes the existence of an injury in all occupational disease cases.

“The legislature has enacted an amendment for the very purpose of authorizing employers and employees to elect to bring occupational disease claims and injuries under the Act, and, respectively, to pay and receive compensation therefore, in lieu of all common-law rights of action. The very bringing of such claims under the Act presupposes an 'injury,' and, therefore, an injury has generally been recognized as present and existing in all compensable occupational disease cases.” Id. at 462.

Thus even if one assumes that the definition of “injury” specifically excluded occupational diseases, then by implication from the addition of those claims to the Act and subsequent court decisions there was no question that the term “injury” as used in the Act included both accidents and occupational diseases. Id.; See also: Marie v. Standard Steel Works, 319 S.W.2d 871, 875 (Mo. 1959). This was clearly the understanding prior to the 2005 changes to the Act.

When the legislature enacted changes to the Act in 2005, Sections 287.020.3(5) and 287.220.1 were not changed in any way. The language in those sections was the same both before and after the 2005 amendments. It is a fundamental principal of statutory construction that if a law is amended, those portions of the law that remain unchanged continue to have the

same meaning and interpretation after the amendment. Kelly v. Hanson, 984 S.W.2d 540, 544 (Mo.App. 1998); Sell v. Ozarks Med. Ctr., 333 S.W.3d 498, 508 Mo.App. S.D. 2011). Section 1.120 RSMo provides:

“The provisions of any law or statute which is reenacted, amended, or revised, so far as they are the same as those of a prior law, shall be construed as a continuation of such law and not as a new enactment.”

The Fund’s argument in this case is similar to the argument advanced in Sell. Sell involved an issue of notice. The Administrative Law Judge found that the injured worker told a supervisor about the accident but did not give the employer written notice of the accident within 30 days as required by Section 287.420. The employer argued that under the new strict construction requirement, the statute mandated written notice and that actual notice was not sufficient. While portions of the notice statute were changed in 2005, the portion indicating that written notice was not necessary if the employer was not prejudiced, remained unchanged. In rejecting the employer’s argument the Court noted that pre-2005 decisions held that if the employer received actual notice within 30 days of an accident, even if not in writing, then the employer was deemed to be not prejudiced. The Court concluded that since this portion of the Act was not changed then the prior interpretations remain in effect. In reaching this conclusion the Court noted:

[I]n construing a statute a fundamental precept is that the legislature acted with knowledge of the subject matter and the existing law. Holt v. Burlington N. R.R. Co., 685 S.W.2d 851, 857 (Mo.App. 1984). In revising the workers' compensation statutes as a whole, the legislature clearly expressed its intent to negate the effects of various cases and their progeny relevant to some of the sections and terms of the workers' compensation chapter. No such actions were directed toward section 287.420, and, particularly, the legislature made no mention of prior cases interpreting the notice exception at issue here. Such an omission signals an intentional acceptance of existing case law governing the unchanged portion of section 287.420.” Id.

Therefore, since the 2005 changes to the Act did not in any way alter the language of Sections 287.020.3(5) or 287.220.1, the prior judicial interpretations indicating that the term “injury” applied to both accidents and occupational diseases continued in full force and effect using the rule of construction cited above.

This conclusion is bolstered by the language of Section 287.020.3(5). The definition of “injury” or “personal injury” only excludes occupational diseases “except as specifically provided in this chapter.” (Emphasis added). The definition of “injury” always contemplated that it would include occupational diseases under some circumstances. Section 287.067, RSMo Supp 2009, contains provisions that appear to include occupational diseases as injuries:

“An injury” by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability.” Section 287.067.2, RSMo Supp 2009 (Emphasis added.) “An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter.” (Emphasis added). Section 287.067.3 RSMo.

Thus, by its very terms the section of the Act defining an occupational disease recognizes that conditions caused by an occupational disease are specifically referred to as, and considered to be, injuries.

To hold otherwise would produce absurd results. First, the statute of limitations for occupational diseases could not be determined if the Fund's position prevails since it requires a showing of when it became "reasonably discoverable and apparent that an "injury" has been sustained..." (Emphasis added). Section 287.063.3 RSMo. Second, the average weekly wage could not be determined for occupational disease cases since it requires a calculation starting with the week immediately preceding the date of injury. Section 287.250.4. Third, occupational disease claims would be precluded from death benefits since that provision of the Act only allows for death benefits when the "injury causes death." (Emphasis added). Section 287.240.1 RSMo. Fourth, the weekly compensation rates for temporary total disability, permanent partial disability and permanent total disability could not be calculated for occupational disease claims since they are all based on when the injury occurs. Sections 287.140, 287.190 and 287.200. Fifth, employers would have no responsibility to provide medical care to cure and relieve from the effects of an injury by occupational disease. Section 287.140.1, RSMo Supp. 2009. Sixth, medical providers would be allowed to bill the employee directly for medical services authorized by the employer, because the admonition of billing for those services would not apply to occupational diseases. Section 287.140.13, RSMo Supp. 2009. The Fund's position that the term "injury" when used in the Act does not include occupational diseases would have the effect of removing occupational disease claims from the Act.

However, by specifically altering the burden of proof for occupational disease claims from "a substantial factor" to "the prevailing factor" shows that the Legislature intended that occupational disease claims continue to be a part of the Workers' Compensation Act. Therefore, the term "subsequent compensable injury" as is contained in Section 287.200.1 includes both accidents and occupational diseases. Since the statute does not preclude Second Injury Fund liability when the last injury is due to an occupational disease, the claimant has established a right to recover from the Second Injury Fund.

Based on the entire record, the claimant suffered a compensable work related occupational disease in 2007 resulting in a 17.5% permanent partial disability to his right wrist (26.25 weeks) and 22% of his right elbow (46.2 weeks). At the time the last injury was sustained, the claimant had a 16.5% pre-existing permanent partial disability to his left wrist (28.875 weeks) and a 100% pre-existing permanent partial disability to his left eye (140 weeks). The permanent partial disability from the last injury combines with the pre-existing permanent partial disability to create an overall disability that exceeds the simple sum of the permanent partial disabilities by 15% with respect to the upper extremities and 10% with respect to the left eye.

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 that he had significant ongoing complaints associated with these injuries. The claimant changed how he performs many activities both at home and at work due to the combination of his problems. The claimant testified that as a result of the combination of his problems, he was limited in his ability to lift items. The claimant was used to

using his right side to compensate for his left wrist problems, but as a result of the right side injuries he is unable to compensate. The claimant testified that he has to go much slower and be more careful due to his inability to use his right side to compensate for his left hand weakness and left side sight loss in his job. The claimant uses knives on a regular basis. The claimant testified he would use his ability on his right side in the past to really operate by feel. The claimant is unable to hold the knives as firmly in his right hand and has a loss of feeling in the right hand. This requires him to concentrate more on where the knives are in relationship to the items he is cutting. The risk of danger in cutting himself has increased as a result of the combination of his physical problems.

The SIF liability is calculated as follows:

76.825 weeks for last injury x 15% loading factor =	11.52 weeks
28.875 weeks for pre-existing left wrist disability x 15% loading factor =	4.33 weeks
140 weeks for pre-existing disability associated with his left eye x 10% load =	14.00 weeks
Total	29.85 weeks

Therefore, the Second Injury Fund bears liability for 29.85 weeks of permanent partial disability benefits.

CONCLUSION

Both attorneys in this case submitted exceptionally well-written briefs with very powerful legal contentions. However, the Second Injury Fund is liable to claimant for 29.85 weeks of additional permanent partial disability benefits. The attorney for the claimant is entitled to an attorney fee of 20% of this award.

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