

FINAL AWARD ALLOWING COMPENSATION
(Modifying Award and Decision of Administrative Law Judge by Separate Opinion)

Injury No.: 02-149555

Employee: Ralph Honer
Employer: Lange Stegmann Company (Settled)
Insurer: Missouri Merchants & MFG Association (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: March 15, 2002
Place and County of Accident: St. Louis, Missouri

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. We have reviewed the evidence and briefs, and we have considered the whole record. Further, we have heard the oral arguments of the parties.

Pursuant to section 286.090 RSMo, we issue this final award and decision modifying the October 13, 2004 award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Introduction

Employee filed two claims alleging work injury. The first claim, Injury No. 01-097613, alleged an August 23, 2001, accident resulting in leg and back injuries. The second claim, Injury No. 02-149555, alleged an occupational disease resulting in carpal tunnel syndrome with an accident or occupational disease date of March 15, 2002.

On February 24, 2004, employee settled both claims with employer/insurer. Employee and employer/insurer settled the first claim for permanent partial disability of 17.23 % of the body as a whole, referable to the low back. Employee and employer/insurer settled the second claim for permanent partial disability of 15% of each hand at the wrist.

The claims proceeded to trial against the Second Injury Fund (SIF). The claims were consolidated for hearing. The administrative law judge found that before the injuries relevant herein, employee suffered from diabetes, glaucoma, and hypertension. The administrative law judge concluded that employee's preexisting illnesses resulted in a 20% permanent partial disability of the body as a whole. No party appealed these determinations.

For the first injury, the administrative law judge found the primary injury resulted in 68.92 weeks permanent partial disability (17.23% of the body as a whole). Based upon a finding that employee's preexisting and primary disabilities combined synergistically, the administrative law judge awarded 22.338 weeks of permanent partial disability against the SIF (15% load).

For the second injury, the administrative law judge implicitly finds that the primary injuries resulted in 52 weeks permanent partial disability. The administrative law judge found that employee was rendered permanently and totally disabled as a result of the primary wrist injuries combined with employee's preexisting low back, glaucoma, morbid obesity and diabetes. The administrative law judge awarded permanent total disability against the SIF with payment as follows: for 52 weeks (March 15, 2002, through March 15, 2003) the SIF shall pay \$183.77, the difference between the permanent partial disability rate and the permanent total disability rate. Thereafter, the SIF

shall pay the full permanent total disability rate of \$513.19.

The SIF filed an Application for Review from the award of the administrative law judge in Injury No. 02-149555. The SIF alleges that the administrative law judge benefit payment timeline is contrary to section 287.220.4 RSMo. Specifically, SIF argues that the three permanent partial disability payment periods must run consecutively and not concurrently. Employee counters that section 287.220.4 does not apply to these claims because the second injury resulted in permanent total disability payments from the SIF.

Discussion

Did the 2002 injury cause permanent partial disability?

Section 287.220.1 reads, in part:

If the previous disability or disabilities . . . and the last injury together result in total and permanent disability, . . . the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself. . .

Section 287.220.4 explains the timing of SIF payments in the event of successive work-related permanent disabilities:

If more than one injury in the same employment causes concurrent and consecutive permanent partial disability, compensation payments for each subsequent disability shall not begin until the end of the compensation period of the prior disability.

There is no dispute that employee suffered more than one injury in the same employment and that he thereby suffered concurrent and consecutive permanent disabilities. The question before us is *did employee's second injury cause a permanent partial disability?* If so, section 287.220.4 applies.

The parties implicitly assert two possible interpretations of the phrase "causes concurrent and consecutive permanent partial disability." Employee asserts that the phrase refers to the extent of the permanent disability owed by the SIF as a result of the second injury. The SIF asserts the phrase refers to the extent of disability resulting from the last injury alone. We agree with the SIF.

The basis for our conclusion is found in the Missouri Supreme Court's opinion in *Stewart v. Johnson*, 398 S.W.2d 850 (Mo. banc 1966). The employee in *Stewart* suffered a work injury that combined with preexisting disabilities to render him permanently and totally disabled. The *Stewart* court explained the proper application of section 287.220.1 RSMo for apportioning liability between employer and the SIF. The court ruled it must "first consider *only the disability resulting from the last injury*; otherwise the words 'considered alone and of itself' are meaningless." *Id.*, at 854 (emphasis added). Applying this rule, the court found that "the disability resulting from the last injury alone was a permanent partial disability." *Id.* The court then concluded that employer's liability is calculated with reference to section 287.190 RSMo, the permanent partial disability statute. Then, the remainder that would be due for permanent total disability is apportioned to the SIF.

We are convinced the same reasoning applies to the interpretation of section 287.220.4. The subsection refers to the extent of disability suffered in successive individual injuries. We conclude that the plain language of section 287.220.4 requires that we consider the disability caused by each injury alone to determine if that subsection applies.

The employee in the instant case, like the employee in *Stewart*, suffered a work injury that combined with preexisting disabilities to render him permanently and totally disabled. The administrative law judge properly applied the rule enunciated in *Stewart* and found that the second injury, alone and of itself, caused a permanent partial disability of 52 weeks.

Based upon the foregoing, we conclude that employee suffered more than one injury in the same employment that caused concurrent and consecutive permanent partial disability. Therefore, section 287.220.4 applies to determine

the timing of the compensation payments in this case.

Application of section 287.220.4 RSMo

According to section 287.220.4, compensation payments for each subsequent disability shall not begin until the end of the compensation period of the prior disability. Further, SIF payment for permanent partial disability is not due until the employer has completed its permanent partial disability payments. Section 287.220.1 RSMo.

Applying the above rules, the employer's permanent partial disability period for the first injury ran from November 1, 2001, for 68.92 weeks until February 24, 2003. Beginning on February 25, 2003, the SIF permanent partial disability period for the first injury ran for 22.33 weeks until July 31, 2003. Beginning on August 1, 2003, the employer's permanent partial disability period for the second injury began to run and extended for 52 weeks until July 31, 2004.

Permanent Total Disability

Employee is permanently and totally disabled as of March 15, 2002. According to section 287.220.1 RSMo, when a combination of the primary injury and preexisting disabilities renders the employee permanently and totally disabled, the SIF liability is determined as follows:

[I]f the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, *the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the "Second Injury Fund. . .*

SIF is liable for the remainder of the compensation that would be due for permanent total disability under section 287.200 after subtracting employer's payment. See *Latumo v. Carnahan*, 640 S.W. 2d 470 (Mo. App. 1982), *Kowalski v. M-G Metals and Sales, Inc.*, 631 S.W.2d 919 (Mo. App. 1982). For the period from March 15, 2002, through February 24, 2003, the remainder is \$183.77.^[1] For the period from February 25, 2003, through July 31, 2003, the remainder is \$ 513.19.^[2] For the period August 1, 2003, through July 31, 2004, the remainder is \$183.77.^[3] Beginning August 1, 2004, and continuing for employee's lifetime or until modified by law, the remainder is \$513.19.^[4]

Maximum Weekly Benefit

The result of our conclusions is that employee never receives more than the statutory maximum weekly benefit for permanent total disability. See section 287.200 RSMo. This result is in accord with the majority view.

There is both a theoretical and a practical reason for the holding that awards for successive or concurrent permanent injuries should not take the form of weekly payments higher than the weekly maxima for total disability. The theoretical reason is that, at a given moment in time, a person can be no more than totally disabled. The practical reason is that if the worker is allowed to draw weekly benefits simultaneously from a permanent total and a permanent partial award, it may be more profitable for him or her to be disabled than to be well--a situation which compensation law studiously avoids in order to prevent inducement to malingering.

5-92 Larson's Workers' Compensation Law section 92.01.

Award

The Second Injury Fund shall pay to employee:

- o \$183.77 per week for the period March 15, 2002 through February 24, 2003;

- o \$513.19 per week for the period February 25, 2003, through July 31, 2003;
- o \$183.77 per week for the period August 1, 2003 through July 31, 2004; and,
- o \$513.19 per week beginning August 1, 2004, and continuing for employee's lifetime or until modified by law.

The award and decision of Administrative Law Judge Margaret D. Landolt, issued October 13, 2004, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

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 28th day of September 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

I must respectfully dissent from the decision of the majority of the Commission. I would affirm the payment timeline determined by the administrative law judge.

Section 287.220.4 RSMo Inapplicable

By its terms, § 287.220.4 RSMo does not apply to the injuries in this case. Employee suffered successive injuries in the same employment. The first injury resulted in permanent partial disability and the second injury resulted in permanent total disability. The majority's conclusion that the second injury caused permanent partial disability for purposes of the application of § 287.220.4 is in error. In the case of *Lturno v. Carnahan*, 640 S.W.2d 470 (Mo. App. 1982), which was cited by the majority, the court had occasion to characterize a second injury such as we consider herein for purposes of § 287.220. The *Lturno* court characterized the second injury as one resulting in permanent total disability.

[W]e hold the clause "and after the completion of payment of the compensation by the employer" in Section 287.220 means that when benefits are awarded against an employer in a second injury case resulting in the worker's permanent total disability, the Fund shall not assume responsibility for paying that part of the permanent total disability compensation assessed against the employer until after the employer completes payment of

that award against it.

Laturno, 640 S.W.2d at 472. (Emphasis added).

Section 287.220.4 simply does not apply to the instant case.

Even if § 287.220.4 applied to this case, the section would not operate as urged by the Second Injury Fund. The section would only permit us to lay end-to-end the Second Injury Fund's obligation for consecutive and concurrent permanent partial disabilities. The Second Injury Fund asks the Commission to use the section to affect the theoretical timeline of employer's payments. Section 287.220 does not apply to employer's obligations. Employer's obligation is determined under § 287.190 RSMo. *Stewart v. Johnson*, 398 S.W.2d 850, 854 (Mo. banc 1966).

I find no other statutory provision that would prevent the Second Injury Fund's obligation for permanent total disability benefits from running concurrently with the permanent partial disability period of the first injury. Absent a statutory provision requiring that the benefits for these two injuries run consecutively, the timing of payments must be determined independently for each injury.

No Weekly Maximum on Compensation for Separate Injuries

The Commission majority asserts that that an employee cannot receive more than his statutory permanent total disability rate for any one week. The Missouri Workers' Compensation Law does not so state. "A cardinal principle of all administrative law cases is that an administrative tribunal is a creature of statute and exercises only that authority invested by legislative enactment." *Farmer v. Barlow Truck Lines, Inc.*, 979 S.W.2d 169, 170 (Mo. banc 1998).

The plain language of § 287.190.5(5) RSMo, as it relates to weekly compensation for permanent partial disability, reads:

For all injuries occurring on or after August 28, 1992, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the employee's average weekly earnings as of the date of the injury; provided that the weekly compensation paid under this subdivision shall not exceed an amount equal to fifty-five percent of the state average weekly wage. (Emphasis added).

Section 287.200.1(4) RSMo, as it relates to weekly compensation for permanent total disability, reads:

For all injuries occurring on or after August 28, 1991, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the injured employee's average weekly earnings as of the date of the injury; provided that the weekly compensation paid under this subdivision shall not exceed an amount equal to one hundred five percent of the state average weekly wage; (Emphasis added).

It is clear from the use of the phrase "the injury", that the language of these subsections applies only to the determination of the rate to be paid for the primary injury under consideration. These sections set no maximum weekly limit on the amount that may theoretically be paid to employee in any given week on account of multiple injuries.

Employee is not Fully Compensated

The practical effect of accepting the Second Injury Fund's argument is that employee is not fully compensated for his first injury. Employee will receive permanent total disability benefits from March 15, 2002, for his lifetime, as required by § 287.220. However, for his first injury, employee's benefits effectively stopped when he suffered the second injury. As a result, he will receive only 29-2/7 weeks of permanent partial disability benefits instead of the 91-2/7 to which he is entitled under §§ 287.190 and 287.220. The decision of the majority shorts employee 62 weeks of benefits worth \$20,424.04. This is certainly contrary to the purpose of the Workers' Compensation Law to compensate employees for work-related injuries.

No Statutory Authority for Second Injury Fund Offset

Viewed another way, the Second Injury Fund effectively receives a credit for amounts previously paid by employer and the Second Injury Fund for the previous injury. Section 287.220 provides for no such credit or offset. "The legislature's failure to include an offset provision for prior second injury fund payments leads us to the conclusion such an offset was not intended." *Frazier v. Treasurer of Missouri*, 869 S.W.2d 152 (Mo. App. 1993).

The administrative law judge properly applied the law. I would affirm the award and decision of the administrative law judge.

John J. Hickey, Member

AWARD

Employee: Ralph Honer Injury No.: 02-149555
Dependents: N/A Before the
Division of Workers'
Employer: Lange Stegmann Co. (Settled) Compensation
Department of Labor and Industrial
Additional Party: Second Injury Fund Relations of Missouri
Jefferson City, Missouri
Insurer: Missouri Merchants & MFG Association (Settled)
Hearing Date: July 8, 2004 Checked by: MDL:tr

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 15, 2002
5. State location where accident occurred or occupational disease was contracted: St. Louis, 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:
Repetitive and repeated use of hands to perform job.
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 hand, left hand, and depression

14. Nature and extent of any permanent disability: 15% permanent partial disability of each hand paid by Employer and permanent total disability paid by Employer due to a combination
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? -0-

Employee: Ralph Honer Injury No.: 02-149555

17. Value necessary medical aid not furnished by employer/insurer? -0-
18. Employee's average weekly wages: Maximum
19. Weekly compensation rate: \$513.19 for PTD and \$329.42 for PPD
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: (Settled)

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:
weekly differential (\$183.77) payable by SIF from March 15, 2002 through
March 15, 2003, and thereafter \$513.19 per week for Claimant's lifetime

TOTAL:

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 hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Mr. Ray B. Marglous

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Ralph Honer Injury No.: 02-149555
Dependents: N/A Before the
Employer: Lange Stegmann Co. (Settled) Division of Workers'
Additional Party: Second Injury Fund Compensation
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Insurer: Missouri Merchants & MFG Association (Settled) Checked by: MDL:tr

PRELIMINARIES

A hearing was held on July 8, 2004, at the Division of Workers' Compensation in the City of St. Louis. Ralph Honer ("Claimant") was represented by Mr. Ray B. Marglous. The Second Injury Fund was represented by Assistant Attorney General Mr. Michael Finneran. The claims against Lange Stegmann Co. ("Employer") previously settled. Mr. Marglous requested a fee of 25% of Claimant's award.

STIPULATIONS

The parties stipulated that on or about August 22, 2001 (Injury Number 01-097613), Claimant sustained an accidental injury arising out of and in the course of employment causing injury to Claimant; venue is proper in the City of St. Louis; Employer received proper notice of the injury; and the claim was timely filed. The parties further stipulated that Claimant was earning an average weekly wage sufficient to place him at the maximum rates of compensation of \$513.19 for total disability benefits and \$329.42 for permanent partial disability benefits. With respect to Injury Number 01-097613, Employer paid \$3,032.21 in temporary total disability benefits; and \$2,808.73 in medical benefits. With respect to Injury Number 02-149555, Employer paid no benefits.

The issues for determination by hearing are: With respect to Injury Number 02-149555, whether or not Claimant sustained an accident or occupational disease arising out of and in the course of employment on or about March 15, 2002. With respect to both injury numbers, the issues are: Whether or not Claimant is permanently and totally disabled; and nature and extent of Second Injury Fund liability.

FINDINGS OF FACT

This Workers' Compensation case arose out of a work-related injury in which Claimant injured his low back, and left lower extremity as a result of the August 23, 2001 work related injury (Injury No. 01-097613), which occurred when a ladder on which Claimant was working collapsed, causing him to fall to the ground. Claimant injured both hands (Injury No. 02-149555) due to repetitive work-related duties involving the use of his hands and wrists over the course of his employment.

Claimant is a 60-year-old high school graduate who, following high school, attended Jackson Welding School, a technical school where he learned a trade. Claimant worked as a welder/fabricator his entire life.

Claimant served in Vietnam from 1966 until 1968. Following his discharge, he returned home and worked for a manufacturer as a welder, and thereafter for Chrysler. In 1970 he began working as a welder for Great Lakes Carbon, later known as Carondelet Coke. He worked first as general repairman and eventually was promoted to shop supervisor. He worked there until 1989 when he began working for Employer, the last company for which he worked. He worked as Employer's head repairman. Job duties included checking conveyors for trouble spots, repairing broken conveyors and machines, and greasing the machines.

Claimant testified his job involved a great deal of walking, lifting, and carrying heavy equipment. Employer was located near the Mississippi River, and Claimant was required to walk between the river and the buildings. Before the

August 2001 injury, Claimant testified he was able to perform his job without difficulty. He also testified he had no problems with his back or legs. Prior to his work injury, Claimant testified he liked his job and hoped to work until he was 70-years-old.

After leaving the Army Claimant was diagnosed with Agent Orange toxicity and diabetes. His diabetes has required constant medical care since its diagnosis, including treatment at the VA Medical Center and later from his personal physician. Claimant testified he occasionally missed work due to his diabetes. He initially took pills to control the illness, and when they did not work, he was prescribed insulin. He testified diabetes occasionally causes him to black out. Claimant has suffered from glaucoma since age 34. Treatment includes visits to the eye doctor and the use of eye drops. Glaucoma gives him blurred vision and makes it difficult to drive at night. It affected his job because the illness caused him to lose focus on occasion, and made welding difficult due to problems he had reading directions, and it often caused blurred vision. In addition, Claimant suffered from hypertension and obesity prior to the 2001 work-related back injury. He testified the obesity resulted not from overeating, but from other illnesses, including a thyroid problem and diabetes. As with the diabetes, Claimant suffered from thyroid problems for years. Obesity affected Claimant's ability to perform strenuous or repetitive work, and it caused difficulty stooping, bending, getting up from a squatting position, and lifting heavy objects. Finally, long before his work-related back injury Claimant suffered problems with his hands that caused problems gripping items and caused him to spontaneously drop items. In addition, his hands tingled and went numb. Claimant used his hands to weld and fabricate steel, to grind items, to repair pulleys, to move items, to hold onto beams, and perform other tasks. Claimant never received treatment for his hands before the 2001 back injury. He testified that prior to the work-related back injury he used sick leave to miss time from work due to these illnesses, and that these illnesses hindered his ability to perform his work.

Claimant injured his back on or about August 23, 2001, following a fall. He was repairing a steel ladder when the rung on which he was working gave out causing him to fall four to five feet to the concrete ground. As a result of the fall his foot twisted, he injured his knee, and he injured his back. He reported his fall to his supervisor and went home to care for his injuries. The next morning he attempted to work through his pain, but by 9:00 a.m. his leg went out from under him and he was unable to stand up. Employer brought him to the medical clinic and he received physical therapy and treatment with Dr. Anderson, including an MRI. He received treatment through Fall 2001. He was released to work light duty, however his job had no light duty and therefore returned to work full duty in November 2001. Claimant testified when he returned to work he could not perform his job as he did before. He took time off work due to pain. He followed up with Dr. Anderson one time and complained of radiating pain from his low back and down his left leg. Dr. Anderson offered Claimant an operation, but he did not want surgery. Claimant's job involves a great deal of walking, and following the August 2001 injury he had difficulty walking long distances due to pain.

After Claimant returned to work in November 2001 the condition of his hands and wrists deteriorated. Claimant testified he had a tingling sensation and numbness in his hands. He could not hold things tightly and he had difficulty grasping items, including wrenches. Claimant testified he believed this was related to the diabetes. Claimant frequently used his hands at work to tighten nuts and bolts, repair bearings, grease fittings, weld, fabricate, and to carry items. His problems with his hands caused him difficulty performing all of these tasks. Electrical studies performed in April 2002 showed Claimant suffered from carpal tunnel syndrome and polyneuropathy. That was when he learned his hand problems were not just related to his diabetes. He has not had carpal tunnel release surgery. Before he left his job he told Employer about the problems he was having with his hands but did not ask for medical treatment. Employer offered to send him to Dr. Anderson but Claimant did not go back to see him for his hands.

Claimant left his job on or about March 15, 2002. His daughter wrote a note for him that he signed stating he left due to his diabetes. However, at that time he had not seen a doctor about his hands and assumed the symptoms were related to diabetes and not to his work as a welder. Claimant testified it was not until the April 2002 tests were performed that he learned his hand symptoms were likely work-related. Claimant testified that when he left his job he knew he could no longer work. In addition to the problems with his hands, he testified his low back continued to bother him. When he left his job he could not hold onto items and he could not walk more than one-half block. As of today, Claimant testified he suffers the effects of these work-related and preexisting illnesses, including difficulty getting from a sitting to a standing position, difficulty pushing and pulling, bending and twisting his body, he cannot stand longer than 15 or 20 minutes, he weighs over 300 pounds, and he cannot lift over 20 pounds. Claimant testified the physical things he presently has difficulty performing are necessary to performing his job as a welder. He testified he has difficulty performing everyday tasks, including mowing a lawn or pushing his grandchildren. He uses a cane if he needs to walk over one-half block. At the time he left his job Claimant testified he was on numerous medications. He further stated his hand problems were the last straw, and the reason he left his job. However, since he left his job his problems with his hands are the same; he is not getting better or worse.

Claimant's testified his physical condition is the same today as when he left his job. He testified nothing has worsened. He cannot walk longer than ten to fifteen minutes or long distances, he cannot squat, he cannot perform heavy lifting, and he is in a great deal of pain. With regard to his hands, his fingers are numb and tingle constantly and he continues to have difficulty grasping and holding items. His back continues to hurt and precludes him from bending,

twisting, squatting and sitting for long periods of time.

On February 24, 2004, Claimant settled his claim against his Employer for his 2001 injuries to his low back and left leg for 17.23% body as a whole. On that date he settled his claim against Employer for the 2002 injuries for 15% of each wrist. As a result of these injuries Claimant testified he has continued problems with his back, hands, and wrists. He testified these injuries affect his ability to lift, twist, sit, squat and walk as well as his ability to get a job.

Dr. Schlafly, a board certified orthopedic surgeon, examined Claimant on January 21, 2003 and reviewed Claimant's medical records prior to the exam. Dr. Schlafly testified that Claimant's job duties were a substantial factor in causing his low back pain and left lumbar radiculopathy. Following his examination, Dr. Schlafly rated Claimant's low back as having a permanent partial disability of 50% of the body as a whole. He testified that Claimant is "incapable of returning to previous duties performing mechanic work, and he should not bend over and lift more than 25 pounds. He is incapable of prolonged standing, sitting or walking. He cannot do activities such as squatting or climbing of ladders." He recommended Claimant consult with a spine surgeon for possible low back surgery.

Dr. Schlafly also testified that Claimant's job duties with Employer were a substantial factor in causing his bilateral carpal tunnel syndrome. Dr. Schlafly opined that as a result of the bilateral carpal tunnel syndrome Claimant suffered a 30% permanent partial disability of the left wrist and 25% permanent partial disability of the right wrist. He testified Claimant should avoid repetitive pulling, pushing, lifting, gripping and pinching with his hands as well as repetitive bending and twisting of the wrists. Dr. Schlafly testified Claimant should not use vibrating power tools and, if engaged in repetitive work, he should be permitted 20 minutes of rest per hour. Dr. Schlafly opined there is a synergistic effect in both hands and a loading factor should be applied. He recommended Claimant undergo bilateral carpal tunnel release surgery.

Dr. Schlafly opined the diabetes, obesity, and glaucoma were a hindrance and obstacle to employment. He testified the pre-existing medical conditions combined to a 20% permanent partial disability of the body as a whole. He further opined there was a synergistic effect between the injury to the low back and hands and the pre-existing medical conditions, the combination of which is greater than the simple sum.

Claimant was examined by Mr. James England, a vocational rehabilitation specialist. Mr. England testified he examined Claimant, reviewed his medical records, and he administered the Wide Range Achievement Test.

Mr. England testified that Claimant had difficulty moving around, and getting up out of the chair. He used a cane, and he had to stand and move around every twenty minutes or so. Mr. England testified obesity is an important factor in employability due to an individual's ability to move around and how prospective employers view the individual's ability to move around. With regard to Claimant's medical history, Mr. England opined the diabetes, and low back problems are a hindrance or obstacle to Claimant's employability. In rendering his ultimate opinion, Mr. England considered Claimant's pulmonary breathing problems, the work related injury of August 23, 2001, and the bilateral carpal tunnel syndrome. In addition to the medical records, Mr. England also reviewed the medical rating report prepared by Dr. Schlafly, including restrictions placed upon Claimant and their effect on his ability to function and work.

Mr. England opined the transferable skills Claimant acquired during his life involved a medium level of exertion, which injuries and work restrictions precluded him from performing. He further opined jobs that might involve a light level of exertion required him to be on his feet. Mr. England opined the transferable skills Claimant possesses are not of use due to physical restrictions. Based upon his examination and review of the records, including work restrictions, Mr. England opined Claimant is not employable in the open labor market. Mr. England based his ultimate opinion on Claimant's obesity, diabetes, visual difficulties, his problems with mobility, and the problems with his upper extremities. Mr. England opined "...the trouble he has with day-to-day functioning, the impression he would make on an interview, and just taking into consideration the physical restrictions that I understand he has; I don't believe that he would be able to compete successfully for employment." He further opined he did not believe Claimant could sustain long-term employment. Mr. England stated that his medical problems and physical restrictions do not leave any employment options. Mr. England testified it was his opinion Claimant was not a candidate for vocational rehabilitation.

RULINGS OF LAW

Second Injury Fund Liability, Injury Number 01-097613

Based upon the above findings of fact, I find, with respect to the 2001 work-related injuries Claimant suffered to his low back and the pre-existing diabetes, glaucoma, hypertension and diabetes as follows:

Claimant's job for Employer is labor intensive and includes a great amount of lifting, bending, stooping, standing, and twisting in order to perform his job duties. As part of his job duties Claimant was required to walk great distances, lift heavy objects, and perform repetitive tasks. On August 23, 2001, while in the scope and course of his employment, Claimant fell off of a ladder thereby sustaining injury to his low back.

Prior to the 2001 work-related injury Claimant suffered morbid obesity, diabetes, glaucoma and hypertension. He

treated with medications for many years and the preexisting illnesses are an obstacle to his ability to work. Claimant testified credibly about the problems the pre-existing illnesses caused him when performing his job, including restrictions in his activities, that caused him problems moving, standing, walking, breathing, and, on occasion, to miss time from work.

Claimant is a credible witness who provided credible testimony at the hearing. Claimant credibly testified to his chronic pain and the difficulty his low back injury caused him and his ability to perform his job.

The uncontroverted medical evidence as testified to by Dr. Schlafly proves Claimant suffers a restricted range of motion in the low back related to the August 2001 work-related injury, which limits his ability to bend, stand, squat, and stoop. Dr. Schlafly's testimony concerning Claimant's pre-existing illnesses is substantiated by the medical evidence and shows the combined effect of these illnesses on his life and ability to work and further, that these illnesses serve as a hindrance and obstacle to employment.

The preexisting illnesses Claimant suffered amount to 20% permanent partial disability of the body as a whole. This is based upon present complaints, the nature and type of Claimant's illnesses, the medical records and the testimony. Claimant suffered permanent partial disability referable to the low back of 17.23% body as a whole. This disability meets the threshold for Second Injury Fund liability.

Claimant's injuries combine synergistically and create a hindrance and obstacle to employment. The disabilities of his low back, diabetes, glaucoma, and obesity, when taken together, affect his work as a welder and will continue to cause him difficulty performing his job, bending, stooping, lifting, walking, sitting, and moving.

Based on the substantial evidence with regard to Injury Number 01-097613, Claimant is entitled to an award from the Second Injury Fund of \$7,358.58, determined as follows: 17.23% body as a whole (Primary injury) or 68.92 weeks; 20% body as a whole (preexisting due to diabetes, obesity, and glaucoma) or 80 weeks for a total of 148.92 weeks with a 15% load factor or 22.338 weeks at a rate of \$329.42 per week for a total award of \$7,358.58.

Second Injury Fund Liability, Injury Number 02-149555

Based upon the findings of fact, I find, with respect to the 2002 work-related injuries Claimant suffered to his right hand and wrist and left hand and wrist (bilateral carpal tunnel), in addition to the pre-existing injuries to his low back, glaucoma, diabetes, and morbid obesity, as follows:

Claimant's job as a welder is labor intensive and includes repetitive lifting, carrying, twisting and use of his hands. Claimant's job required him to constantly and continuously use his hands and work with tools, including vibrating tools, to weld items together. Claimant performed these repetitive tasks on a daily basis for as long as he worked as a welder. These repetitive movements caused Claimant to suffer injury to his wrists, including chronic pain in both wrists, numbness in the hands and wrists, tingling in the hands and wrists, an inability to open and flex his hands, and an inability to hold onto objects without dropping them. In addition, testimony from Claimant detailed the affects of these injuries and illnesses on his life.

Prior to the 2002 work-related injuries to both hands and wrists Claimant suffered an injury to his low back as the result of a 2001 work-related injury. Claimant has a long history of diabetes, glaucoma, and morbid obesity as well as other illnesses. As a result of these injuries and illnesses Claimant has chronic pain in his back, difficulty grasping and holding onto tools or other items, and difficulty walking for an extended period of time. He often requires the use of a cane, and difficulty sitting for an extended period, bending, kneeling, stooping, running, and squatting. Claimant suffered from diabetes since the 1970s, the effects of which have caused him to miss work and contributed to his weight gain. Claimant's glaucoma causes difficulty reading and seeing. Taken together the pre-existing illnesses are an obstacle to his ability to work. Claimant testified credibly as to the difficulty he has performing his job, the problems with his hands and wrists, and his pain level. Claimant testified credibly that his illnesses cause him problems moving and that to function he must take a great deal of medication each day.

Dr. Schlafly's testimony that Claimant's hand and wrist injuries were caused by his work-related activities is supported by competent and substantial evidence. The substantial and competent evidence proves Claimant suffered from bilateral carpal tunnel syndrome before he knew the cause of the illness. The medical records from the VA Medical Center confirm Dr. Schlafly's diagnosis. The work restrictions placed on Claimant, including restriction to sedentary work, restriction from repetitive gripping and lifting duties with his hands, lifting restrictions, and restrictions from using vibrating power tools are supported by substantial and competent evidence. Finally, I find these injuries created a hindrance and obstacle to employment.

Mr. England's uncontroverted opinion as to Claimant's employability is credible and supported by the substantial and competent evidence. Claimant is permanently and totally disabled and unemployable in the open labor market as Claimant is a 60-years-old and performed a lifetime of work as a welder. Claimant's physical illnesses and injuries involve many work restrictions, and he has no transferable skills. Claimant has physical limitations and restrictions which preclude him from sitting for extended periods of time, standing for extended periods of time, bending, squatting, performing repetitive movements with his hands, or performing even light or sedentary work. Due to Claimant's limitations I accept Mr. England's opinion that Claimant is unemployable in the

open labor market.

I find the primary injury to Claimant's hands in 2002 when combined with Claimant's preexisting injuries to his low back, glaucoma, morbid obesity and diabetes render him unemployable in the open labor market and therefore permanently and totally disabled.

I find the Second Injury Fund liable for permanent total disability benefits resulting from the March 15, 2002 work-related injuries. I find Claimant collected permanent partial disability benefits from his Employer as a result of the primary injury. Therefore, the Second Injury Fund is liable for permanent total disability benefits in the amount of \$183.77 per week from March 15, 2002 through March 15, 2003, and thereafter in the amount of \$513.19 per week for Claimant's lifetime.

This award is subject to an attorney's lien of 25% in favor of Claimant' attorney, Ray B. Marglous.

Date: _____ Made by: _____

Margaret D. Landolt
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Reneé T. Slusher
Director
Division of Workers' Compensation

[\[1\]](#) \$513.19 - \$329.42 (employer payment)

[\[2\]](#) \$513.19 - \$ 0.00 (employer payment)

[\[3\]](#) \$513.19 - \$329.42 (employer payment)

[\[4\]](#) \$513.19 - \$ 0.00 (employer payment)