

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

Injury No.: 04-145596

Employee: Fred Hoven
Employer: Sachs Electric Company (Settled)
Insurer: Zurich American Insurance (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we reverse the award and decision of the administrative law judge.

Preliminaries

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

The administrative law judge made the following findings and conclusions: (1) employee sustained a compensable last injury which resulted in permanent partial disability of 97.5625 weeks; (2) employee's preexisting hearing loss, tinnitus, vertigo, left shoulder, right elbow, and hernia conditions do not constitute hindrances or obstacles to his employment or reemployment; (3) at the time the last injury was sustained, employee suffered a 25% preexisting permanent partial disability of the right knee; and (4) owing to the synergistic combination of the primary and preexisting disabling conditions, the Second Injury Fund is liable for 20.6344 weeks of enhanced permanent partial disability benefits.

Employee filed a timely Application for Review with the Commission arguing the administrative law judge erred in concluding employee's hearing loss, tinnitus, vertigo, left shoulder, right elbow, and hernia conditions do not constitute hindrances or obstacles to his employment or reemployment.

The Second Injury Fund filed a timely Application for Review with the Commission arguing the administrative law judge erred in awarding permanent partial disability benefits against the Second Injury Fund because employee failed to meet his burden of proving he has reached maximum medical improvement with regard to the primary injury.

We deny employee's claim against the Second Injury Fund for the reasons stated herein.

Findings of Fact

Primary injury

Employee worked as an electrician and general foreman for employer for almost 20 years. In 2004 he began to suffer the gradual onset of pain, tingling, numbness, and loss of strength symptoms affecting his hands and arms. Employee began treating with Dr. Cantrell in 2004 for symptoms in his right wrist. By early 2007, employee had symptoms of numbness in both hands. In February 2007, a nerve conduction study revealed evidence of bilateral carpal tunnel syndrome and ulnar neuropathy.

Dr. Crandall performed a right carpal tunnel release on April 9, 2007, and prescribed medication and physical therapy. Dr. Crandall returned employee to full-duty work on May 9, 2007. On November 21, 2007, Dr. Crandall opined employee had reached maximum medical improvement,

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and rated the injury at 5% permanent partial disability of the right wrist. But four to six months later, employee's grip strength decreased in his right hand and his pain symptoms returned. Eventually, employee sought further treatment with Dr. Schlafly, who performed a repeat right carpal tunnel release in June 2009, and a left carpal tunnel release and left ulnar nerve transposition in August 2009. Employee experienced relief from his symptoms for about four to six months after the surgeries with Dr. Schlafly. After that, employee began to experience a return of the symptoms of tingling, loss of grip strength, and numbness.

Employee testified that his symptoms referable to his bilateral elbows and wrists were about the same on the day of the hearing as they were before Dr. Schlafly performed the series of surgeries in 2009. Employee's arms fall asleep when he talks on the telephone, drives, or writes, and he frequently drops items. Other current problems include numbness and tingling into the fingers and diminished right grip strength.

Maximum medical improvement

Dr. Lichtenfeld, the only doctor to testify, opined that employee has not reached maximum medical improvement for the 2004 primary injury. At his deposition, Dr. Lichtenfeld made clear he believes employee may benefit from further EMGs and nerve conduction studies and, if those studies so indicate, further surgery. Dr. Lichtenfeld rendered permanent partial disability ratings, but with the caveat that his ratings were subject to change if employee gets more treatment. Dr. Lichtenfeld's opinion stands unopposed on the record. Dr. Schlafly's treatment notes also suggest employee may need additional evaluation and possible surgery: Dr. Schlafly completed an "Attending Physician's Disability Statement" to indicate that employee should be able to go back to work by January 5, 2010, but that employee "may need surgery for right ulnar nerve."

Employee's testimony supports the proposition that the treatments and surgeries he's received so far have not been effective in relieving his complaints, and that future significant treatment may, as Dr. Lichtenfeld opined, be warranted. Perhaps if employee had testified or provided other evidence to show that he does not intend or anticipate any further significant treatment for the 2004 injuries, we might be able to combine such evidence with Dr. Lichtenfeld's provisional/permanent disability ratings to find employee is at maximum medical improvement and to evaluate the degree of permanent partial disability referable to the 2004 injuries. But upon careful review of employee's testimony, we can find no mention of the question whether employee anticipates further treatment for the bilateral wrists or left elbow. (We note employee mentioned that he is "putting off" surgery for his right elbow—this testimony is inconclusive in that it indicates both a reluctance to get further surgery and the possibility that surgery is ultimately intended by employee). Discerning no basis in employee's testimony for a finding that his medical condition is permanent, we return to Dr. Lichtenfeld's uncontested opinion that employee would benefit from further evaluation and treatment for the primary injuries and that employee's disabling conditions are not necessarily permanent.

Given this evidence and these circumstances, we credit Dr. Lichtenfeld on the issue of permanency. We find employee is not at maximum medical improvement for the 2004 bilateral upper extremity injuries.

Conclusions of Law

Second Injury Fund liability

In order to prove Second Injury Fund liability for enhanced permanent partial disability benefits, a threshold requirement is that an employee with preexisting permanent partial disability sustain "a subsequent compensable injury resulting in additional permanent partial disability ..." § 287.220.1 RSMo. In other words, employee is required to prove, as a preliminary matter, that his 2004 primary injuries left him with residual permanent partial disability. Section 287.090.6(1) RSMo defines "permanent partial disability" as "a disability that is permanent in nature and partial in

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degree.” The permanent nature of an injury must be shown to a reasonable certainty, and such proof may not rest on surmise and speculation. See *Farmer-Cummings v. Future Foam*, 44 S.W.3d 830, 834 (Mo. App. 2001); *Sanders by Carmean v. St. Clair Corp.*, 943 S.W.2d 12, 16 (Mo. App. 1997).

We have found, based on Dr. Lichtenfeld’s uncontested testimony, that employee is not at maximum medical improvement for the primary work injury. It follows that we cannot determine the nature or extent of any permanent disability resulting from the primary injury. As the court explained in *Cardwell v. Treasurer of Mo.*, 249 S.W.3d 902, 910 (Mo. App. 2008): “One cannot determine the level of permanent disability associated with an injury until it reaches a point where it will no longer improve with medical treatment. ... Although the term maximum medical improvement is not included in the statute, the issue of whether any further medical progress can be reached is essential in determining when a disability becomes permanent ...” Here, the essential issue of whether further medical progress may be reached has not been resolved by the proof put forward by employee. The only doctor to testify opined that employee is not at maximum medical improvement and that he would benefit from further evaluation. The notes from Dr. Schlafly and employee’s own testimony support the proposition that employee remains in need of further treatment for the primary injuries. Employee did not testify as to whether he intends further significant treatment, and his only mention of further surgery is inconclusive.

Simply put, we don’t know whether employee’s medical condition or any disability referable to the primary injury are permanent. As a result, any determination of permanent partial disability referable to the primary injury would necessarily hinge upon surmise and speculation.

In light of the foregoing considerations, we conclude that employee has failed to show that he sustained a “subsequent compensable injury” resulting in permanent partial disability for purposes of § 287.220.1.

Conclusion

Employee failed to prove he suffered a subsequent compensable injury resulting in permanent partial disability for purposes of § 287.220.1 RSMo. Accordingly, employee’s claim against the Second Injury Fund is denied.

The award and decision of Administrative Law Judge Suzette Carlisle is attached solely for reference.

Given at Jefferson City, State of Missouri, this 19th day of July 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

 V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Fred Hoven

Injury No.: 04-145596

Dependents: N/A

Employer: Sachs Electric Company (Settled)

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial

Additional: Second Injury Fund

Relations of Missouri
Jefferson City, Missouri

Insurer: Zurich American Insurance Company (Settled)

Hearing Date: October 13, 2011

Checked by:SC

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: December 28, 2004
5. State location where accident occurred or occupational disease was contracted: St. Louis City, 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: Claimant developed bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome from repetitive activities as an electrician.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Bilateral hands and elbows
14. Nature and extent of any permanent disability: 25% of the right wrist, 15% of the left wrist, 15% of the left elbow (Settled)
15. Compensation paid to-date for temporary disability: \$0
16. Value necessary medical aid paid to date by employer/insurer? \$11,844.81

Employee: Fred Hoven

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$1200.00
- 19. Weekly compensation rate: \$675.90/\$354.05
- 20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable:

Employer settled prior to hearing

22. Second Injury Fund liability: Yes

| | |
|---|------------|
| 20.6344 weeks of permanent partial disability from Second Injury Fund | \$7,305.61 |
|---|------------|

| | |
|---------------|-------------------|
| TOTAL: | \$7,305.61 |
|---------------|-------------------|

23. Future requirements awarded: None

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

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Dean Christianson

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Fred Hoven

Injury No.: 04-145596

Dependents: N/A

Employer: Sachs Electric Company (Settled)

Additional Second Injury Fund

Insurer: Zurich American Insurance Company
(Settled)

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

STATEMENT OF THE CASE

The parties appeared for a hearing before the undersigned administrative law judge at the Missouri Division of Workers' Compensation (DWC) on October 13, 2011. Fred Hoven (Claimant) requested a final award to determine the liability of the Second Injury Fund (SIF) for permanent partial disability (PPD) benefits. Attorney Dean Christianson represented the Claimant. Assistant Attorney General Da-Niel Cunningham represented the SIF. Venue is proper and jurisdiction properly lies with the DWC. The record closed after presentation of the evidence.

Prior to the start of the hearing, Sachs Electric Company (Employer) and Zurich American Insurance Company, (Insurer), settled their case with Claimant and did not participate in the hearing. The stipulation is not in evidence. The Claimant submitted two injury numbers for disposition; 04-145596 and 07-125562. Although separate awards were written, much of the evidence is contained in both awards.

STIPULATIONS

The parties stipulated that on or about December 28, 2004:

1. Claimant was employed by the Employer and sustained an occupational disease which arose out of and in the course of employment in St. Louis City, located in Missouri;
2. Venue is proper in St. Louis City;
3. The Employer and Claimant operated under the Missouri Workers' Compensation Law;¹
4. The Employer's liability was fully insured;
5. The Employer had notice of the injury;
6. A Claim for compensation was timely filed;
7. Claimant's average weekly wage was \$1200.00 which resulted in a rate of temporary total disability (TTD) of \$675.90 and \$354.05 for PPD benefits;

¹ All references in this award to the Employer also refer to the Insurer. All references are to the 1999 Revised Statutes of Missouri unless otherwise stated.

8. The Employer paid no TTD benefits; and
9. The Employer paid medical benefits totaling \$11,844.81

ISSUES

The sole issue to be decided is the nature and extent of the SIF's liability for PPD benefits, if any.

Claimant's Exhibits A through O and the SIF's Exhibit I were offered and received into evidence without objection. Any objections contained in the depositions or made during the hearing but not expressly ruled on in this award are now overruled. To the extent marks and highlights are contained in the Exhibits, they were made prior to becoming part of this record and were not placed there by the undersigned administrative law judge.

FINDINGS OF FACT

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

1. Claimant graduated from high school and completed some coursework through the Local 1 apprenticeship training.
2. Claimant is a member of IBW-Local 1, and received work assignments through the union hall. Employer hired Claimant in the summer of 1989 and he worked through December 24, 2008. Claimant worked as an electrician, foreman, and as a general foreman. As an electrician, Claimant used power tools and hand tools on a regular basis. As a foreman, Claimant retrieved tools and pipe for other employees.
3. Over time, Claimant developed complaints with his arms. Initially, Claimant received treatment at St. Louis Medical Clinic and with Dr. Cantrell for his right wrist. A December 28, 2004 nerve conduction study revealed right wrist neuropathy. The left hand was not tested.
3. On February 21, 2007, Claimant reported numbness in both hands, right worse than left. Nerve conduction studies on February 27, 2007 revealed bilateral neuropathy of the wrists, and elbows. Dr. Daniel Phillips described the 2007 findings as "worse than the December 2004" results.
4. Dr. Crandall performed a right carpal tunnel release on April 9, 2007, and prescribed medication and physical therapy. Dr. Crandall returned Claimant to work full duty on May 8, 2007. On November 21, 2007, Dr. Crandall opined Claimant had reached maximum medical improvement (MMI), and rated 5% PPD of the right wrist.
5. After six months, Claimant began to drop items, and his grip strength decreased in both wrists. His arms fell asleep when he talked on the telephone, drove, and wrote.

6. Right wrist problems included tingling into the fingers, and decreased right grip strength.
7. Claimant stopped working for Employer in 2008, a year after the first right carpal tunnel release.
8. Left wrist symptoms became worse over time. Nerve conduction studies dated May 22, 2009 revealed right moderate carpal tunnel syndrome, left cubital tunnel syndrome, and left early mild carpal tunnel syndrome.
9. On June 10, 2009, Dr. Bruce Schlafly performed a repeat right carpal tunnel release.
10. On August 10, 2009, Dr. Bruce Schlafly performed a left carpal tunnel release and a left ulnar nerve transposition.
11. On November 3, 2009, Dr. Schlafly opined Claimant became disabled June 10, 2009 and returned him to work full duty on November 16, 2009.
12. Current left wrist complaints include decreased grip strength, wrist tenderness, and numbness in the first three fingers, tingling, and dropping items. He felt pain when he picked up or pushed heavy objects. Tool vibration and gripping caused hand numbness and pain.
13. The left elbow is tender to touch. Claimant had decreased strength and pain when he uses power tools and grips.
14. Claimant wears a right elbow splint to keep the arm straight at night. When Claimant uses the telephone the arm falls asleep and it tingles from the elbow to the hand. Claimant declined the recommended surgery.
15. Claimant's medications include an anti-inflammatory, two pain relievers, cholesterol medication, an aspirin, and valium for dizziness and vertigo.

Preexisting medical conditions

16. Left ear ringing began in the 1980's. A hearing test was performed which showed diminished left ear hearing at high pitched sounds. Medication did not help. Prior to 2004, Claimant had trouble hearing at work with background noise. Claimant asked co-employees to repeat statements or he moved to another room. At night, the ringing annoyed Claimant when he tried to sleep. Prior to 2004, Claimant was under no physician imposed restrictions, did not wear hearing aids, and had no surgery.

17. Claimant has experienced **vertigo** since the 1980's when he stood up quickly or turned his head. He felt dizzy and the room spun. He experienced car sickness. Leading up to 2004, Claimant was afraid of heights, and needed to hold on to something to avoid losing his balance. Claimant reported complaints to his primary care physician. Medical evidence shows the first prescription for vertigo on June 10, 2008, which produced limited results. Doctors advised him to be careful when getting up and climbing ladders. Claimant performed his work duties, and did not inform the Employer about the vertigo.

18. Claimant had a prior **right knee** surgery by Dr. Burke on May 23, 2002 for a meniscus tear. Before 2004, Claimant had pain, popping, and grinding, which increased with activity. At work, Claimant sat on a stool to work in low places. In May 2004, Claimant had increased right knee pain after he rose from a seated position. He improved after a month of treatment.

18. On May 24, 2005, Dr. Burke treated Claimant for **left shoulder** pain due to a sudden onset of pain. X-rays revealed Type II acromion and mild AC joint arthrosis. Dr. Burke diagnosed AC joint pain and bursitis of the left shoulder, and injected cortisone. By June 3, 2005, Claimant reported marked improvement. Dr. Burke prescribed therapy and released him from care on July 12, 2005. Claimant saw Dr. Burke twice.

19. **Mark Lichtenfeld, M.D.**, examined Claimant on March 23, 2010, and issued a report at the request of his attorney. For the December 2004 injury, Dr. Lichtenfeld diagnosed bilateral carpal tunnel syndrome, and left cubital tunnel, and ulnar nerve transposition.

20. Dr. Lichtenfeld rated the following disability for the hands/wrists:

- a. 37.5% PPD of the right wrist for carpal tunnel syndrome
- b. 35% PPD of the left wrist for carpal tunnel syndrome
- c. Dr. Lichtenfeld opined the two injuries create a synergistic effect, and a 15% loading factor should apply

For the elbows:

- a. 35% PPD of the left elbow for cubital tunnel syndrome
- b. 17.5% PPD of the right elbow
- c. Dr. Lichtenfeld opined the two injuries create a synergistic effect, and a 15% loading factor should apply

Despite rating Claimant's upper extremities in March 2010, Dr. Lichtenfeld testified Claimant had not reached maximum medical improvement in November 2010.

22. Dr. Lichtenfeld rated the following disabilities for the preexisting injuries:

- a. 32.5% PPD of the right knee

- b. 15% PPD of the body for vertigo
 - c. 15% PPD of the body for tinnitus in the left ear
 - d. 12.5% PPD of the body for a hernia
 - e. 27.5% PPD of the left shoulder
23. Dr. Lichtenfeld opined the disabilities combined with the 2004 work injury to create a synergistic effect, and created a significant obstacle and/or hindrance to employment or reemployment.
24. Dr. Lichtenfeld imposed restrictions on repetitive and overhead activities, climbing ladders, working at heights, and uneven surfaces.

FINDINGS OF FACT & RULINGS OF LAW

Claimant has established a right to recover from the Second Injury Fund. A claimant in a worker's compensation proceeding has the burden of proving all elements of his claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 911 (Mo.App. 2008). In order for a claimant to recover against the Second Injury Fund, he must prove that he sustained a compensable injury, referred to as “the last injury,” which resulted in permanent partial disability. Section 287.220.1 RSMo. A claimant must also prove that he had a pre-existing permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment should he become unemployed; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15% for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo.App. 2008) (Citations omitted). In order for a claimant to be entitled to recover permanent partial disability benefits from the Second Injury Fund, he must prove that the last injury, combined with his pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. *Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 138 S.W.3d 714, 717-18 (Mo. banc 2004). Claimant has met the burden imposed by law.

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

1. Claimant sustained a compensable last injury which resulted in the following permanent partial disability that is a hindrance or obstacle to employment or reemployment.
 - a. 25% of the right wrist (43.75 weeks),
 - b. 15% PPD of the left elbow (27.5625) weeks, and

- c. 15% PPD of the left wrist (26.25) weeks²

Total weeks of disability from the last injury: 97.5625 weeks

- 2. I find Claimant’s hearing loss, tinnitus, vertigo, left shoulder, right elbow, and hernia conditions do not constitute a hindrance or obstacle to his employment or reemployment.
- 3. As of the time the last injury was sustained, Claimant had the following preexisting permanent partial disabilities, which meet the statutory thresholds and were of such seriousness as to constitute a hindrance or obstacle to employment or reemployment:

- a. 25% PPD of the right knee (40 weeks)

Total weeks for preexisting disabilities: 40

- 4. The credible evidence establishes that the last injury, combined with the pre-existing permanent partial disabilities, causes 15% greater overall disability than the independent sum of the disabilities. The Second Injury Fund liability is calculated as follows: 97.5625 weeks for last injury + 40 weeks for preexisting injuries = 137.5625 weeks x 15% = 20.6344 weeks of overall greater disability.

CONCLUSION

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

Date: _____

Made by: _____

Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation

² To calculate left wrist disability: 175 weeks times 15% equals 26.25 weeks. To calculate left elbow disability: 210 weeks minus 26.25 weeks equals 183.75 weeks times 15% equals 27.5625 weeks.