

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

Injury No.: 08-122130

Employee: Charles Harris III
Employer: Hutkin Development Company (Settled)
Insurer: Westport Insurance Corporation
c/o Gallagher Bassett Services (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 May 11, 2012. The award and decision of Administrative Law Judge Suzette Carlisle, issued May 11, 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 9th day of November 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Charles Harris III Injury No.: 08-122130
Dependents: N/A Before the
Employer: Hutkin Development Company (Settled) **Division of Workers'**
Compensation
Additional Party: Second Injury Fund Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Insurer: Westport Insurance Corporation, c/o Gallagher Bassett Services (Settled)
Hearing Date: March 14, 2012 Checked by: SC

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: September 19, 2008
5. State location where accident occurred or occupational disease was contracted: St. Louis 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's repetitive use of his hands as a contractor caused the development of bilateral carpal tunnel syndrome.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Left and right wrists
14. Nature and extent of any permanent disability: 15% permanent partial disability of both the left and right wrists (Settled)
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? N/A

Employee: Charles Harris III.

Injury NO: 08-122130

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Sufficient for maximum rate listed in number 19.
- 19. Weekly compensation rate: \$404.66
- 20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable:

Employer settled prior to hearing.

22. Second Injury Fund liability:

21.53 weeks of permanent partial disability from Second Injury Fund	\$8,712.33
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TOTAL:	\$8,712.33
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23. Future requirements awarded: None.

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

The compensation awarded to 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: Brent Cantor

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Charles Harris II.	Injury No.: 08-122130
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	Hutkin Development (Settlement)	Department of Labor and Industrial Relations of Missouri
Additional Party:	Second Injury Fund	Jefferson City, Missouri
Insurer:	Westport Insurance Corporation (Settled)	Checked by: SC

STATEMENT OF THE CASE

The parties appeared before the undersigned administrative law judge on March 14, 2012 for a final hearing to determine the liability of the Second Injury Fund (SIF), in the matter of Charles Harris III. (Claimant). Attorney Brent C. Cantor represented Claimant. Assistant Attorney General Rachel K. Houser represented SIF. The record closed after presentation of the evidence. Employer, Hutkin Development, and their Insurer, Westport Insurance Corporation, previously settled with Claimant for 15% permanent partial disability (PPD) of each wrist, and did not participate in the hearing.

The parties stipulated to that on or about September 19, 2008:

1. Claimant was employed by Employer, and sustained an occupational disease injury in St. Louis County, located in Missouri, and venue is proper;
2. Employer and Claimant operated under the Missouri Workers' Compensation Law;
3. Employer's liability was fully insured by Westport Insurance Corporation;
4. Employer had notice of the injury,
5. A Claim for Compensation was timely filed; and
6. Claimant's average weekly wage was sufficient for a compensation rate of \$404.66; and
7. If the Court finds the case compensable, the parties stipulate the percentages of disability and loading factors contained in Exhibit N-I should apply

The sole issue to be determined is whether there is a compensable claim against SIF when the primary injury is an occupational disease?

SUMMARY OF THE EVIDENCE

All evidence was reviewed but only evidence which supports this award will be summarized below. 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, they

were made prior to becoming a part of this record, and were not placed there by the undersigned administrative law judge.

Exhibits

Claimant's Exhibits A through M and joint Exhibits N-I and O-II were admitted without objection. The SIF did not offer any additional exhibits.

Live Testimony

1. Claimant testified live and his testimony was credible. Claimant performed construction projects for Employer which included painting, drywall, and building demolition. He used power tools to perform his job duties. Claimant's hands became numb with tingling, pain, and locking in 2008.
2. Claimant sustained an accidental injury arising out of and in the course of employment that resulted in injury to Claimant's bilateral hands/wrists.
3. A September 4, 2008 nerve conduction study revealed bilateral carpal tunnel syndrome. Claimant received bilateral carpal tunnel surgeries on September 23, 2008, as described in Exhibit E.
4. Claimant and Employer settled the workers' compensation claim arising out of the injury for 15% PPD of each wrist, a 10% load, and two weeks for disfigurement.
5. Claimant has the following limitations or complaints regarding the work injury: Claimant's hands continue to lock up, and they hurt when he brushes his teeth. Claimant could no longer perform his work activities. He last worked in 2009.
6. Prior to 2008, Claimant had the following disabling injuries or conditions:
 - a. Claimant sustained an injury to his low back when he slipped and fell on ice. In 1991, surgery was performed to remove a herniated disc. Medical records are not in evidence. Claimant continued to work but had chronic back pain. The injury was disabling and constituted a hindrance and obstacle to employment.
 - b. Claimant sustained a gunshot wound to the left thigh, and surgery was performed to repair sciatic nerve damage. Medical records are not in evidence. After Claimant's release, he continued to have leg weakness and numbness. The injury was disabling and constituted a hindrance and obstacle to employment.

Opinion Evidence

7. Dr. Bruce Schlafly examined Claimant, took a history, and issued a report. He found Claimant's work activities with Employer were the prevailing factor that caused him to develop bilateral carpal tunnel syndrome. He provided the following ratings of permanent partial disability:

- a. With respect to the primary injury: 25% PPD of each wrist.
- b. With respect to the preexisting disabilities, which constituted a hindrance and obstacle to employment:
 - i. 25% PPD of the low back.
 - ii. 65% PPD of the left hip at 207 week level.
- c. Dr. Schlafly opined the primary and preexisting disabilities created a synergistic effect and created a hindrance or obstacle to employment.

FINDINGS OF FACT & RULINGS OF LAW

Claimant sustained an occupational disease injury

Claimant asserts SIF is liable for PPD benefits. However, SIF contends the word "injury" as defined in § 287.020.3 RSMo excludes occupational diseases. Claimant's bilateral carpal tunnel syndrome is an occupational disease, therefore not an "injury." Claimant failed to prove he sustained a "subsequent compensable injury" under § 287.220.1, so SIF is not liable.

I find persuasive the Commission's decision in *Kathleen Peters v. Treasurer of Missouri as Custodian of the Second Injury Fund* (2012 WL 769835). In *Peters*, the claimant sustained a repetitive motion injury to her right shoulder. The Commission held SIF's argument did not consider the complete definition of injury in § 287.020.3, which includes occupational diseases within the definition of "injury" in Chapter 287. Section 287.020.3(5) RSMo which 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).

In *Peters*, the Commission found "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 causing the injury, the prior employer shall be liable for such occupational disease. (Emphasis added).

The Commission concluded the above sections specifically refer to a condition of ill caused by occupational disease as an "injury." Furthermore, the legislature specifically provided that the term "injury" includes occupational disease, and injuries by occupational disease are compensable. For these reasons, the Commission held the term "injury" as it appeared in the phrase "subsequent compensable injury" in § 287.220.1 included occupational diseases.

In this case, the parties stipulated Claimant sustained an occupational disease. Section 287.067 refers to occupational disease as a compensable injury. I find Dr. Schlafly's opinion is credible that Claimant's work activities caused carpal tunnel syndrome. For these reasons, I find the term "injury" includes injuries from occupational disease, which are 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:

1. Claimant sustained a compensable last injury. The parties stipulated that if the Court found the case compensable, disability from the primary injury resulted in permanent partial disability equivalent to 15% PPD of the right wrist and 15% PPD of the left wrist. (52.5 weeks).

2. As of the time the last injury was sustained, the parties stipulated 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. 20% PPD of the body as a whole (low back) (80 weeks).
 - b. 40% PPD of the left hip (82.8 weeks).

Total weeks for preexisting disabilities: 162.8

3. The credible evidence establishes that the last injury, combined with the pre-existing permanent partial disabilities, causes 10% greater overall disability than the independent sum of the disabilities. The Second Injury Fund liability is calculated as follows: 52.5 weeks for last injury + 162.8 weeks for preexisting injuries = 215.3 weeks x 10% = 21.53 weeks of overall greater disability.

CONCLUSION

The Second Injury Fund is liable for permanent partial disability benefits as outlined in this award. Attorney for Claimant shall be entitled to an attorney fee of 25% of this award.

Made by: _____
Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation

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

Injury No.: 09-030219

Employee: Charles Harris III
Employer: Hutkin Development Company (Settled)
Insurer: Westport Insurance Corporation
c/o Gallagher Bassett Services (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 May 11, 2012. The award and decision of Administrative Law Judge Suzette Carlisle, issued May 11, 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 9th day of November 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Charles Harris III

Injury No.: 09-030219

Dependents: N/A

Employer: Hutkin Development Company (Settled)

Additional Second Injury Fund

Insurer: Westport Insurance Corporation, c/o
Gallagher Bassett Services (Settled)

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Hearing Date: March 14, 2012

Checked by:SC

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: March 3, 2009
5. State location where accident occurred or occupational disease was contracted: St. Louis 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:
Repetitive use of Claimant's hands at work caused bilateral cubital tunnel syndrome.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Bilateral elbows
14. Nature and extent of any permanent disability: 15% PPD of the right elbow, 25% PPD of the left elbow
(Settled)
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? N/A

Employee: Charles Harris III.

Injury No.:09-030219

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Sufficient for the amount listed in number 19 below.
- 19. Weekly compensation rate: \$404.66
- 20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable:

Employer settled prior to hearing

22. Second Injury Fund liability: Yes

36.77 weeks of permanent partial disability from Second Injury Fund	\$14,879.35
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TOTAL:	\$14,879.35
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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 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Brent Cantor

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Charles Harris II.	Injury No.: 09-030219
Dependents:	N/A	Before the
Employer:	Hutkin Development (Settlement)	Division of Workers' Compensation
Additional Party:	Second Injury Fund	Department of Labor and Industrial Relations of Missouri
Insurer:	Westport Insurance Corporation (Settled)	Jefferson City, Missouri
		Checked by: SC

STATEMENT OF THE CASE

The parties appeared before the undersigned administrative law judge on March 14, 2012 for a final hearing to determine the liability of the Second Injury Fund (SIF), in the matter of Charles Harris III. (Claimant). Attorney Brent C. Cantor represented Claimant. Assistant Attorney General Rachel K. Houser represented SIF. The record closed after presentation of the evidence. Employer, Hutkin Development, and their Insurer, Westport Insurance Corporation, previously settled with Claimant for 15% permanent partial disability (PPD) of the right elbow, and 25% PPD of the left elbow, and did not participate in the hearing.

The parties stipulated to that on or about March 3, 2009:

1. Claimant was employed by Employer, and sustained an occupational disease in St. Louis County, located in Missouri, and venue is proper;
2. Employer and Claimant operated under the Missouri Workers' Compensation Law;¹
3. Employer's liability was fully insured by Westport Insurance Corporation;
4. Employer had notice of the injury,
5. A Claim for Compensation was timely filed;
6. Claimant's average weekly wage was sufficient for a compensation rate of \$404.66;
7. If the Court finds the case compensable, the parties stipulate to the percentages of disability and loading factors contained in Exhibit O-II should apply.

The sole issue to be determined is whether there is a compensable claim against SIF when the primary injury is an occupational disease.

¹ In this award all statutory references are to Section 287 of the Revised Statutes of Missouri (2005), unless otherwise stated.

SUMMARY OF THE EVIDENCE

All evidence was reviewed but only evidence which supports this award will be summarized below. 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, they were made prior to becoming a part of this record, and were not placed there by the undersigned administrative law judge.

Exhibits

Claimant's Exhibits A through M and joint Exhibits N-I and O-II were admitted without objection. The SIF did not offer any additional exhibits.

Live Testimony

1. Claimant testified live and his testimony was credible. Claimant performed construction projects for Employer which included painting, drywall, and building demolition. He used power tools to perform his job duties. In 2008, Claimant's elbows became painful.
2. Claimant sustained an occupational disease injury which arose out of and in the course of employment that resulted in injury to Claimant's bilateral elbows.
3. A September 4, 2008 a nerve conduction study revealed bilateral carpal tunnel syndrome and ulnar nerve entrapment. On March 26, 2009 Dr. Knierim performed bilateral ulnar nerve releases and transpositions. Due to complications, a repeat procedure was performed on the left elbow on April 28, 2009, as described in Exhibit F.
4. Claimant and Employer settled the workers' compensation claim arising out of the injury for 15% PPD of the right elbow, 25% PPD of the left elbow, a 10% load, and five weeks for disfigurement.
5. Claimant has the following limitations or complaints regarding the work injury: Claimant has elbow swelling, left worse than right. Claimant was unable to perform the required work activities. He last worked for Employer in 2009.
6. Prior to 2009, Claimant had the following disabling injuries or conditions:
 - a. In 2008, Claimant began to experience pain and numbness in his hands while working. He was diagnosed with bilateral carpal tunnel syndrome and surgical releases were performed on both hands. Claimant settled the claim arising out of his work activities for 15% PPD of each wrist. Leading up to 2009, Claimant continued

to have wrist/hand pain and locking with activity. The injury was disabling and constituted a hindrance and obstacle to employment.

- b. Claimant sustained an injury to his low back when he slipped and fell on ice. In 1991, surgery was performed to remove a herniated disc. Medical records are not in evidence. Claimant continued to work but has chronic back pain. The injury was disabling and constituted a hindrance and obstacle to employment.
- c. Claimant sustained a gunshot wound to the left thigh, and surgery was performed to repair sciatic nerve damage. Medical records are not in evidence. Claimant continued to have leg weakness and numbness. The injury was disabling and constituted a hindrance and obstacle to employment.

Opinion Evidence

7. Dr. Bruce Schlafly examined Claimant, took a history, and issued a report. He found Claimant's work activities with Employer were the prevailing factor that caused him to develop bilateral cubital tunnel syndrome. He provided the following ratings of permanent partial disability:

- a. With respect to the primary injury: 40% PPD of the left elbow and 25% PPD of the right elbow.
- b. With respect to the preexisting disabilities, which constituted a hindrance and obstacle to employment:
 - i. 25% PPD of the right wrist.
 - ii. 25% of the left wrist.
 - iii. 25% PPD of the low back.
 - iv. 65% PPD of the left hip at 207 week level.
- c. Dr. Schlafly opined the primary and preexisting disabilities created a synergistic effect and create a hindrance or obstacle to employment.

FINDINGS OF FACT & RULINGS OF LAW

Claimant sustained an occupational disease injury

Claimant asserts SIF is liable for PPD benefits. However, SIF contends the word "injury" as defined in § 287.020.3 RSMo excludes occupational diseases. Claimant's bilateral cubital tunnel syndrome is an occupational disease, therefore not an "injury." Claimant failed to prove he sustained a "subsequent compensable injury" under § 287.220.1, so SIF is not liable.

I find persuasive the Commission's decision in *Kathleen Peters v. Treasurer of Missouri as Custodian of the Second Injury Fund* (2012 WL 769835). In *Peters*, the claimant sustained

a repetitive motion injury to her right shoulder. The Commission held SIF's argument did not consider the complete definition of injury in § 287.020.3, which includes occupational diseases within the definition of "injury" 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).

In *Peters*, the Commission found "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 causing the injury, the prior employer shall be liable for such occupational disease. (Emphasis added).

The Commission concluded the above sections specifically refer to a condition of ill caused by occupational disease as an "injury." The legislature specifically provided

that the term “injury” includes occupational disease, and injuries by occupational disease are compensable. For these reasons, the Commission held the term “injury” as it appeared in the phrase “subsequent compensable injury” in § 287.220.1 included occupational diseases.

In this case, the parties stipulated Claimant sustained an occupational disease. I find Dr. Schlafly’s opinion is credible that Claimant’s work activities caused cubital tunnel syndrome. Section 287.067 refers to occupational disease as a compensable injury. For these reasons, I find the term “injury” in Chapter 287 includes injuries from occupational disease, which are 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:

1. Claimant sustained a compensable last injury. The parties stipulated that if the Court found the case was compensable, disability from the primary injury resulted in 15% PPD of the right elbow and 25% PPD of the left elbow (84 weeks).
2. The parties further stipulated that prior to the last injury, 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. 15% PPD the left wrist (26.25 weeks).
 - b. 15% PPD of the right wrist (26.25 weeks).
 - c. 20% PPD of the BAW (low back) (80 weeks).
 - d. 40% PPD of the left hip (82.8weeks).

Total weeks for preexisting disabilities: 215.3

3. The parties submitted joint Exhibit O-II in support of SIF liability. However, I find the stipulations do not control, and they are not conclusive, therefore, the court is not bound by them for the reasons stated below.
4. Rule 8 CSR 50-2.010(14) of the Department of Labor and Industrial Relations states “[p]rior to hearing, the parties shall stipulate to uncontested facts and present evidence only on contested issues.” Such stipulations “are controlling and conclusive, and the courts are bound to enforce them.” *Boyer v. Nat’l Express Co.*, 29 S.W.3d 700, 705 (Mo. App. 2001). However, stipulations must be viewed in light of what the parties were attempting to accomplish. *Id.* (Citations omitted)
5. Prior to the hearing in this case, the parties stipulated SIF would be responsible for the percentages of disability and loading factors outlined in Exhibit O-II. However, the exhibit is ambiguous for two reasons: First, the parties did not stipulate what loading factor should

apply to the primary elbow injuries. Second, the loading factors were applied twice to the preexisting disabilities. Therefore, it is not possible to calculate SIF liability based solely on the content of Exhibit O-II.

6. Based upon competent and substantial evidence contained in the entire record, I find a 15% loading factor should apply to each elbow in the primary case.
7. I find the preexisting disabilities created a synergistic effect and imposed a hindrance or obstacle to employment or reemployment. Based upon the percentages stipulated to in Exhibit O-II for preexisting disabilities, I further find the parties intended to impose a 15% loading factor on opposing extremities, and a 10% loading factor on non-opposing body parts as outlined below:
8. **Primary injuries:**
 - a. Right elbow – 210 weeks x 15% = 31.5 weeks x 15% (load) = 4.73 weeks SIF liability
 - b. Left elbow – 210 weeks x 25% = 52.5 weeks x 15% (load) = 7.88 weeks SIF liability

Pre-existing injuries:

- a. Left wrist – 175 weeks x 15% = 26.25 weeks x 15% (load) = 3.94 weeks SIF liability
- b. Right wrist – 175 x 15% = 26.25 weeks x 15% (load) = 3.94 weeks SIF liability
- c. Low back – 400 x 20% = 80 weeks x 10% (load) = 8.00 weeks SIF liability
- d. Left hip – 207 x 40% = 82.80 weeks x 10% (load) = 8.28 weeks SIF liability

TOTAL WEEKS OWED BY SIF:	36.77
Multiplied by PPD Rate:	x <u>\$404.66</u>

SIF DOLLAR AMOUNT OWED: \$14,879.35

CONCLUSION

The Second Injury Fund is liable for permanent partial disability benefits as outlined in this award. Attorney for Claimant shall be entitled to an attorney fee of 25% of this award.

Date: _____

Made by: _____

Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation