

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

Injury No. 10-112340

Employee: Adela Guzman
Employer: George's Processing, Inc. (Settled)
Insurer: Self-Insured (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. We have reviewed the evidence, read the parties' briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge.

Introduction

The parties asked the administrative law judge to resolve the sole issue of Second Injury Fund liability (if any) for permanent partial disability benefits.

The administrative law judge rendered the following findings and conclusions: (1) employee sustained a compensable injury on November 1, 2010, that resulted in disability of 16.5% of the body as a whole; (2) as of November 1, 2010, employee was not at maximum medical improvement for her alleged pre-existing permanent partial disabilities of the right wrist, left wrist, and right long finger from her claim of December 31, 2009; and (3) by application of the decisions in *Hoven v. Treasurer*, 414 S.W.3d 676 (Mo. App. 2013) and *Miller v. Treasurer*, 425 S.W.3d 218 (Mo. App. 2014), employee's injuries do not trigger Second Injury Fund liability because employee had not undergone any treatment for her pre-existing injuries of December 31, 2009, until after her last injury of November 1, 2010, and was not at maximum medical improvement at the time of her last injury.

Employee filed a timely application for review with the Commission alleging the administrative law judge erred: (1) in finding the Second Injury Fund was not liable for permanent partial disability; (2) in finding that employee was not suffering from an injury that constituted a hindrance or obstacle to her employment at the time of her work injury on November 1, 2010; and (3) in finding employee's injuries prior to November 1, 2010, did not qualify employee to recover benefits from the Second Injury Fund.

For the reasons set forth below, we reverse the award and decision of the administrative law judge.

Findings of Fact

Primary injury

Employee worked for employer hanging and packing chickens. Employee's supervisors expected her to hang 52 chickens per minute. Hanging chickens involved grabbing one chicken in each hand, twisting them, and hanging them overhead. In the course of her

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work, employee also routinely handled boxes of chicken parts weighing between 23 and 70 pounds. Employee complains that these duties caused her to suffer a repetitive trauma injury affecting her neck and bilateral shoulders culminating on or about November 1, 2010.

Employee received authorized treatment provided by employer with Drs. Gary Moffitt and John Heim for her shoulder and neck complaints. Although an MRI revealed a partial thickness tear of employee's right rotator cuff, Drs. Moffitt and Heim agreed that surgical intervention would not likely benefit employee, and instead pursued a treatment regimen of physical therapy exercises. Despite employee's failure to improve with physical therapy, both doctors ultimately opined that employee has reached maximum medical improvement with regard to her bilateral upper extremities.

Employee provided a report and testimony from Dr. David Volarich, who opined that her repetitive work activity of reaching overhead was the prevailing factor causing her to suffer overuse syndrome of the bilateral shoulders, as well as an overuse syndrome resulting in a strain/sprain of the cervical spine. In a report generated by an independent medical examination requested by the employer, Dr. Ted Lennard agreed that employee's work was the prevailing factor causing (at least) the onset of her right shoulder pain; Dr. Lennard did not address employee's left shoulder or cervical spine complaints.

Employee persuasively testified (and we so find) that she continues to experience pain in her bilateral shoulders 24 hours per day, even on the weekends when she is not working. The pain extends from her shoulders into her neck and upper back. Based on the essentially unanimous/uncontested expert medical opinion evidence, we are persuaded that employee's repetitive work activity was the prevailing factor causing her to suffer overuse syndrome of the bilateral shoulders, as well as an overuse syndrome resulting in a strain/sprain of the cervical spine; we so find. After careful consideration, we find that, as a result of the effects of the primary injury, employee suffers a permanent partial disability of 20% of the right shoulder; a 5% permanent partial disability of the left shoulder; and a 5% permanent partial disability of the body as a whole referable to the cervical spine.

Preexisting conditions of ill-being

Employee alleges that, at the time of the primary injury culminating on November 1, 2010, she was suffering from preexisting conditions of ill-being affecting her bilateral wrists and her right long middle finger resulting from her repetitive work of packing, wrapping, and weighing boxes of chicken parts. Employee reported these injuries to employer and requested treatment on or about December 31, 2009, but for unknown reasons, employer delayed sending employee for treatment for almost a year.

