

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

Injury No.: 06-108933

Employee: Michael Heisler
Dependent: Kathy Marie Heisler, (Spouse)
Employer: Boeing Company Interstate (Settled)
Insurer: Indemnity Insurance Company of North America (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 15, 2011. The award and decision of Administrative Law Judge Linda J. Wenman, issued November 15, 2011, 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 30th day of March 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Michael Heisler Injury No.: 06-108933
Dependents: Kathy Marie Heisler (spouse) Before the
Employer: Boeing Company Interstate (settled) **Division of Workers'**
Compensation
Additional Party: Second Injury Fund Department of Labor and Industrial
Relations of Missouri
Insurer: Indemnity Ins. Co. of N. America (settled) Jefferson City, Missouri
Hearing Date: October 25, 2011 Checked by: LJW

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: November 15, 2006
5. State location where accident occurred or occupational disease was contracted: St. Louis County, MO
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: Due to the repetitive nature of his work, Employee developed right carpal tunnel, and bilateral cubital tunnel syndrome.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right wrist and both elbows.
14. Nature and extent of any permanent disability: 17.5 % PPD referable to the right wrist, 22.5% PPD referable to the right elbow with 30.635 weeks backed out reducing 210 week level to 179.375 weeks, and 10% PPD referable to the left elbow previously paid by Employer producing a total of 92 weeks of PPD disability. PTD benefits from SIF.
15. Compensation paid to-date for temporary disability: \$4,724.05 previously paid by Employer.
16. Value necessary medical aid paid to date by employer/insurer? \$18,271.44 previously paid by Employer.

Employee: Michael Heisler

Injury No.: 06-108933

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Sufficient to produce rates listed below.
- 19. Weekly compensation rate: \$718.87 / \$376.55
- 20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable: Previously paid by Employer

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:
Weekly differential of \$342.32 payable by SIF for 92 weeks beginning June 5, 2007,
and \$718.87 thereafter for Claimant's lifetime.

TOTAL: TO BE DETERMINED

23. Future requirements awarded: N/A

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 in favor of the following attorney for necessary legal services rendered to the claimant: Gary W. Kullmann

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Michael Heisler	Injury No.: 06-108933
Dependents:	Kathy Marie Heisler (spouse)	Before the
Employer:	Boeing Company Interstate (settled)	Division of Workers' Compensation
Additional Party:	Second Injury Fund	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Insurer:	Indemnity Ins. Co. of N. America (settled)	Checked by: LJW

PRELIMINARIES

A Second Injury Fund hearing for final award was held regarding the above referenced Workers' Compensation claim by the undersigned Administrative Law Judge on October 25, 2011. The case was taken under submission on the day of hearing. Attorney Gary Kullmann represented Michael Heisler (Claimant). Assistant Attorney General Rachael Houser represented the Second Injury Fund (SIF).

On October 4, 2010, Claimant and Boeing Company Interstate (Employer), reached a settlement regarding the issue of Employer's permanent partial disability liability in this claim. The stipulation represented 17.5 % PPD referable to the right wrist, 22.5% PPD referable to the right elbow with 30.635 weeks backed out reducing 210 week level to 179.375 weeks, and 10% PPD referable to the left elbow producing a total of 92 weeks of PPD disability.

Prior to the start of the hearing the parties identified the issues for disposition in this case as the liability of SIF for permanent total disability (PTD) or permanent partial disability (PPD) benefits, and a determination of whether Claimant's spouse was a dependent at the time of injury. The parties stipulated Claimant reached maximum medical improvement (MMI) on June 4, 2007. Claimant offered Exhibits A-K, and SIF offered no exhibits. The exhibits were admitted into the record without objection. Any markings contained within any exhibit were present when received, and the markings did not influence the evidentiary weight given the exhibit. Any objections not expressly ruled on in this award are overruled.

FINDINGS OF FACT

All evidence presented has been reviewed. Only testimony and evidence necessary to support this award will be reviewed and summarized.

1. Claimant is 60 years old, a graduate of North County Technical High School, where he specialized in sheet metal training. Claimant has no post high school training. Claimant began working for Employer in 1975 performing sheet metal work. He worked for Employer for the next 31 ½ years, and left the employment during February 2007.

2. In 1974 Claimant married his wife, Kathy Marie. Claimant and Kathy have remained continuously married since 1974. Since her marriage, Kathy Marie Heisler has remained dependent in whole and part upon Claimant. The couple had three children who are emancipated.
3. Throughout his career with Employer, Claimant worked as a sheet metal riveter. Claimant's work was very hand intensive, and required use of vibratory tools. During 2006 (primary injury), Claimant began to experience pain and numbness in his upper extremities. By November 2006, Employer began to provide medical treatment to Claimant due to his occupational disease. Ultimately, Claimant was diagnosed with chronic bilateral cubital tunnel syndrome, and chronic right carpal tunnel syndrome. During February and March 2007, Claimant first underwent a right carpal tunnel release and a right cubital tunnel release with ulnar nerve transposition, and a month later Claimant underwent a left cubital tunnel release with ulnar nerve transposition. On June 4, 2007, Claimant reached maximum medical improvement (MMI) from these surgeries. On October 14, 2010, Claimant settled his claim with Employer for 17.5 % PPD referable to the right wrist, 22.5% PPD referable to the right elbow with 30.635 weeks backed out reducing 210 week level to 179.375 weeks, and 10% PPD referable to the left elbow producing a total of 92 weeks of PPD disability. Claimant has not worked since February 2007. He experiences difficulty with gripping and twisting items; his left upper extremity is worse than his right; he is unable to fully extend his left arm; he continues to experience left arm popping and numbness; and he is unable to lift items above five pounds unless the item is held without his arms extended.
4. Claimant has the following additional rated preexisting conditions that preceded his last work related injury: 1973 bilateral wrist injuries; a November 2001 left lateral epicondylitis; a history of lumbar spine disease; and a history of cervical spine disease.

1973 bilateral wrist injuries – Claimant fell from a tree while working for a tree service, and fractured both wrists. His right wrist was casted, and he underwent ORIF surgery to repair his left wrist. Following more than a year of healing, Claimant is unable to fully bend his right thumb, and he has limited range of motion in his right wrist. Claimant is unable to fully bend his left wrist, and has limited pronation and supination. He continues to experience daily pain, wore wrist supports when working, and modified his work activities to accommodate his injury. Claimant believes his settlement reflected 50% PPD referable to the left wrist, and 25% PPD referable to the right wrist.¹

2001 left lateral epicondylitis – During November 2001, Claimant developed left elbow pain while working. Employer provided medical treatment, and during June 2002, Claimant underwent a left lateral epicondylectomy. During 2004, Claimant settled his case with Employer for 17.5% PPD referable to his left elbow. Prior to his primary injury, Claimant experienced daily pain in his left elbow, but was able to lift and fully extend his left arm.

Lumbar spine disease – Claimant has experienced low back pain since a fall from a tree in 1971. Between 1971 and September 2000, Claimant received conservative treatment as needed for his back complaints. During September 2000, an MRI of the lumbar spine demonstrated progression of degeneration at L4-5, and a possible L5-S1 herniated disc. When

¹ Due to the age of the injury, no medical or Division records regarding the injury remain.

conservative treatment failed, Claimant underwent a L5-S1 hemilaminotomy. Post-operatively Claimant redeveloped left leg radicular pain. During 2002, Claimant slipped getting out of bed and fell landing on his buttocks. X-rays showed increasing degenerative changes with narrowing at L4-5 and L5-S1. Claimant also suffered a compression fracture at T12. Claimant began using a cane to assist in ambulation. During June 2003, Claimant underwent his second lumbar spine surgery, an L4-5 anterior-posterior fusion. Post-operatively, Claimant continued to experience radiating low back pain, and during August 2007, Claimant was formally diagnosed with failed back surgery syndrome and remained in pain management. Prior to the primary injury, Claimant and Employer were accommodating Claimant's work duties due to his low back condition. Claimant frequently had to stand and change positions, take a break to lie down in a cabinet to rest his back, lifted a maximum of 10 pounds at work, was provided a chair while working, was given a three-wheeled bike to move about the plant, and was given a special parking pass to allow close parking to the plant. Claimant experienced daily low back and leg pain. In addition to the work accommodations, Claimant missed approximately 20-30 days of work per year due to his back.

Cervical spine disease – Between 2001 and 2006, Claimant developed neck pain when moving his head. During June 2006, Claimant developed degenerative cervical spine spur formation. By late 2006, Claimant developed constant headaches, sonophobia and photophobia. Prior to the primary injury, Claimant testified he experienced daily migraine type headaches. He avoids light and noises.

Due to the combination of his conditions, Claimant is now using a motorized chair to get around. He is no longer able to use a wheelchair as his arms will not allow him to wheel himself. He has difficulty completing his activities of daily living due to his combined physical impairments. He is only able to walk 100 yards, and can only tolerate 15 minutes standing. He is able to lift 5 pounds if the item is held close to his body and 2 pounds if the item is held with arms extended.

5. Claimant was examined by Dr. Volarich at his request on September 26, 2008. Upon examination Dr. Volarich noted the following abnormalities: depression and anxiety; bilateral weakness in the biceps and triceps muscles and pronators and supinators; weakness in the left leg quadriceps and hamstrings; left leg weakness to dorsiflexion and plantar flexion; an antalgic gait; unable to heel or toe walk; decreased cervical spine range of motion; decreased lumbar spine range of motion; positive trigger point left trapezius muscle; numbness in left foot; decreased bilateral elbow range of motion; moderately severe pain to palpation over medial epicondyle and cubital tunnel with radiating pain into small finger left hand; decreased bilateral wrist range of motion; decreased right thumb adduction and opposition; positive bilateral hand thenar atrophy; radial shortening of the right forearm and wrist causing radial deviation; significant degenerative arthritic changes in all fingers bilateral hands; decreased bilateral grip strength; and positive left calf atrophy. Dr. Volarich rated Claimant's primary injuries at 35% PPD referable to the right wrist; 35% PPD referable to the right elbow; and 35% PPD referable to the left elbow. Dr. Volarich rated Claimant's preexisting injuries at 35% PPD referable to the left elbow due to the left wrist fracture; 35% PPD referable to the right elbow due to the right wrist fracture; 60% BAW PPD referable to the lumbar spine; and 20% BAW PPD referable to the cervical spine. Dr. Volarich further opined based on his medical assessment alone, Claimant is PTD due to a combination of his disabilities and is unable to compete in the open labor market.

6. Vocational rehabilitation counselor, Ms. Delores Gonzalez, interviewed Claimant on November 19, 2010. After reviewing Claimant's medical records, Ms. Gonzalez noted the various physical restrictions placed on Claimant's activities by treating and non-treating physicians, and taking into account Claimant's medical history, educational aptitude, and relevant work history, Ms. Gonzalez opined Claimant was PTD and unable to compete in the open labor market due to a combination of his primary and preexisting medical conditions. Ms. Gonzalez further opined Claimant was not capable of performing any competitive work as a result of his combination of primary and preexisting conditions. Ms. Gonzalez noted Claimant was not a candidate for vocational rehabilitation, and his residual functional capacity is less than sedentary work as a result of his injuries.

RULINGS OF LAW WITH SUPPLEMENTAL FINDINGS

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:

Issues related to liability of SIF for PTD benefits

Claimant seeks permanent total disability benefits from the Second Injury Fund. Section 287.020.7 RSMo., defines "total disability" as the inability to return to any employment, and not merely the inability to return to employment in which the employee was engaged at the time of the last work related injury. *See Fletcher v. Second Injury Fund*, 922 S.W.2d 402 (Mo.App.1996)(overruled in part). The determinative test to apply when analyzing permanent total disability is whether a claimant is able to competently compete in the open labor market given claimant's condition and situation. *Messex v. Sachs Electric Co.*, 989 S.W.2d 206 (Mo.App. 1999)(overruled in part). An employer must be reasonably expected to hire the claimant, given the claimant's current physical condition, and reasonably expect the claimant to successfully perform the work duties. *Shipp v. Treasurer of Mo.*, 99 S.W.3d 44 (Mo.App. 2003)(overruled in part). If the last injury standing alone did not cause the employee to become PTD, the inquiry turns to potential liability for PTD by Second Injury Fund. The Second Injury Fund is implicated in all cases of permanent disability where there has been previous disability, and in cases of permanent total disability, the Second Injury Fund is liable for remaining benefits owed after the employer has completed payment for disability of the last injury alone. §287.220.1 RSMo. Even though a claimant might be able to work for brief periods of time or on a part-time basis it does not establish that they are employable. *Grgic v. P&G Construction*, 904 S.W.2d 464, 466 (Mo.App.1995). The trier of fact determines whether medical evidence is accepted or rejected, and the trier may disbelieve uncontradicted or unimpeached testimony. *Alexander v. D.L. Sitton Motor Lines*, 851 S.W. 2d 525, 527 (MO banc 1993). Further, §287.220.1 RSMo directs that the degree of disability be determined by "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*" (emphasis added). See also *Garcia v. St. Louis County and Treasurer of Missouri as Custodian of Second Injury Fund*, 916 S.W.2d 263 (Mo.App.1995) quoting *Frazier v. Treasurer of Missouri as Custodian of Second Injury Fund*, 869 S.W.2d 152 (Mo.App. 1993).

Claimant seeks PTD benefits from SIF. Dr. Volarich opined Claimant is PTD due to a combination of his primary and preexisting conditions, and was permanently and totally unemployable in the open labor market based solely on his physical examination. I find Dr. Volarich's opinion credible. Claimant has significant primary and preexisting disabilities. Claimant may have worked with preexisting conditions prior to his last work injury, but the mere fact Claimant was able to work does not make them non-disabling. Prior to his last work injury, Claimant's physical condition required substantial accommodations by Employer, and despite the accommodations, Claimant had to find places in the plant to hide and lie down in order to complete his workday. Claimant ultimately left his employment as he was no longer physically able to perform his job duties. I find the evidence produced by Claimant demonstrates PTD against SIF. No contradictory expert evidence was presented.

I find Claimant is PTD due to a combination of Claimant's current and preexisting conditions. Given Claimant's limitations, it would be unreasonable to expect any employer to hire Claimant, or to expect Claimant to successfully perform new work duties. Claimant is permanently and totally disabled due to the combination of his last work injury and his preexisting disabling conditions measured at the time of his last work injury, and SIF shall pay PTD benefits as prescribed by law. I further find Claimant's wife, Kathy Marie Heisler, was dependent on Claimant at the time of the primary injury.

CONCLUSION

Claimant is found to be permanently and totally disabled as of June 5, 2007. Employer paid 92 weeks of permanent partial disability. SIF will pay weekly differential of \$342.32 during the period of PPD. Following the 92 weeks of PPD paid by Employer, SIF shall provide Claimant with permanent and total disability benefits of \$718.87 weekly for Claimant's lifetime. As Claimant has been found PTD, the remaining issue of SIF liability for PPD is moot. Claimant's attorney is entitled to a 25% lien.

Date: _____

Made by: _____

LINDA J. WENMAN
Administrative Law Judge
Division of Workers' Compensation