

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

Injury No.: 08-041043

Employee: Judy Gunn
Employer: Parker Hannifin Corp. (Settled)
Insurer: Self-Insured (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 § 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 November 8, 2012. The award and decision of Chief Administrative Law Judge Grant C. Gorman, issued November 8, 2012, 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 1st day of February 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T
Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Judy Gunn

Injury No. 08-041043

Dependents: None

Employer: Parker Hannifin Corp. (Settled)

Additional Party: Second Injury Fund

Insurer: Self-Insured (Settled)

Hearing Date: August 6, 2012

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

Checked by: GCG/ln

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: May 10, 2008
5. State location where accident occurred or occupational disease was contracted: Franklin County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant injured her right shoulder from repetitive use and lifting in the course and scope of employment.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right shoulder
14. Nature and extent of any permanent disability: Primary: 20% Right shoulder
Pre-existing: 27.5% BAW - Low Back, 20% Left shoulder, 16% left and right wrists.
15. Compensation paid to-date for temporary disability: Not Applicable
16. Value necessary medical aid paid to date by employer/insurer? Not Applicable

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- 17. Value necessary medical aid not furnished by employer/insurer? Not Applicable
- 18. Employee's average weekly wages: Undetermined
- 19. Weekly compensation rate: \$389.04 for PPD benefits
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: Settled

22. Second Injury Fund liability: Yes

31.96 weeks of permanent partial disability from Second Injury Fund \$12,433.72

TOTAL: \$12,433.72

23. Future requirements awarded: None

Said payments to begin as of the date of this Award and to be payable and be subject to modification and review as provided by law.

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

Sam Eveland

Employee: Judy Gunn

Injury No. 08-041043

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Judy Gunn

Injury No: 08-041043

Dependents: None

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Parker Hannifin Corp. (Settled)

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

Additional Party Second Injury Fund

Insurer: Self-Insured (Settled)

Checked by: GCG/ln

PRELIMINARY STATEMENT

The parties appeared before the undersigned Administrative Law Judge on August 6, 2012 in Franklin County, Missouri for a final hearing to determine the liability of the Second Injury Fund in the matter of Judy Gunn (Claimant). Attorney Sam Eveland represented Claimant. Assistant Attorney General Rodney Campbell represented the Second Injury Fund. Employer, Parker Hannifin Corp., and its insurer, previously settled with Claimant, and did not participate in the hearing. Mr. Eveland requested a fee in the amount of 25%.

The parties stipulated to the following:

1. On May 10, 2008, Claimant sustained an occupational disease arising out of and in the course of employment that resulted in injury to Claimant. The injury occurred in Franklin County, Missouri.
2. Claimant was an employee of Employer pursuant to Chapter 287 RSMo.
3. Venue is proper in Franklin County, Missouri.
4. Employer received proper notice of the claim.
5. Claimant filed the claim within the time allowed by law.
6. Claimant's applicable rate of compensation was \$389.04 for permanent partial disability (PPD) benefits.
7. The primary injury resulted in 20% PPD of the right shoulder. Pre-existing permanent partial disabilities are as follows: 27.5% BAW - Low Back, 20% Left shoulder, 16% left and right wrists.

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8. The pre-existing injuries were hindrances and obstacles to employment.
9. A 10% loading factor applies for the pre-existing low back and right wrist injuries; a 15% loading factor applies for the pre-existing left shoulder and left wrist injuries.

The sole issue to be determined is:

1. Liability of the Second Injury Fund.

SUMMARY OF THE EVIDENCE

Only evidence necessary to support this Award will be summarized. Any objections not expressly ruled on during the hearing or in this Award are now overruled. To the extent there are marks or highlights contained in the exhibits, those markings were made prior to being made part of this record, and were not placed thereon by the Administrative Law Judge. Further, any such markings had no impact on any rulings made in this case.

Exhibits

Claimant offered Exhibits A through Q, which were received into evidence without objection. The Second Injury Fund did not offer any exhibits.

Live Testimony

1. Claimant testified live. Her testimony was credible.
2. On or about May 10, 2008 Claimant sustained an accidental injury arising out of and in the course of employment that resulted in injury to Claimant. Claimant injured her right shoulder from repetitive use and lifting in the course and scope of employment.
3. Claimant received medical care as described in Exhibits B through Q.
4. Claimant and Employer settled the workers' compensation claim for 20% of the right shoulder.
5. Claimant has the following limitations or complaints regarding the work injury:

Intermittent pain, limited use and range of motion in right shoulder.
6. Prior to the date of injury, Claimant had the following disabling injuries or conditions:

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- a. In 2006, Claimant sustained an injury to her low back. The treatment records are contained in the Exhibit. The injury was disabling and constituted a hindrance and obstacle to employment. Claimant continues to suffer from pain and stiffness in her low back.
- b. In 2005, Claimant sustained an injury to her left shoulder. The treatment records are contained in the Exhibits. The injury was disabling and constituted a hindrance and obstacle to employment. Claimant continues to suffer from pain and stiffness in her left shoulder.
- c. On or about March 31, 2003, Claimant sustained an occupational disease to her left and right wrist. Claimant received medical care as described in the Exhibits. Claimant settled the workers' compensation claim arising out of the injury for 16% left and right wrists, 15% right middle finger and 2.5% right ring finger. The injury was disabling and constituted a hindrance and obstacle to employment.

Opinion Evidence

7. Dr. Shawn Berkin examined Claimant, took a history, and issued a report. He found Claimant sustained an accident arising out of and in the course of employment that resulted in injury to Claimant. He provided the following ratings of permanent partial disability:
 - a. With respect to the primary injury: 35% of the right shoulder.
 - b. With respect to the pre-existing disabilities, which constituted a hindrance and obstacle to employment:
 - i. 50% of the right wrist.
 - ii. 40% of the left wrist.
 - iii. 30% of the left shoulder.
 - iv. 45% of the lumbar spine.
 - c. Dr. Berkin found the combination of her disabilities created a substantially greater disability than the simple sum of each separate injury or illness by an unspecified amount.

FINDINGS OF FACT & RULINGS OF LAW

Claimant has established a right to recover from the Second Injury Fund. A claimant in a worker's compensation proceeding has the burden of proving all elements of his claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 911 (Mo.App. E.D.2008). In order for a claimant to recover against the SIF, he must prove that he

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sustained a compensable injury, referred to as “the last injury,” which resulted in permanent partial disability. Section 287.220.1 RSMo. A claimant must also prove that he had a pre-existing permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment should he become unemployed; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15% for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo.App. E.D. 2008) (Citations omitted).

In order for a claimant to be entitled to recover permanent partial disability benefits from the Second Injury Fund, he must prove that the last injury, combined with his pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. *Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 138 S.W.3d 714, 717-18 (Mo. banc 2004). Claimant has met the burden imposed by law.

The Second Injury Fund asserts as a defense that after the 2005 amendments to Chapter 287 RSMo., Fund liability is not triggered when the primary injury is an occupational disease claim. The argument is essentially that the language of Section 287.220.1 requires “a subsequent compensable *injury*” to trigger fund liability, and the definition of injury in Section 287.020.3(5) states that except as specifically provided for in the Chapter it is not to include occupational disease. The Fund argues applying strict construction; an occupational disease does not create Fund liability.

However, the definition of “injury” or “personal injury” in Section 287.020.3(5) only excludes occupational diseases **“except as specifically provided in this chapter.”** (emphasis added). Thus the definition of injury can include occupational disease under some circumstances. Section 287.067.2 provides that 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.” (emphasis added) Likewise, Section 287.067.3 provides an **injury** due to repetitive motion is recognized as an occupational disease for purposes of this chapter.” (emphasis added). Sections 287.067.2 and 3 both specifically provide for injury by occupational disease. Further, Section 287.067.3 specifically provides that occupational disease by repetitive motion, which is the primary injury in this case, is an “injury”. The claim against the Second Injury Fund is compensable.

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

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1. On May 10, 2008 Claimant sustained a compensable last injury which resulted in permanent partial disability equivalent to 20% of the right shoulder (46.4 weeks x 15% load = 6.96 weeks). The testimony of Claimant regarding her symptoms and the opinions of Dr. Berkin regarding medical causation are found to be credible with respect to the symptoms and injuries to the right shoulder.

2. As of the time the last injury was sustained, Claimant had the following preexisting permanent partial disabilities, which meet the statutory thresholds and were of such seriousness as to constitute a hindrance or obstacle to employment or reemployment:

- a. 16% of the right wrist (28 weeks) x 10 load= 2.8 weeks
- b. 16% of the left wrist (28 weeks) x 15 load= 4.2
- c. 20% of the left shoulder (46.4 weeks) x 15 load= 6.96
- d. 27.5% of the BAW low back (110 weeks) x 10 load= 11

Total weeks for preexisting disabilities: 25

3. 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 Second Injury Fund liability is calculated as follows: 6.96 weeks for last injury + 25 weeks for preexisting injuries = 31.96 weeks of overall greater disability. 31.96 weeks x \$389.04 = \$12,433.72.

CONCLUSION

The Second Injury Fund is liable to Claimant for \$12,433.72 in permanent partial disability benefits. Attorney Sam Eveland shall be entitled to an attorney fee of 25% of this award for necessary legal services provided.

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