

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

Injury No.: 99-125167

Employee: Daniel Gruendler (deceased)
Dependent: Deborah Gruendler
Employer: Union Camp Corporation (Settled)
Insurer: Liberty Mutual Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, heard oral arguments, and considered the whole record. Pursuant to section 286.090 RSMo, the Commission modifies the award and decision of the administrative law judge dated January 21, 2010. This Commission adopts the findings, conclusions, decision and award of the administrative law judge to the extent that they are not inconsistent with the decision set forth below.

Discussion

The issues stipulated in dispute at trial were the nature and extent of any permanent partial disability, whether employee was permanently and totally disabled, and the nature and extent of any Second Injury Fund liability.

The administrative law judge determined and concluded that employee was permanently and totally disabled on June 12, 2000, due to a combination of his primary and preexisting injuries, and that employee's dependent, Deborah Gruendler, is entitled to continuation of employee's permanent total disability benefits for her lifetime. The administrative law judge ordered the Second Injury Fund to pay permanent partial disability benefits at a differential rate of \$22.06 for 63 weeks beginning January 8, 2001, and thereafter \$325.07 per week for as long as provided by law.

We agree with the administrative law judge that employee was permanently and totally disabled due to a combination of his primary and preexisting injuries, and that employee's dependent is entitled to a continuation of employee's permanent total disability benefits for her lifetime. We disagree, however, with the administrative law judge's finding that employee was permanently and totally disabled on June 12, 2000. We must address this finding because of its bearing on the appropriate date of commencement of permanent total disability benefits from the Second Injury Fund.

Although the statutes involving temporary total disability and permanent disability do not set out a specific time line, there is an intended timing of benefits paid by employers. Temporary total disability benefits are due from the date of the injury through the date the condition has reached the point where further progress is not expected. Courts have used various terms to determine when an employee's condition has reached the point where further progress is not expected, including the term maximum medical improvement. *Vinson v. Curators of the University of*

Employee: Daniel Gruendler

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Missouri, 822 S.W.2d 504, 508 (Mo. App. E.D. 1991)(interpreting a doctor's testimony of employee's maximum treatment potential to mean maximum medical improvement); *Cooper*, 955 S.W.2d at 575 (using the term maximum medical progress to define the point where no further progress is expected for an employee's condition).

After reaching the point where no further progress is expected, it can be determined whether there is either permanent partial or permanent total disability and benefits may be awarded based on that determination. One cannot determine the level of permanent disability associated with an injury until it reaches a point where it will no longer improve with medical treatment. Furthermore, an employers' liability for permanent partial or permanent total disability does not run concurrently with their liability for temporary total disability.

Although the term maximum medical improvement is not included in the statute, the issue of whether any further medical progress can be reached is essential in determining when a disability becomes permanent and thus, when payments for permanent partial or permanent total disability should be calculated.

Cardwell v. Treasurer of Mo., 249 S.W.3d 902, 910 (Mo. App. 2008).

Employer's plant closed on June 12, 2000; there is no other significance to this date. The record reveals that employee continued to receive treatment related to his 1999 occupational disease until March 24, 2004. The parties, in fact, stipulated that employee reached maximum medical improvement on March 24, 2004, the date that Dr. Coin released employee following treatment for the occupational disease. As of June 12, 2000, employee had not even undergone carpal tunnel or trigger thumb surgeries and releases, so any determination of permanent disability related to the primary injury was clearly premature.

Given the foregoing, the administrative law judge's determination that employee was permanently and totally disabled as of June 12, 2000, is erroneous as contrary to the evidence and the stipulation of the parties regarding maximum medical improvement. We conclude that employee was permanently and totally disabled on March 24, 2004. Accordingly, permanent total disability payments should commence from the Second Injury Fund beginning March 24, 2004.

Conclusion

The Commission modifies that portion of the award of the administrative law judge concluding employee was permanently and totally disabled on June 12, 2000. The Commission concludes and determines that the competent and substantial evidence supports a finding that employee was permanently and totally disabled as of March 24, 2004.

The record reveals that employer paid 63 weeks of permanent partial disability benefits to employee's dependent at a rate of \$303.01 per week. The parties stipulated that employee's total disability rate is \$325.07. Accordingly, the Second Injury Fund is ordered to pay to dependent permanent total disability benefits beginning March 24, 2004, at the differential rate of \$22.06 for 63 weeks. Thereafter, the Second Injury Fund is ordered to pay permanent total disability benefits at the rate of \$325.07 per week for dependent's lifetime.

All remaining findings of fact and conclusions of law are affirmed.

Employee: Daniel Gruendler

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The award and decision of Administrative Law Judge Kathleen M. Hart issued January 21, 2010, as modified, is attached and incorporated by this reference to the extent it is not inconsistent with our findings, conclusions, award and decision herein.

Given at Jefferson City, State of Missouri, this 12th day of August 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Daniel Gruendler (deceased)

Injury No.: 99-125167

Dependents: Deborah Gruendler

Before the
**Division of Workers'
Compensation**

Employer: Union Camp Corporation (previously settled)

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

Additional Party: Second Injury Fund (SIF)

Insurer: Liberty Mutual Insurance Company (previously settled)

Hearing Date: November 2, 2009

Checked by: KMH

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: on or about September 17, 1999
5. State location where accident occurred or occupational disease was contracted: St. Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant injured his right and left hands as a result of repetitive activities at work.
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 and left wrists and thumbs
14. Nature and extent of any permanent disability: 18% right wrist, 18% left wrist
15. Compensation paid to-date for temporary disability: \$9,752.05
16. Value necessary medical aid paid to date by employer/insurer? \$24,645.95

Employee: Daniel Gruendler (deceased)

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- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: unknown
- 19. Weekly compensation rate: \$325.07/\$303.01
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

63 weeks of permanent partial disability from Employer
 plus 6.3 weeks for multiplicity (previously paid)

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:
 weekly differential of \$22.06 payable by SIF for 63 weeks beginning
 January 8, 2001, and, thereafter, \$325.07 per week as provided by law

TOTAL: TO BE DETERMINED

23. Future requirements awarded:

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Chris Wagner

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Daniel Gruendler (deceased)

Injury No.: 99-125167

Dependents: Deborah Gruendler

Before the
**Division of Workers'
Compensation**

Employer: Union Camp Corporation (previously settled)

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

Additional Party: SIF

Insurer: Liberty Mutual Insurance Company (previously settled)

Checked by: KMH

A hearing was held on the above captioned matter November 2, 2009. Daniel Gruendler (Claimant) passed away December 26, 2004. His wife, Deborah, was represented by attorney Chris Wagner. The SIF was represented by Assistant Attorney General Karin Schute. Claimant previously settled his claim against Employer/Insurer.

All objections not expressly ruled upon in this award are overruled to the extent they conflict with this award.

STIPULATIONS

The parties stipulated to the following:

1. Claimant was injured in the course and scope of his employment for Employer on or about September 17, 1999.
2. Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law.
3. Employer's liability was fully insured by Liberty Mutual Insurance Company.
4. Employer had notice of the injury and a claim for compensation was timely filed.
5. Claimant's average weekly wage was sufficient to entitle him to rates of \$325.07 for TTD and \$303.01 for PPD.
6. On September 22, 2005, Claimant's wife and Employer/Insurer reached a compromise settlement of 18% of each wrist plus a 10% load factor.
7. Claimant reached maximum medical improvement from his primary injury March 24, 2004.

ISSUES

The parties stipulated the issues to be resolved are as follows:

1. PPD
2. PTD
3. Second Injury Fund liability

FINDINGS OF FACT

Based upon the competent and substantial evidence, my observations of witnesses at trial, and the reasonable inferences to be drawn therefrom, I find:

1. On the date of his work injury in 1999, Claimant was a 46 year old male. Claimant graduated from high school in 1972. During high school, he worked part time for Western Bowl. After graduation, he continued working part time for Western Bowl as an assistant mechanic until 1995.
2. When Claimant was five years old, he had a cardiac catheterization and was diagnosed with a defective aortic valve. He was not able to play most sports, and his condition was monitored throughout his life. In 1995, at the age of 42, Claimant had a heart attack and aortic valve replacement. After his recovery, he was only able to bowl one night a week, and he quit his job at Western Bowl. Claimant quit recreational bowling in 1997 because of his heart condition and knee problems.
3. In 1981, Claimant had a roller skating accident and injured his left knee. He had open knee surgery to repair a dislocated kneecap and fractured patella.
4. Claimant began working for Employer in 1984 as a machine operator. His job was hand intensive and involved lifting and stacking bags. He continued working for Employer until the plant closed June 12, 2000.
5. In January 1987, Claimant injured his left knee and left hand. The treating doctor noted a scar on Claimant's left knee due to his prior patella surgery. His hand complaints resolved, and Claimant had left knee surgery involving meniscus repair and loose body removal. During his follow-up treatment, the doctor noted Claimant had atrophy in his left quadriceps compared to the right.
6. Claimant reinjured his left knee in April 1988. He had a third knee surgery that involved patellar shaving, partial medial meniscectomy, and chondral fracture repair.
7. In 1989, Claimant was diagnosed with bilateral epicondylitis as a result of repetitive lifting at work. He treated conservatively with medications and cortisone injections. Due to his ongoing complaints, he underwent bilateral arthrotomy, ligament repair, partial capsulectomy and lateral epicondylectomy. At trial on this case, the Administrative Law Judge found Claimant credible. He testified his work at the bowling alley involved minimal work and little or no repetitive activities. He was more of a troubleshooter and spent a substantial amount of time sitting around and reading when the machines were functioning properly. He testified he continued to have elbow pain and aching on a daily basis, and he was awarded 30% PPD to each elbow. He settled his Second Injury Fund claim for 16% of the left knee, 10% of the left wrist, 10% of the body referable to gout, and 10% of the body referable to the heart.
8. In 1991, Claimant again injured his left knee at work. He was diagnosed with medial compartment osteoarthritis and had his fourth knee surgery. He had ongoing complaints in his knee and difficulty squatting, bending, and driving. He settled his case for 25% of his knee, and settled his Second Injury Fund claim for 30% of each elbow, 10% of the

left wrist, 10% of the body referable to his gout, and 10% of the body referable to his heart.

9. In 1995 he had an aortic valve replacement and was unable to continue to work at the bowling alley. Mrs. Gruendler testified Claimant stopped working this job due to his heart condition, depression, and knee injuries.
10. Claimant first saw a psychiatrist in 1998 and was prescribed Paxil. In 2000, he was diagnosed with recurrent depression.
11. In the late 1990's, Claimant began having bilateral thumb and hand complaints. In 1999, he was diagnosed with work related overuse syndrome in his hands. In May 2000, Claimant was taking Coumadin and numerous other medications daily, and he asked Dr. Covert about disability due to his heart condition, chronic bilateral elbow complaints, and a treating doctor's recommendation for a total knee replacement. Dr. Covert noted Claimant had a vascular problem in his arms and recommended he seek further treatment. Claimant had nerve conduction studies that showed bilateral carpal tunnel syndrome, and Dr. Schlafly recommended carpal tunnel releases.
12. Employer's plant closed June 12, 2000. Claimant's wife, Deborah Gruendler, testified Claimant tried to find other work, but was not able to work because of his multiple medical problems. He was treating for bilateral carpal tunnel syndrome, trigger finger, depression, numerous medical problems, and was not able to work full time.
13. In August 2000, Dr. O'Day evaluated Claimant at the request of the Social Security Administration. He found Claimant was able to ambulate for only "rather modest" periods of time due to his left knee condition. He restricted Claimant's lifting due to his heart condition and carpal tunnel, and restricted Claimant from climbing ladders as a result of his left knee condition.
14. Claimant also saw a psychologist in August 2000 for evaluation at the referral of the Social Security Administration. Claimant had complaints of impaired short-term memory and concentration, and an impaired ability to adapt to the environment and interact socially. The psychologist opined this negatively affects Claimant's ability to obtain or maintain employment and get along with co-workers or supervisors.
15. In September 2000, Dr. Ollinger diagnosed bilateral carpal tunnel syndrome and recommended surgery. He noted Claimant was taking numerous medications for his heart, blood pressure, cholesterol, diabetes and depression. Claimant had carpal tunnel releases in December 2000 and January 2001, and was released in December 2001. His hand complaints continued and he had bilateral trigger thumb releases in 2003.
16. In June 2001, Claimant's primary care physician, Dr. Mehra, found he was unable to grip and lift heavy objects due to the carpal tunnel syndrome; unable to walk for any length of time due to shortness of breath; unable to lift over 5 pounds due to chest pain, and unable to cope with the stress of daily work. He opined Claimant was unable to sustain employment at even the sedentary level.

17. On March 24, 2004, Claimant was released at MMI from his primary injury. He had a certification in small engine repair, and found a job in a shop working a few hours a day when he felt good. Claimant was unable to drive to work due to his knee and arm injuries, so his wife or son took him to and from his part-time work. Claimant was able to hold this job until August 2004 when he was physically unable to continue working. He was not able to take anti-inflammatories because of his heart condition. He had significant knee pain when squatting and kneeling, and his elbows and hands hurt too much to continue working.
18. Claimant pursued his Social Security Disability Claim and was awarded SSD benefits dating back to June 12, 2000, due to his heart condition, left knee condition, depression, anxiety, stress, and his bilateral hand and elbow conditions.
19. Claimant's wife settled his primary claim for 18% of each wrist. Employer paid TTD benefits from October 29, 2000 until June 7, 2001 and from September 3, 2002 until October 21, 2003, for a total of 30 weeks.
20. Claimant died December 26, 2004, as a result of his heart condition. An amended claim was filed January 27, 2005, naming Claimant's wife, Deborah Gruendler, as the dependent. At the time of his death Deborah was Claimant's only dependent. She has not remarried.
21. Mrs. Gruendler testified Claimant bowled because he was never able to do other strenuous activities due to his congenital heart condition. She testified Claimant often worked more than 40 hours a week at Employer and another 25-30 hours at the bowling alley. He stopped working at the bowling alley in 1995 because of his depression, knee condition, and heart condition. After his heart attack in 1995, she frequently had to drive him to work, and he often came home from work and went right to bed. She testified he had problems with depression before the onset of his primary injury.
22. Christopher Gruendler, Claimant's son, testified Claimant was not able to play sports with him growing up because of physical limitations. He had significant pain, and was not able to run because of his knees. Christopher did most of the work around the house because Claimant was in too much pain.
23. Deborah and Christopher Gruendler are credible.
24. Dr. Musich, Claimant's medical expert, examined Claimant in 2002 and 2004. In 2002, Dr. Musich noted Claimant continued to have persistent numbness, tingling and weakness in both hands. He had bilateral hand pain with repetitive gripping or twisting. He had daily left knee pain, which was aggravated with any activity. He had bilateral elbow pain with wrist extension or repetitive gripping. He had chest pain and shortness of breath, and was on numerous medications. He opined the combination of Claimant's disabilities rendered him permanently and totally disabled.
25. Claimant saw Dr. Musich again in 2004 after his trigger thumb surgeries. Dr. Musich rated Claimant's thumb conditions, and opined Claimant was permanently and totally

disabled due to a combination of his age, education, training, and past and present disabilities.

26. Susan Shea, Claimant's vocational expert, reviewed Claimant's records, medical evaluations, and met with his wife and daughter. Ms. Shea opined Claimant was unemployable prior to his death due to a number of factors. All his past work and the work for which he was qualified require intensive use of his upper extremities. His upper extremity surgeries limit his ability to work with his hands, and preclude any work for which he may be qualified. His pain precludes his ability to work. His numerous medical issues are a disincentive to any prospective employer. His anxiety and depression affect his ability to work cooperatively with others. Ms. Shea testified she based her conclusions primarily on a review of the medical records and secondarily on the history provided by Claimant's wife and daughter.
27. Jim England reviewed medical records and rendered a vocational opinion on behalf of the Second Injury Fund. He opined Claimant would have been employable in a wide variety of employment settings. He opined only if one assumes Claimant's subjective complaints are accurate, could one conclude he was unemployable. If Claimant was unemployable, it would have been because of his hands alone since he claimed he could not drive any longer or hold a tool more than a few minutes because of his hands. His total disability then would be because of his upper extremities. He testified Claimant had gone back to work after the hand problems were treated, and no treating physician imposed any restrictions. Dr. Musich is the only doctor who found Claimant was totally and permanently disabled. However, Claimant did have restrictions from Dr. Mehra in June 2001. These restrictions related to Claimant's preexisting and primary injuries. He testified with the restrictions imposed by Dr. Mehra and Claimant's inability to cope with the stress of daily work, that can knock him out of doing any kind of work.

RULINGS OF LAW

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

- 1. Claimant was permanently and totally disabled June 12, 2000, due to a combination of his primary and preexisting injuries.**

Section 287.220 RSMO provides that in cases of permanent total disability against the Second Injury Fund, there must be a determination of the following:

1. the percentage of disability resulting from the last injury alone;
2. that there was a pre-existing permanent disability that was a hindrance or obstacle to employment or to obtaining re-employment;
3. that all of the injuries and conditions combined, including the last injury, have resulted in the employee being permanently and totally disabled.

Claimant's primary injury settled for 18% PPD to each wrist. Based on the medical records, I find this percentage accurately reflects his disability from this injury.

Claimant had a number of preexisting disabilities that were a hindrance or obstacle to employment or to obtaining re-employment. He had bilateral elbow surgeries and was awarded 30% PPD to each elbow. I find this percentage accurately reflects his prior elbow disability.

Claimant had four knee surgeries prior to his primary injury. His last knee surgery settled for 25% of the knee. Prior to that he had an open surgery to repair chronic patellar dislocations, an arthroscopic surgery to remove a loose body and repair his meniscus, and another arthroscopic surgery that involved patellar shaving, partial medial meniscectomy, and chondral fracture repair. He had difficulty ambulating and was not able to drive. He had significantly greater than 25% disability to his left knee prior to his work injury.

Claimant also had significant preexisting disability due to his congenital cardiac condition. Prior to his primary injury, Claimant had ongoing chest pain, shortness of breath, and took numerous medications. He had to quit his part time employment at the bowling alley, even though this was not strenuous work. He had restrictions from his primary care physician and was on numerous medications for this condition before the primary injury.

Claimant had preexisting disability due to his gout. The SIF and Claimant had agreed this disability was 10% of the body as a whole in previous SIFO settlements. Claimant also began treating for depression before the primary injury, and his wife credibly testified his depression affected his ability to work.

Each of his preexisting disabilities were a hindrance or obstacle to his employment or obtaining re-employment.

The final question is whether the combination of Claimant's injuries rendered him permanently and totally disabled. The test for permanent total disability is whether Claimant is able to adequately compete in the open labor market given his condition. *Messex v. Sachs Elec. Co.*, 989 S.W. 2d 206, 210 (Mo. App. E.D. 1999). The pertinent consideration in this test is the determination of whether any employer in the usual course of business would reasonably be expected to employ Claimant given his condition. *Carlson v. Plant Farm*, 952 S.W. 2d 369, 373 (Mo. App. W.D. 1997).

While Claimant did continue to work for a short time after his primary injury occurred, the evidence establishes he was not able to compete in the open labor market once Employer's plant closed June 12, 2000. The medical records in June 2000 indicate Claimant had significant complaints and questioned Dr. Covert about permanent disability. By August 2000, the medical records establish he was only able to ambulate for "rather modest" periods of time due to his knee and had a lifting restriction due to his heart and carpal tunnel syndrome. Claimant attempted to work at a part time job after his wrist treatment was complete, and he was not able to maintain even part time employment because of his wrists, elbows, knee, depression, and heart condition. I find no employer in the usual course of business would reasonably be expected to employ Claimant with his multitude of physical limitations. I find Claimant was permanently and

totally disabled at the cessation of his employment June 12, 2000, as a result of the combination of his primary and preexisting disabilities.

2. Claimant’s dependent, Deborah Gruendler, is entitled to continuation of Claimant’s permanent total disability benefits for her lifetime.

Pursuant to *Schoemehl v. Treasurer of the State of Missouri*, 217 S.W.3d 900, (Mo.banc 2007), Deborah Gruendler, as surviving dependent, is entitled to continuation of Claimant’s permanent total disability benefits for her lifetime. The Second Injury Fund argues Mrs. Gruendler is precluded from receiving benefits pursuant to *Strait v. Treasurer*, 257 S.W.3d 600 (Mo.banc 2008). In that case the court found dependents are entitled to benefits in cases that were pending on the date the *Schoemehl* decision issued. *Id.* at 602. The court explained based on “the common-law principle allowing prospective application of a decision to “all actions pending on and prospective to the date on which” the opinion was issued...the interpretation of the law that was made in *Schoemehl* applies to cases that were pending in the commission or pending on appeal at the time of the *Schoemehl* decision.” *Id.* at 602-603.

In the case at hand, Claimant’s case was pending before the Division at the time *Schoemehl* was issued. The term “pending in the commission” is a term of art and encompasses cases pending in the workers’ compensation system before the Division or the Commission. Section 287.610.5 (RSMo 1998) states “whenever in this chapter the word “commission”, “commissioners” or “division” is used in respect to any original hearing, those terms shall mean the administrative law judges appointed under this section.” Accordingly, *Schoemehl* applies, and Mrs. Gruendler is entitled to Claimant’s permanent total disability benefits.

Claimant received TTD payments for 30 weeks. His dependent received 63 weeks of permanent partial disability benefits from Employer. The Second Injury Fund is ordered to pay permanent total disability benefits at the differential rate of \$22.06 during those 63 weeks beginning January 8, 2001, and thereafter \$325.07 per week for as long as provided by law.

Date: _____

Made by: _____

KATHLEEN M. HART
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation