

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

Injury No.: 03-138799

Employee: Debra Highley  
Employer: Von Weise Gear (Settled)  
Insurer: Travelers Insurance (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

Date of Accident: December 16, 2003

Place and County of Accident: Franklin County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. 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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 6, 2007. The award and decision of Administrative Law Judge Kevin Dinwiddie, issued February 6, 2007, 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 19<sup>th</sup> day of July 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

Attest: \_\_\_\_\_  
John J. Hickey, Member

\_\_\_\_\_  
Secretary

**AWARD**

Employee: Debra Highley

Injury No. 03-138799

Dependents: ----

Employer: Von Weise Gear (previously settled)

Additional Party: State Treasurer, as custodian of the Second Injury Fund

Insurer: Travelers Insurance

Hearing Date: Monday, November 27, 2006; finally submitted 12/15/06

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

Checked by: KD/bb

### **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: 12/16/03
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:  
Repetitive use injury to wrists
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: left and right upper extremities at the wrist
14. Nature and extent of any permanent disability: 15% permanent partial disability of the left and of the right wrist
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? N/A
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: in dispute
19. Weekly compensation rate: \$347.05 for permanent partial disability
20. Method wages computation: by agreement of the parties as to permanent partial disability rate of compensation

### **COMPENSATION PAYABLE**

21. Amount of compensation payable: N/A
22. Second Injury Fund liability: Yes

87.6 weeks of permanent partial disability from Second Injury Fund  
at the rate of \$347.05 per week. . . . . \$30,401.58

TOTAL: \$30,401.58

23. Future requirements awarded: N/A

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:

Richard T. Grossman

### FINDINGS OF FACT and RULINGS OF LAW:

Employee: Debra Highley Injury No: 03-138799

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

Dependents: ----

Employer: Von Weise Gear (previously settled)

Additional Party State Treasurer, as custodian of the Second Injury Fund

Insurer: Travelers Insurance

Checked by: KD/bb

The claimant, Ms. Debra Highley, and the State Treasurer, as Custodian of the Second Injury Fund, appeared at hearing by and through their counsel and entered into certain stipulations and agreements as to the issues and evidence to be presented in this claim for compensation as against the Second Injury Fund only. The primary claim as against the involved employer, Von Weise Gear, and its insurer, Travelers Insurance, was previously settled.

The parties have stipulated that the involved work injury resulted in a permanent partial disability of each of the wrists equivalent to 15% of each the left and right upper extremities at the 175 week level, see Section 287.190.1(5) RSMo. The parties have further stipulated that the applicable rate for permanent partial disability is

the maximum provided for by law, or \$347.05. The parties further agree that the issues to be resolved at hearing are as follows:

Rate of compensation for permanent and total disability;  
Nature and extent of permanent disability; and  
Liability of the Second Injury Fund.

The claimant appeared at hearing and testified on her own behalf. In addition to testifying at hearing and by her deposition, the claimant further submitted the deposition testimony of Robert P. Margolis, M.D., and of Mr. James M. England, Jr. The Second Injury Fund elected not to submit any testimony on its behalf.

### EXHIBITS

The Second Injury Fund chose not to submit any exhibits. With the exception of Claimant's Exhibits E and R, which were withdrawn, the following exhibits as offered by the claimant, A through SS, are in evidence:

#### Claimant's Exhibits

- A. Deposition of Robert P. Margolis, taken on October 10, 2006
- B. Deposition of James M. England, Jr., taken on October 20, 2006
- C1. Certified medical records of Metropolitan Orthopedics (33 pages)
- C2. Certified medical records of Metropolitan Orthopedics (47 pages)
- C3. Certified medical records of Metropolitan Orthopedics (3 pages)
- C4. Certified medical records of Metropolitan Orthopedics (61 pages)
- D. Certified medical records of Saint Louis University Health Sciences Center/School of Medicine
- E. Exhibit withdrawn
- F. Certified medical records of D.A. Depew. D.O./Healthline/Meramec Medical Group
- G. Certified medical records of Dr. Emanuel
- H. Certified medical records of Richard E. Coin, M.D.
- I. Certified medical records of St. John's Mercy Medical Center
- J. Certified physical therapy records of HealthSouth Rehab
- K. Certified medical records of Missouri Baptist Hospital-Sullivan (May 1, 1994 through August 28, 1995)
- L. Certified medical records of Dr. David Robson
- M. Certified medical records of Missouri Baptist Medical Center
- N. Letter of Fredric M. Simowitz, M.D., dated March 14, 1995
- O. Certified medical/billing records of Orthopedic Associates, Inc. (Dr. Richard Johnston)
- P. Certified medical records of Parkcrest Surgical Assoc. (Dr. Emanuel)
- Q. Certified medical records of Missouri Baptist Hospital-Sullivan (June 29, 1994 through August 5, 1996)
- R. Exhibit withdrawn
- S. Certified medical records of David Peeples, M.D.
- T. Certified medical records of Missouri Baptist Hospital-Sullivan (January 10, 2000 through October 18, 2000)
- U1. Certified medical records of Sullivan Medical Office (Musa Modad, M.D.)
- U2. Certified medical records of Sullivan Medical Office
- V. Certified medical records of Rolla Ophthalmology (Ifeanyi S. Orizu, M.D.)
- W. Certified chiropractic records of Cuba Chiropractic Center
- X. Certified medical records of St. John's Mercy Hospital, Washington, MO
- Y. Certified medical records of Missouri Baptist Hospital-Sullivan (September 25, 2001 through November 1, 2001)
- Z1. Certified medical records of Neurological Associates, Inc.
- Z2. Certified medical records of Neurosurgery and Neurology, LLC
- AA. Certified medical records of Missouri Baptist Medical Center
- BB1. Certified medical records of Neurology Associates (28 pages)
- BB2. Certified medical records of Neurology Associates (13 pages)
- BB3. Certified medical records of Neurology Associates (16 pages)

- CC1. Certified medical records of Missouri Baptist Medical Center (55 pages)
- CC2. Certified medical records of Missouri Baptist Medical Center (5 pages)
- DD. Medical report of Gary J. Schmidt. M.D., dated 6/7/04
- EE1. Certified medical records of Parkcrest Orthopedics (8 pages)
- EE2. Certified medical records of Parkcrest Orthopedics (4 pages)
- EE3. Certified medical records of Parkcrest Orthopedics (1 page)
- FF. Certified medical records of The Orthopedics Center of St. Louis
- GG. Certified medical records of N.E.I. of St. Louis (Dr. Peeples)
- HH. Certified medical records of Barnes-Jewish Hospital, Washington University Pain Management Center
- II. Certified medical records of Phelps County Regional Medical Center
- JJ. Stipulations for Compromise Settlement, Injury Number 88-175230
- KK. Stipulation for Compromise Settlement, Injury Number 90-119626
- LL. Stipulation for Compromise Settlement, Injury Number 94-041560
- MM. Stipulation for Compromise Settlement, Injury Number 94-201421
- NN. Stipulation for Compromise Settlement, Injury Number 95-155295
- OO. Stipulation for Compromise Settlement, Injury Number 00-167193
- PP. Stipulation for Compromise Settlement, Injury Number 01-113837
- QQ. Stipulation for Compromise Settlement, Injury Number 03-138799
- RR. Deposition of Debra K. Highley, taken on 8/04/06
- SS. Wage statement

### FINDINGS OF FACT AND RULINGS OF LAW

The claimant, Debra Highley, as of the date of hearing in this matter, was a married 52 year old mother of three sons. In her deposition taken on 8/04/06, the claimant acknowledged that she lives at home with her second husband, Stanley, and with her son, Kenneth, along with his wife and four children. Ms. Highley notes that she left school after the tenth grade and began working for a living. Ms. Highley spent seven or so years as a machine operator/packer for SunMark Industries. Thereafter she was employed for a year or two at QM Reader Service, where she sold magazines to residential customers by telephone. The only injury suffered by Ms. Highley in those years was a finger cut while working for her first employer.

Thereafter Ms. Highley was employed at Von Weise Gear Company (hereinafter also referred to as "employer") for approximately 21 years until she separated from that employment in December of 2003. Claimant notes that the employer manufactured motor parts, and that she started as an operator, drilling holes in metal parts and polishing metal parts with a sander. Within three months, and until the end of her career with the employer some 20 years later, Ms. Highley worked as a grinder in the grinding department.

The claimant related that she would grind parts that varied in size from one eighth of an inch to eight inches in diameter, and that she would grind as many as 300 to 400 parts per shift. Claimant relates that grinding also included using micrometers on every fifth part to check for proper size. Within six months the claimant moved into "set-up", which required that she not only run production, but also set up the machines. Claimant relates that set up included putting the correct wheels into the machine, the size of the wheel depending on the size of the part being made; reading blue prints to understand the proper alignment; setting guards; and using wrenches to make as many as ten to fifteen adjustments to a machine. Claimant relates that by 1994 the machines became bigger, requiring more effort to set up, and that in time the employer began using computerized machines in addition to manual machines, which required the claimant to learn to make computerized set ups by entering data into the machine by keyboard.

Claimant further relates that by 1994 she also became responsible for quality control. Claimant became classified as a "Class 1", and began running less production as a grinder because of the time taken up by her other duties. Claimant notes that she became responsible for training others, and that quality control required that she check dimensions and finishes on the parts run by other workers, and enter her findings into a computer. As a Class I, Ms. Highley held a primary position and was never subject to a layoff throughout her tenure with Von Weise Gear Company.

Ms. Highley relates that the only significant breaks in her employment occurred after she had suffered some sort of injury. In 1984 Ms. Highley recalls suffering from blood poisoning when her hand slipped while changing a wheel, causing her to miss a month from work. In 1988 the claimant injured her shoulder and back when a basket full of parts fell after a hoist broke. The claimant went down with the falling basket, which she had

been guiding with her left arm. Ms. Highley recalls that she recovered without surgery, missing 3 or 4 months from work, and returning with left shoulder, back, and neck complaints that caused her to seek assistance from others while performing anything involving any heavy lifting.

In 1990 Ms. Highley suffered a right ring finger injury after a magnet burst, but she was able to recover from that injury and return to work without further restrictions.

Ms. Highley subsequently filed two claims for compensation for injury occurring in 1994. Claimant began dropping things at work, was suffering from symptoms in her upper extremities at the shoulder, elbow, and wrist, and had the following surgeries; a right carpal tunnel release on 5/24/94; a left carpal tunnel release and an ulnar nerve transposition at the left elbow on 6/13/94; a rotator cuff repair and subacromial decompression of the left shoulder on 10/28/94; a transposition of the ulnar nerve in the right elbow on 3/15/96; a subacromial decompression of the right shoulder on 6/7/96; and on 8/16/96 a release of the ulnar nerve at the Guyon's Canal in the right wrist.

The claimant relates that she has no feeling in the right side of her ring and little fingers on the right hand; that a nerve was "sacrificed" during her left elbow surgery, and that she has no feeling in that elbow to date; that twisting a wrench causes her to suffer right wrist pain; and that a loss of strength in her hands and arms caused her to seek to perform less production work, and to perform more of the types of work that were less stressful to her upper extremities, such as training others.

Ms. Highley had no further surgeries until September of 2003, when she had her gallbladder removed, and in December of 2003, when she had a second surgery on the left shoulder, this time to debride a partial rotator cuff tear, and to decompress the subacromial space.

Claimant also has a history of making complaint as to her neck and her low back, as documented in the treatment records of Dr. Samson. Claimant treated with Dr. Samson after an event at work in February of 1994 caused the claimant to make upper and lower extremity complaints (See Claimant's Exhibit C.4). Dr. Samson noted that a cervical MRI and Lumbar CT were negative, and care for Ms. Highley immediately thereafter was provided for concerns as to shoulder tendonitis and possible ulnar neuritis. Claimant returned to Dr. Samson in August of 1995 after suffering low back and left leg complaints following an event at work in July of that year. Dr. Samson diagnosed Ms. Highley as having a left sciatica, and released her to return to her regular work after a lumbar spine MRI was found to be normal (See Claimant's Exhibit C3)

Ms. Highley suffered a fall at work in January of 2000, and treated for complaints of neck pain and for symptoms into her left arm. Claimant treated with Dr. Peeples, and a cervical CT myelogram and an MRI failed to reveal to Dr. Peeples any evidence of a lesion that would require surgery. An MRI of the brain taken on 1/28/00 suggested to Dr. Peeples a presumptive multiple sclerosis, although he notes that his clinical findings and the claimant's lack of a past history of transient neurologic symptoms were both inconsistent with a diagnosis of MS. Ms. Highley also treated conservatively with Dr. Krettek, who likewise concluded that the claimant was not a surgical candidate.

Ms. Highley suffered further complaints in 2001, recalling that after being picked up from work one night, the car she was riding in struck a large pothole, causing her to strike her head. Ms. Highley recalls having both neck and left shoulder complaints, and of being able to return to her work, and eventually having a surgery to the shoulder performed by Dr. Emanuel on 12/17/03 (See Claimant's Exhibit EE1). Ms. Highley also had an MRI of the cervical spine taken on 9/30/01 post her car accident, which was interpreted as showing "Mild degenerative spondylosis without significant change compared to 1/28/2000" (See Claimant's Exhibit Y). Claimant returned for further evaluation by Dr. Krettek, who noted that an MRI taken in Rolla on 4/22/02 revealed no significant change from the MRI taken on 9/30/01.

Dr. Krettek ordered yet another cervical spine MRI, taken on 10/12/03, which he interpreted as demonstrating no change from previous studies (See Claimant's Exhibit Z2).

Ms. Highley also received neurologic evaluation and treatment from Dr. Sudhir Batchu by referral from her personal physician, Dr. Modad. The claimant has submitted three different sets of medical records that collectively present a history of treatment by Dr. Batchu from August of 2001 through February of 2004 (Claimant's Exhibits BB1, BB2, and BB3). Dr. Batchu provided evaluation and/or treatment for a variety of complaints, most notably for what was believed to be a progressive multiple sclerosis. Although there are no treatment records in evidence from Dr. Batchu post 2004, Ms. Highley testified at hearing that she continues to treat with Dr. Batchu for multiple sclerosis, receiving weekly injections. The most recent evaluation in the medical records of Dr. Batchu is a report regarding a nerve conduction study performed 7/07/03, finding delayed conduction through the bilateral tarsal tunnels, right much worse than the left, with findings in the right elbow suggesting possible mild right cubital tunnel syndrome (See Claimant's Exhibit BB1). Dr. Gary J. Schmidt reviewed the records of Dr. Batchu, performed an examination with respect to the claimant's complaint relating to her feet, and concluded that it was probable that

Ms. Highley was in need of a surgical decompression for bilateral tarsal tunnel syndrome (See Claimant's Exhibit DD).

On 6/16/04, Ms. Highley was referred to Dr. David M. Brown for complaint of recurrent numbness in her hands. Dr. Brown performed an examination, and recommended nerve conduction studies. On 7/19/04 Dr. Peeples performed an emg/ncs, and concluded that the study "reveals no electrodiagnostic evidence for a right or left median or ulnar entrapment neuropathy. There is mild chronic denervation in ulnar innervated right hand muscles which is indicative of previous entrapment. No acute denervation is present." Dr. Brown reviewed the findings and recommended a reevaluation in the event the symptoms failed to improve or worsened (See Claimant's Exhibit FF). On 10/07/04 Ms. Highley returned to the office of Dr. Emanuel, who had performed numerous surgeries to her upper extremities in the past, and made complaints of bilateral hand numbness. Claimant was found to have complaints consistent with carpal tunnel syndrome. Claimant returned to Dr. Brown on 11/2/04, and was referred to Dr. Peeples for a second emg/ncs performed in November of 2004. Dr. Peeples, in his report dated 11/18/04, notes "In summary, this study revealed no supportive evidence for recurrent median or ulnar entrapment neuropathies. The right ulnar sensory response was reduced consistent with prior axonal loss". Dr. Peeples performed a physical examination, noted a lack of either muscle atrophy or soft tissue swelling, and further noted that strength and sensation were intact (See Claimant's Exhibit GG). Claimant was subsequently referred to Dr. Brown for reevaluation. On 11/30/04 Dr. Brown reviewed both the clinical and diagnostic findings by Dr. Peeples post the second set of nerve conduction studies; performed an examination of the claimant's upper extremities; and concluded that the examination was negative for a specific peripheral compression neuropathy. Dr. Brown had no treatment recommendations, and concluded that the claimant could work without restrictions (See Claimant's Exhibit FF).

Medical records from Dr. Anthony H. Guarino indicate that in April of 2004 the claimant was referred for pain management. The records indicate that the claimant was treating with Dr. Batchu at the time, but that her results from the pain medication were suboptimal. Dr. Guarino performed a physical examination, diagnosed the claimant as suffering from multiple sclerosis and fibromyalgia, and concludes "This patient has a pain condition that is coming from a problem in the spine and therefore can only be well managed with medications and psychological guidance". Dr. Guarino prescribed Methadone and Gabitril for the pain complaints.

Lastly, claimant submitted Exhibit II, containing MRI reports referable to MRI of the lumbar spine and of the brain performed at Phelps County Regional Medical Center on 10/12/04 and on 3/23/05 respectively. The lumbar MRI was interpreted as showing degenerative changes at L4-L5 and L5-S1, and being otherwise unremarkable.

The conclusion section of the MRI of the brain speaks for itself, and would require expert medical interpretation to appreciate its significance relative to a diagnosis of multiple sclerosis.

#### PERMANENT DISABILITY/LIABILITY OF THE SECOND INJURY FUND

The claimant has a long history of complaint and treatment with respect to both her upper extremities, having had surgery on each the right and left shoulder, elbow, and wrist. Despite the various surgeries had by Ms. Highley to her upper extremities in 1994 and in 1996, Ms. Highley was able to continue working in the grinding department for about 21 years prior to her leaving the employment in December of 2003. Clearly the production work performed by Ms. Highley was a fairly strenuous category of labor, becoming less strenuous over the course of time as the claimant became also engaged in set up of machines, employee training, and in quality control. Ms. Highley has suffered from other injuries and conditions in her upper and lower back, and from a diagnosis of multiple sclerosis that has caused her to seek medical treatment and evaluation for her pain complaints. Dr. Robert P. Margolis, the only physician to give testimony as to nature and extent of permanent disability, concludes that the work performed by Ms. Highley for the employer to 12/16/03 was a substantial factor in a recurrence of the bilateral carpal tunnel syndrome for which she had undergone prior surgery in 1994.

The Claimant and the State Treasurer, as Custodian of the Second Injury Fund, stipulated at hearing that the last injury at work resulted in a permanent partial disability equivalent to 15% of each the left and right upper extremity at the level of the wrist, which coincidentally is the percentage of permanent disability attributed to the last injury by Dr. Margolis.

Both Dr. Margolis, who had the opportunity to perform a medical examination of Ms. Highley on 10/19/05, and Mr. James M. England, the rehabilitation counselor who interviewed Ms. Highley on 2/16/06 for the purpose of rendering an opinion as to her employability, concluded that the disability suffered by Ms. Highley renders her unemployable.

The liability of the employer for disability related to a work injury must first be determined before the liability of the Second Injury Fund, if any, can be determined. For example, if the last injury, considered alone, is the sole cause of a permanent and total disability, the employer shall be responsible for that liability, and the Second Injury Fund shall have no

liability for the combination of disabilities that are pre-existing and work related. Section 287.220 RSMo; Vaught v. Vaughns, Inc., 938 S.W.2d 931 (Mo.App. S.D. 1997); Stewart v. Johnson, 398 S.W.2d 850 (Mo. 1966).

The parties at hearing stipulated that the claimant suffered an injury by occupational disease (recurrent carpal tunnel syndrome) on 12/16/03. It is apparent that 12/16/03 is the last date of exposure to the risk of that injury, inasmuch as Ms. Highley had her second left shoulder surgery performed by Dr. Emanuel on 12/17/03, and she testified that her last day of work at Von Weise Gear was in December of 2003.

It is further apparent that the last injury alone did not result in a disability that is permanent and total. The test for permanent total disability is whether, given the claimant's situation and condition, he is competent to compete in the open labor market. Laturno v. Carnahan, 640 S.W.2d 470, 472 (Mo.App. 1982). This test measures the worker's prospects for returning to employment. Patchin v. National Supermarkets, Inc., 738 S.W.2d 166, 167 (Mo.App. 1987). Total disability means the inability to return to any reasonable employment; it does not require that the employee be completely inactive or inert. Brown v. Treasurer of Missouri, 795 S.W.2d 479, 483 (Mo.App. 1990). The question is whether in the ordinary course of business an employer would reasonably be expected to hire the claimant in his present physical condition, reasonably expecting him to perform the work for which he is hired. Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919, 922 (Mo.App. 1982).

The recurrent carpal tunnel syndrome at issue was diagnosed clinically, and was not confirmed by any of the diagnostics performed while Ms. Highley was being evaluated by Drs. Brown and Peeples. Further, although the findings of Drs. Brown and Peeples are inconsistent with those of Dr. Margolis to the extent that he found the claimant to have positive Tinel's sign upon his clinical examination, like Drs. Brown and Peeples, Dr. Margolis noted there was no evidence of atrophy, and further opined that the thenar eminences were strong. Dr. Margolis is aware of the claimant's prior history of bilateral carpal tunnel release. When asked his opinion as to restrictions for Ms. Highley due to her recurrent carpal tunnel, Dr. Margolis opined, "That she should avoid exposure to vibration". Dr. Margolis further acknowledged that he had no further treatment recommendations to make for the last injury (Claimant's Exhibit A, at page 14).

The testimony of Dr. Margolis, in conjunction with the relevant medical records in the matter from Drs. Brown and Peeples, persuades that the last injury suffered by Ms. Highley on 12/16/03 resulted in a permanent and partial disability of the upper extremities bilaterally at the level of the wrist. At issue, then, is the liability of the Second Injury Fund for the combination of disability, if any, between the last injury, resulting in a permanent and partial disability equivalent to 15% of the left and right upper extremities at the wrist, and any other disability from a preexisting injury or condition, Section 287.220 RSMo.

After a review of the extensive medical in this matter, it is apparent that the opinions of Dr. Margolis and Mr. England as to disability are grounded in an appreciation for the full medical history in the matter, but not necessarily on an appreciation for the complete work history of Ms. Highley.

At hearing in this matter, when asked to provide a working history, Ms. Highley neglected to mention that for a period of time she worked two employments at the same time. At hearing Ms. Highley also acknowledged that she would work 40 or more hours a week, with overtime, and that at the end of her employment with the employer she switched to a weekend shift that required her to work 12 hour days on Friday, Saturday, and Sunday, while still picking up some overtime.

In her deposition testimony Ms. Highley acknowledges that while working at Von Wiese Gear she also worked as a manager at a Taco Bell located at her husband's place of employment, Wallis Oil. As for the timing of that employment, Ms. Highley notes as follows:

Q: About how long did you do that?

A: About a year, a little over a year.

Q: And you're doing it at the same time you worked with---

A: Yes.

Q: --Von Weise?

A: Right. I was doing it at the same time that I was working the three days.

Q: Okay. And about how long ago was that that you were doing that?

A: Before --- It was a year before, I guess, I left Von Weise.

Q: So kind of the early 2000, 2001, 2002?

A: Somewhere in there. (Claimant's Exhibit RR, at pages 30-32)

Dr. Margolis does not mention a history of claimant having worked two jobs a year or so prior to leaving Von Wiese Gear, nor does Mr. England. Mr. England does not mention such work experience in his vocational history, or as a part of his analysis as to transferable skills. Mr. England acknowledges that he read the deposition of Ms. Highley and, without any further specifics, claims that his review of that deposition does not change any of his

opinions (Claimant's Exhibit B, at page 25). However, it is noteworthy that the report that he relies on as the basis for his opinions was written on 2/ 24/06, approximately 6 months prior to the taking of the deposition of Ms. Highley on 8/04/06. It is apparent to this fact finder that the analysis of Mr. England is flawed, to the extent that it fails to take into consideration the full work history of the claimant.

It is further hard to reconcile certain statements made by Mr. England as to the ability of Ms. Highley to work before and after her last injury, and as to her limitations both before and after that same injury. When asked whether Ms. Highley was capable of employment in the labor market prior to her last injury, Mr. England acknowledged that he supposed that she was, inasmuch as she continued to work for the employer up until 12/16/03. In other words, Mr. England is acknowledging that the claimant, prior to her recurrent carpal tunnel syndrome, was capable of more than just a sedentary form of employment. The only restriction placed on Ms. Highley by Dr. Margolis as a result of the recurrent carpal tunnel syndrome was a proscription against exposure to vibration. The question, then, is whether a proscription against an exposure to vibration, the only restriction offered by Dr. Margolis as a consequence of the recurrent carpal tunnel syndrome, is sufficient to cause the claimant to become unemployable on the open labor market. The argument, as made by the Second Injury Fund, is to the effect that if the claimant is in fact unemployable on the open labor market, it is because her condition has progressively worsened post her last employment with Von Weise Gear. If the claimant were capable of a light or sedentary form of employment prior to her last injury, then the claimant must persuade that the disability from the last injury combines with her prior disability so as to render her unemployable.

The claimant testified in a very credible manner, and her testimony as to her history of treatment and complaint was generally consistent with the medical records in evidence. The fact that she was a capable of working two employments within a year or so of her last day of work for the employer, and was capable of working 12 hour days with overtime prior to leaving work to have her left shoulder surgery, makes it impossible for this fact finder to conclude, as a matter of a reasonable certainty, that the last injury, a recurrent carpal tunnel syndrome, by combination with the prior disabilities, has caused the claimant to become unemployable on the open labor market.

Second Injury Fund liability is triggered when the preexisting injury is a hindrance or obstacle to employment or to obtaining reemployment. "If the Second Injury Fund is to fulfill its acknowledged purpose, the proper focus of the inquiry as to the nature of the prior disability is not on the extent to which the condition has caused difficulty in the past; it is on the *potential* that the condition may combine with a work related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition." Wuebbling v. West County Drywall, 898 S.W.2d 615, 620 (Mo.App. E.D. 1995).

The testimony of Ms. Highley, in conjunction with that of Dr. Margolis, persuades that the claimant suffers from the following preexisting permanent partial disability that constitutes a hindrance or obstacle to employment; 17.5% of the right wrist; 17.5% of the left wrist; 45% of the left elbow; 25% of the right elbow; 25% of the right shoulder; 41% of the left shoulder; 15% of the body as a whole referable to the low back; 15% body as a whole referable to the neck; and 12.5 % of the body as a whole referable to multiple sclerosis. The testimony of Dr. Margolis persuades that these prior disabilities, in combination with the disability referable to the recurrent bilateral carpal tunnel resulting from the last work injury, results in a disability that is greater than the simple sum of disabilities. The disability suffered from the last injury, 15% permanent partial disability referable to the left and right upper extremities at the wrist, reaches the threshold to trigger potential Second Injury Fund liability, Section 287.220 RSMo.

The testimony further persuades that permanent partial disability by combination exceeds the simple sum of disabilities by a factor of 15%. The total due as against the Second Injury Fund is 15% of 584 weeks of disability, or a total of 87.6 weeks. At the stipulated rate of \$347.05 per week, the amount due is \$30,401.58.

#### RATE OF COMPENSATION

A finding in favor of the Second Injury Fund as to the issue of liability for permanent and total disability renders moot the issue as to the applicable rate for permanent and total disability.

This award is subject to a lien in favor of Richard T. Grossman, Attorney at Law, in the amount of 25% thereof for necessary legal services rendered.

This award is subject to interest as provided by law.

Date: February 6, 2007

Made by: /s/ KEVIN DINWIDDIE  
KEVIN DINWIDDIE  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

/s/ PATRICIA "PAT" SECREST  
Patricia "Pat" Secrest, *Director*  
*Division of Workers' Compensation*