On December 29, 2010, Dr. Moffitt first evaluated employee for her bilateral upper extremity complaints, and noted a history of pain in both wrists and numbness in both hands, with the symptoms waking employee at night. Dr. Moffitt believed employee was suffering from a chronic inflammatory problem, recommended a physical therapy program, and released employee back to hanging and packing chickens without restriction. Employee's symptoms did not improve with physical therapy, however, so on March 1, 2011, Dr. Moffitt referred employee to Dr. John Heim, an orthopedic surgeon.

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On March 28, 2011, Dr. Heim recommended a nerve conduction study that revealed a right carpal tunnel syndrome. On May 5, 2011, Dr. Heim noted that physical therapy had “not accomplished anything,” and that employee’s complaints remained unchanged. *Transcript*, page 48. Dr. Heim recommended right carpal tunnel and right trigger finger release surgeries, and performed those procedures on June 20, 2011.

Employee’s triggering and locking of the right middle finger resolved following surgery, but with respect to her right carpal tunnel syndrome, it appears to us that the surgical release performed by Dr. Heim did not ultimately improve employee’s condition in any fashion.¹ Employee underwent post-surgical physical therapy, but it is clear from the records of Drs. Heim and Moffitt, as well as employee’s own testimony, that this treatment was not effective in relieving her ongoing symptoms. On August 19, 2011, and December 9, 2011, Dr. Heim noted that employee continued to provide a history of multiple complaints, and determined that employee was then at maximum medical improvement. Dr. Moffitt saw employee again on June 27, 2013, and recorded a history from employee that the surgery was not helpful in resolving employee’s complaints referable to the right wrist. Dr. Moffitt agreed with Dr. Heim that no further treatment was advisable in light of employee’s ongoing complaints.

Although Dr. Heim was not deposed, it is obvious from his treatment records that he was rather skeptical of employee’s ongoing subjective complaints, and provided his December 9, 2011, opinions with an eye toward terminating treatment and getting employee back to work. Dr. Heim seemed especially persuaded by the results of a December 5, 2011, functional capacity evaluation (FCE) where the therapist (purportedly) observed inconsistent pain behaviors on employee’s part. It was after this FCE that Dr. Heim made the decision that there was nothing more he could offer employee. In any event, in the absence of firsthand testimony from the therapist who performed the FCE, we are not persuaded by Dr. Heim’s suggestion that, based on the results of the FCE, employee’s ongoing complaints should be seen as exaggerated or otherwise disingenuous.

Employee continues to experience swelling and constant, severe pain in her right hand, as well as pain in her left wrist. Employee described problems with gardening, household chores, turning doorknobs, awakening at night, opening and closing jars, dressing herself, and with driving referable to her bilateral wrist injuries of December 31, 2009, that have remained consistent since that date.² In light of this evidence, although Dr. Heim did not render his maximum medical improvement opinion until August 19, 2011, we find that employee was, in reality, at maximum medical improvement with respect to her bilateral

¹ At oral argument in this matter, counsel for the Second Injury Fund asserted that employee testified that Dr. Heim’s surgery improved her right carpal tunnel syndrome complaints. But after a careful review of the hearing transcript, we find no such testimony from employee. Instead, employee’s complaints at the hearing mirror her original pre-surgical complaints as reflected in the records from Drs. Moffitt and Heim. Compare *Transcript*, pages 14-18 versus pages 46-48, and 100.

² We note that employee delivered her testimony through an interpreter, and there appears to have been some temporal confusion during the course of the Second Injury Fund’s cross-examination, where employee seemed to indicate her pain/limitations referable to the December 31, 2009, injuries began “three years ago,” which would have been some time in 2012. On both direct and redirect examination, however, employee consistently indicated (and we are so persuaded) that the ongoing limitations she describes began contemporaneous with her pain which manifested in December 2009.

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carpal tunnel syndrome as of December 31, 2009, because her symptoms and limitations did not improve at all with treatment.

Dr. Volarich rated preexisting permanent partial disability affecting employee's bilateral wrists referable to carpal tunnel syndrome, opined that these conditions amounted to hindrances or obstacles to employment as of November 1, 2010, and that these conditions interact with the primary injury in a synergistic fashion, such that a 15% load factor is appropriate. We find these opinions persuasive.³ We find that as of November 1, 2010, employee suffered from preexisting permanent partial disability affecting the bilateral wrists referable to carpal tunnel syndrome in the amount of 10% of the left wrist and 20% of the right wrist, and that these preexisting conditions of ill-being interact with the effects of the primary injury in a synergistic fashion, such that a loading factor of 15% is supported.

Conclusions of Law

Second Injury Fund liability

Section 287.220 RSMo creates the Second Injury Fund and controls the assessment of Second Injury Fund liability in "all cases of permanent disability where there has been previous disability." Employee seeks enhanced permanent partial disability benefits from the Second Injury Fund. Section 287.220 provides as follows with respect to Second Injury Fund liability for enhanced permanent partial disability benefits:

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, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial 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

³ We are not, however, persuaded by Dr. Volarich's rating of preexisting permanent partial disability referable to the right trigger finger, as the records from Dr. Moffitt reveal (and we have found) that employee's triggering and locking of the right middle finger resolved following surgery.

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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.

The Second Injury Fund argues that we are precluded, as a matter of law, from finding, as a factual matter, that employee's disability referable to her preexisting bilateral wrist injuries was permanent as of November 1, 2010, because Dr. Heim's record of August 19, 2011, indicated that she was then at maximum medical improvement (MMI) for her bilateral carpal tunnel syndrome. The Second Injury Fund argues that we are required to accept this later-in-time MMI determination from Dr. Heim as dispositive, and that we must accordingly find that such disability was not permanent until August 19, 2011. We are not persuaded, for the following reasons.

Although the courts have suggested that a doctor's MMI determination can be helpful in assisting the fact-finder when there is some question as to the appropriate timing of the payment of various kinds of disability benefits, see *Cardwell v. Treasurer of Mo.*, 249 S.W.3d 902 (Mo. App. 2008), more recent authority from the Supreme Court of Missouri suggests that an MMI determination is not necessarily dispositive with respect to other issues. See *Greer v. Sysco Food Servs.*, SC94724 (Dec. 8, 2015). In our view, the *Greer* decision (albeit involving a different issue of disputed temporary total disability benefits) stands for the proposition that we are not required to ignore the actual record before us in favor of elevating the date of a doctor's MMI determination as establishing a bright line rule mandating particular results, especially where (as here) those results are not supported by the facts. We also find the decisions in *Hoven v. Treasurer*, 414 S.W.3d 676 (Mo. App. 2013) and *Miller v. Treasurer*, 425 S.W.3d 218 (Mo. App. 2014) distinguishable from the case before us, for the following reasons.

First, we note that in the *Hoven* case, there was no evidence that the employee had reached maximum medical improvement for a disputed injury *at the time of the hearing*. Specifically, the record in the *Hoven* case included uncontested expert medical testimony from Dr. Mark Lichtenfeld that the employee was not at maximum medical improvement for his carpal tunnel syndrome injury; that he needed further evaluation and possible surgery; and that the doctor's permanent partial disability ratings were subject to change in the event the employee did get more treatment. 414 S.W.3d at 679. The employee's testimony at the hearing was inconclusive as to the issue whether he intended to get further treatment, and as a result, the Commission determined that there was no basis for a finding that the employee's medical condition was permanent *at the time of the hearing*, let alone that employee had suffered permanent disability referable to that condition. *Id.* In affirming the Commission's award denying compensation, the *Hoven* court did not conclude that the employee was required to provide a doctor's opinion that a preexisting condition was at maximum medical improvement as of the date of his primary injury; rather, the decision stands for the proposition that where the record contains *no* evidence of permanency, there is no basis for an award of permanent partial disability benefits.

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Here, in contrast, the record includes the uncontested medical opinions from Drs. Heim, Moffitt, Lennard, and Volarich that employee is at maximum medical improvement for her bilateral carpal tunnel syndrome condition, and that further treatment is not likely to improve her condition. Unlike in the *Hoven* case, we are confident based on the record before us that employee's medical condition and disability referable to carpal tunnel syndrome is permanent.

In *Miller v. Treasurer*, 425 S.W.3d 218 (Mo. App. 2014), the employee sought benefits from the Second Injury Fund for an alleged preexisting permanent partial disability affecting his cervical spine. *Id.* at 219. The court concluded that the degree of preexisting permanent partial disability referable to the cervical spine could not be determined (and thus could not be assessed against the Second Injury Fund) because the employee underwent a cervical discectomy and fusion surgery subsequent to the date of the primary injury. *Id.* at 221. The court's brief decision in *Miller* does not include any indication whether employee's condition actually improved following that surgery, but implicit in the court's decision is a finding that the employee's disability referable to the cervical spine injury was not permanent until the treating surgeon released the employee at MMI. Here, on the other hand, the record reveals (and we have found) that employee's complaints and limitations referable to bilateral carpal tunnel syndrome did not improve at all despite physical therapy and a right carpal tunnel release, and her disability was thus permanent as of the date of injury on December 31, 2009. The *Miller* case is clearly distinguishable on this basis.

While it may not have been apparent to employee or to a hypothetical treating physician as of November 1, 2010, that her carpal tunnel syndrome was not susceptible to any improvement and was thus permanently disabling at that time, we find nothing in the language of § 287.220 or in Chapter 287 generally (which, of course, we must strictly construe) that would require us to artificially constrain *our own* factual inquiry to those limited facts ascertainable to a hypothetical observer on November 1, 2010, especially when we have the benefit of a record that allows us to ascertain—and ultimately compels a finding—that employee's bilateral carpal tunnel syndrome was not susceptible to any improvement, and that her disability referable thereto was permanent as of the date of injury on December 31, 2009.

We have credited Dr. Volarich's opinions that employee suffered from preexisting permanent partial disability referable to carpal tunnel syndrome; that these conditions were serious enough to constitute hindrances or obstacles to employment; and that there is a synergistic interaction between employee's preexisting disability affecting the bilateral wrists and the primary injury of November 1, 2010. We have also found that employee's right carpal tunnel syndrome involves a preexisting 20% permanent partial disability of the wrist; this satisfies the 15% threshold for a major extremity injury. See *Treasurer of Missouri-Custodian of the Second Injury Fund v. Witte*, 414 S.W.3d 455 (Mo. 2013). We conclude that employee has satisfied each of the statutory requirements for proving Second Injury Fund liability for permanent partial disability benefits.

Accordingly, we calculate Second Injury Fund liability for permanent partial disability benefits as follows: 46.4 weeks (20% permanent partial disability of the right shoulder) + 11.6 weeks (5% permanent partial disability of the left shoulder) + 20 weeks (5% permanent partial

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disability of the body as a whole referable to the cervical spine) + 17.5 weeks (10% permanent partial disability of the left wrist) + 35 weeks (20% permanent partial disability of the right wrist) = 130.5 weeks x the 15% load factor = 19.575 weeks of enhanced permanent partial disability. At the stipulated permanent partial disability rate of \$280.90 the Second Injury Fund is liable for \$5,498.62 in permanent partial disability benefits.

Decision

We reverse the award of the administrative law judge.

The Second Injury Fund is liable to employee for enhanced permanent partial disability benefits in the amount of \$5,498.62.

The award and decision of Administrative Law Judge Robert H. House, issued May 22, 2015, is attached solely for reference.

For necessary legal services rendered to employee, Jennifer Newman, Attorney at Law, is allowed a fee of 25% of the compensation awarded, which shall constitute a lien on said compensation.

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

Given at Jefferson City, State of Missouri, this 23rd day of December 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Adela Guzman

Injury No. 10-112340

Dependents: N/A

Employer: George's Processing, Inc. (settled)

Additional Party: Second Injury Fund

Insurer: George's Processing, Inc. c/o Regions Claims Mgmt

Hearing Date: April 20, 2015

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

Checked by:

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
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: November 1, 2010.
5. State location where accident occurred or occupational disease was contracted: Butterfield, Barry 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: Employee sustained repetitive injuries while working in the Packing Department hanging and packing chickens as well as assembling boxes for packing.
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 shoulder, left shoulder, neck, and upper back.
14. Nature and extent of any permanent disability: 16.5% of the body as a whole as settled with employer/insurer.
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? Unknown.
17. Value necessary medical aid not furnished by employer/insurer? -0-

18. Employee's average weekly wages: \$421.35/week.
19. Weekly compensation rate: \$280.90/week.
20. Method wages computation: By agreement of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable: N/A.
22. Second Injury Fund liability: No.
23. Future requirements awarded: None

Said payments to begin _____ 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 _____ of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Adela Guzman	Injury No. 10-112340
Dependents:	N/A	
Employer:	George's Processing, Inc. (settled)	Before the DIVISION OF WORKERS' COMPENSATION
Additional Party:	Second Injury Fund	Department of Labor and Industrial Relations of Missouri
Insurer:	George's Processing, Inc. c/o Regions Claims Mgmt	Jefferson City, Missouri
Hearing Date:	April 20, 2015	Checked by:

AWARD

The parties presented evidence at a final hearing on April 20, 2015. The claimant appeared in person and by Attorney Jennifer L. Newman. Assistant Attorney General Sandra McDowell appeared for the Second Injury Fund. Employer/Insurer previously settled with Claimant and did not participate in the hearing. There were two issues presented at the hearing for determination: nature and extent of disabilities related to date of maximum medical improvement (MMI) and liability of the Second Injury Fund.

The parties stipulated to the following:

1. The appropriate compensation rate on the date of injury was \$280.90/week for permanent partial disability (PPD); and
2. Claimant's attorney is requesting a 25% attorneys' fee.

Claimant testified at the hearing. I find that her testimony was credible. Claimant sustained repetitive injuries during the course of her employment working in the Packing Department at George's Processing, Inc. on November 1, 2010. Claimant sustained injuries to her left shoulder, right shoulder, neck, and upper back.

She first received medical treatment with Dr. Gary Moffitt on December 29, 2010. Dr. Moffitt noted complaints of pain in Claimant's forearms to her shoulders and neck as well as numbness in both hands. Dr. Moffitt's records indicate that Claimant's job duties required Claimant to hang and pack chickens. X-rays of her neck showed degenerative disc disease. X-rays of her shoulders were read as normal. Dr. Moffitt diagnosed Claimant with bilateral shoulder bursitis and recommended exercise and physical therapy.

On March 1, 2011, Ms. Guzman returned with ongoing symptoms, and Dr. Moffitt referred her to an orthopedist. A nerve conduction study of Claimant's right shoulder was performed on April 8, 2011. This testing revealed mild to moderate chronic median neuropathy at the right wrist with no signs of radiculopathy or neuropathy.

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On May 6, 2011, Dr. John Heim noted Claimant had no relief with physical therapy. Dr. Heim's records also note that the claimant had ongoing numbness and tingling that radiated into her arms, a trigger of her right middle finger, and ongoing neck pain. On June 20, 2011, Dr. Heim performed a right open carpal tunnel release and release of the A1 pulley on Claimant's right middle finger.

Following surgery, Dr. Heim recommended occupational therapy for both hands and noted that Claimant's shoulder pain radiated to her neck. Dr. Heim recommended therapy for cervical myofascitis on July 1, 2011. On August 3, 2011, Dr Heim's records show Claimant had ongoing multiple complaints in her right hand, wrist, forearm, and shoulder and recommended additional physical therapy. On August 19, 2011, Dr. Heim noted claimant had ongoing complaints in her right arm, shoulder, and wrist but placed her at MMI with regard to carpal tunnel syndrome and released her with no restrictions.

On September 7, 2011, Dr. Heim evaluated Claimant's right shoulder. Dr. Heim ordered an MRI, which was performed on September 14, 2011. Initially, the MRI was thought to reveal a tear of the rotator cuff. However, Dr. Heim reviewed the MRI on October 14, 2011, and noted it only showed impingement of Claimant's right shoulder but no definite tear. Dr. Heim's records indicate Claimant improved with physical therapy but her symptoms returned when she stopped physical therapy. An FCE performed on December 5, 2011, placed her at the light to medium work level. Dr. Heim opined on December 19, 2011, that Claimant had achieved maximum medical improvement.

Prior to the work injury of November 1, 2010, Claimant alleges repetitive injuries to her right hand, right middle finger, left hand, left elbow, right elbow, left arm, and right arm while working for George's Processing, Inc. With regard to this prior injury of December 31, 2009, Claimant developed numbness and tingling in both hands, right worse than left. She also developed triggering of the right long finger. Her symptoms awakened her at night. Claimant settled her claim for the December 31, 2009, with the employer for 16.25% of the right wrist, 5% of the left wrist, and 20% of the long finger on the right hand on January 20, 2015. Despite all of this, Claimant did not undergo any treatment until after the date of her last injury.

Claimant did not start receiving any treatment for her right hand, right middle finger, left hand, left elbow, right elbow, left arm, and right arm until December 29, 2010. Even after December 29, 2010, the only treatment she received was on the right wrist and right hand. At the time of the hearing, she testified that she was still in need of surgery for her left wrist and had undergone no treatment for her left hand and wrist. After treatment for her right wrist and hand injury of December 31, 2009, she still has ongoing problems. She experiences constant pain and numbness in her right hand. She testified she has pain in her right middle finger and right hand even on the weekends when she is not working. She stated that her right hand feels like needles and continues to go to sleep. She also stated that her right hand feels heavy, has swelling, and has hot and cold sensations. She stated she is right hand dominant.

With regard to her left hand and wrist, she experiences constant pain, which is

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slightly less than the pain she experiences in her right hand. She stated that the pain in her right wrist is different than the pain in her left wrist. She stated that she has difficulty driving, doing daily activities such as cleaning bath tubs and mopping, and washing her dog. The claimant experiences difficulty with her fine motor skills and is unable to manipulate the clasps on her jewelry. She has reduced grip strength and drops items.

The claimant uses creams to try to alleviate her bilateral hand pain. She also continues to soak her hands and wrists in warm salt water to try to reduce the pain in her hands. She stated that since the December 2009 injury, she has difficulty reaching behind her to do things like latch her bra. She also has trouble reaching overhead. The claimant lives in a house and has always enjoyed gardening. She testified that she stopped gardening before November 1, 2010, and that her daughter now helps her with gardening as well as housework.

The claimant began employment at George's Processing, Inc. in 2008, and she continues to be employed there. She performed the same job in the Packing Department up until the end of 2013. From 2008 until 2013, she performed duties of packing chickens, hanging chickens, and making boxes. After 2013, she was moved to a job in which she only made boxes. Her current duties include cutting plastic and making boxes all day. She works with approximately 1,500 to 2,000 boxes each day. She experiences pain in her hands while at work and after working as well.

Claimant was examined by Dr. David Volarich on July 23, 2012. On examination, Dr. Volarich found Claimant had loss of range of motion with regard to flexion, extension, radial deviation, and ulnar deviation in the right wrist. Claimant also had loss of radial deviation in the left wrist. Phalen's compression provocative testing and Tinel's signs were positive over both carpal tunnels, right worse than left. Reverse Phalen's and Finkelstein's were negative bilaterally. Dexterity of the fingers was intact. Adduction and opposition of the thumbs was normal. There was no significant atrophy in either hand. Ganglion cyst formation was not found. Recurrent triggering was not identified. The grind test was negative in both thumbs, and tests for carpal instability were negative. With regard to the grip strength testing, the claimant received a zero (0) for all five attempts on the right hand with no explanation provided by Dr. Volarich. With regard to the left hand, she had grip strengths noted of five (5), five (5), and ten (10) on the first three (3) attempts, but on the fourth (4th) and fifth (5th) attempts, a zero (0) was noted again with no explanation given. Claimant testified that she was unable to do the test on the right due to pain when she pressed with her hands. She stated she could do three (3) of the five (5) on the left before it caused too much pain.

Dr. Volarich assigned a thirty-five (35) percent disability rating to the right wrist due to the carpal tunnel syndrome that required open carpal tunnel release. He noted that this rating accounts for pain, paresthesias and weakness in the dominant hand. Dr. Volarich assigned a thirty-five (35) percent disability rating to the right long finger rated at the metacarpal phalangeal joint, due to the triggering that required A1 pulley release.

With regard to the left wrist, Dr. Volarich assigned twenty (20) percent disability due to the carpal tunnel syndrome that he noted had not been evaluated or treated. He noted that this

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rating accounts for pain, paresthesias and weakness. In addition, Dr. Volarich opined that there is a 15% disability based upon a multiplicity factor due to the combination of injuries in each of the upper extremities. Dr. Volarich stated that the combination of the claimant's disabilities created a substantially greater disability than the simple sum or total of each injury and that a loading factor should be added if the Fund is found liable.

Also, in order for a claimant to recover against the Second Injury Fund, she must prove that she sustained a compensable injury, referred to as "the last injury," that resulted in permanent partial disability. Section 287.220.1 RSMo. A claimant also must prove that she 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) include a minimum of 50 weeks of compensation or injuries to the body as a whole or 15% from major extremities. *Dunn v. Treasurer of Missouri, Custodian of the Second Injury Fund*, 272 S.W.3d 267, 272 (Mo. App. E.D. 2008).

In order for claimant to be entitled to recover permanent partial disability benefits from the Second Injury Fund, she must prove that the last injury, combined with her pre-existing permanent partial disabilities caused greater overall disability than the independent sum of the disabilities. *Elrod v. Treasurer of Missouri, Custodian of the Second Injury Fund*. 128 S.W.3d, 714, 717-18 (Mo.banc. 2004). When considering the disability that is to be awarded, it is within the power of the ALJ to determine the weight to be given to each piece of evidence submitted at the hearing. *Davis v. Research Medical Center*, 903 S.W.2d 557, 571 (Mo.App. W.D. 1995).

The Court in *Hoven v. Treasurer of State of Missouri, Custodian of the Second Injury Fund*, 414 S.W.3d 676, 678 (Mo. App. E.D. 2013), found that the level of permanent disability associated with an injury cannot be determined until that injury reaches maximum medical improvement (MMI). See also *Cardwell v. Treasurer of State of Missouri, Custodian of the Second Injury Fund*, 249 S.W.3d 902, 910 (Mo. App. E.D. 2008). Also in *Miller v. Treasurer of State of Missouri, Custodian of the Second Injury Fund*, 425 S.W.3d 218 (Mo. App. E.D. 2014), the Court held that a pre-existing disability must reach MMI before triggering liability against the Second Injury Fund. Therefore, pre-existing disabilities that have not yet reached MMI at the time of the last injury (work related injury) cannot be considered in calculating Fund benefits.

Thus, having carefully considered the entire record and the applicable law of the State of Missouri, I find and conclude the following:

1. Claimant sustained a compensable injury on November 1, 2010, that resulted in disabilities of 16.5% of the body as whole; but
2. As of November 1, 2010, claimant was not at maximum medical improvement for her alleged pre-existing permanent partial disabilities of the right wrist, left wrist, right long finger from her claim of December 31, 2009.

As a result, I further find and conclude that Claimant has not established a right to

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recover from the Second Injury Fund.

I find and conclude that based on *Hoven* and *Miller*, Claimant's injuries do not trigger Fund liability as claimant had not undergone any treatment for her pre-existing injuries of December 31, 2009, until after her last injury of November 1, 2010, and was not at maximum medical improvement at the time of her last injury. I deny the claim.

Made by: _____

Robert H. House
Chief Administrative Law Judge
Division of Workers' Compensation
Signed 5/20/15