

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

Injury No.: 07-125562

Employee: Fred Hoven  
Employer: Sachs Electric Co. (Settled)  
Insurer: Zurich American Insurance Co. (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 issue this final award and decision modifying the 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**

The administrative law judge found the Second Injury Fund liable for 12.9 weeks of enhanced permanent partial disability benefits under § 287.220.1 RSMo. Employee filed an Application for Review arguing that the award is insufficient and that the administrative law judge should have considered his preexisting hearing loss, tinnitus, vertigo, left shoulder, right elbow, and hernia conditions.

We note that the administrative law judge determined, without explanation or analysis, that employee's preexisting hearing loss, tinnitus, vertigo, left shoulder, right elbow, and hernia conditions do not constitute hindrances or obstacles to employment or reemployment.

For the reasons stated herein, we agree that the administrative law judge erred in failing to include certain of employee's preexisting conditions in determining the extent of Second Injury Fund liability.

**Discussion**

*Preexisting permanent partial disability*

Employee provided expert medical testimony and disability ratings from Dr. Lichtenfeld and also provided his own testimony to establish he suffered some preexisting disability referable to hearing loss, tinnitus, vertigo, hernia, low back, and left shoulder conditions. This evidence stands unopposed. The administrative law judge appears to have credited employee's evidence, as she made affirmative findings related to each of these conditions discussing the impact on employee's functioning and his work abilities. We agree that employee's evidence as to these preexisting conditions is credible.

The administrative law judge did not, however, make any findings as to the extent of permanent partial disability employee suffered referable to each of these preexisting conditions. After a careful review of the testimony from both Dr. Lichtenfeld and

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employee, we find that at the time employee sustained the primary left knee injury, he suffered the following preexisting permanent partially disabling conditions: 25% of the right knee, 10% of the body as a whole referable to hearing loss, 5% of the body as a whole referable to tinnitus, 15% of the body as a whole referable to vertigo, 12.5% of the body as a whole referable to the hernia, 2.5% of the body as a whole referable to the low back, and 5% of the left shoulder.

We do not make any findings of permanency referable to employee's claimed 2004 bilateral upper extremity injuries, because employee failed to demonstrate that his medical condition or any disability referable to those injuries are permanent. (We disclaim the administrative law judge's finding that employee reached maximum medical improvement from bilateral carpal tunnel syndrome and cubital tunnel syndrome in January 2010). We more fully discuss employee's failure to prove permanency referable to the 2004 injuries in our award and decision on employee's claim for Injury No. 04-145596.

*Hindrance or obstacle to employment or reemployment*

The administrative law judge provided no analysis to explain her determination that employee's preexisting disabling conditions did not amount to hindrances or obstacles to employment or reemployment. The phrase "hindrance or obstacle to employment" is not defined in Chapter 287. As a result, we look to case law for guidance in interpreting its meaning:

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. That potential is what gives rise to prospective employers' incentive to discriminate. Thus, if the Second Injury Fund is to serve its acknowledged purpose, "previous disability" should be interpreted to mean a previously existing condition that a cautious employer could reasonably perceive as having the potential to combine with a work related injury so as to produce a greater degree of disability than would occur in the absence of such condition. A condition satisfying this standard would, in the absence of a Second Injury Fund, constitute a hindrance or obstacle to employment or reemployment if the employee became unemployed.

*Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. 1995) (emphasis in original).

The foregoing "potential to combine" standard has been consistently cited by the courts to determine whether a preexisting condition constitutes a hindrance or obstacle to employment. See *Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 637 (Mo. App. 2007); *Concepcion v. Lear Corp.*, 173 S.W.3d 368, 371 (Mo. App. 2005); *E.W. v. Kan. City Sch. Dist.*, 89 S.W.3d 527, 538 (Mo. App. 2002); and *Carlson v. Plant Farm*, 952 S.W.2d 369, 373 (Mo. App. 1997). When we apply this standard, we conclude that

Employee: Fred Hoven

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employee's preexisting hearing loss, tinnitus, vertigo, hernia, low back, and left shoulder conditions amounted to hindrances or obstacles to employment at the time he sustained the primary injury. This is because we are convinced a cautious employer could reasonably perceive each of these conditions as having the potential to combine with a subsequent work related injury so as to produce a greater degree of disability than would occur in the absence of such condition.

Second Injury Fund liability

Section 287.220.1 RSMo sets forth thresholds for the extent of preexisting permanent partial disability necessary to trigger Second Injury Fund liability. The language of that section makes clear that a 15% threshold applies where the employee suffers from preexisting permanent partial disability referable to "a major extremity injury only." *Id.* Here, employee did not suffer preexisting permanent partial disability referable to a major extremity injury only, but rather suffered multiple preexisting conditions of ill, so the 15% threshold is not applicable. Rather, we look at all of employee's preexisting disabling conditions, determine the total amount of weeks of preexisting permanent partial disability, and ask whether this amount meets the 50-week "body as a whole" threshold. *Id.*

Converting employee's preexisting disabilities into weeks of compensation yields the following results: 40 weeks for the right knee, 40 weeks for hearing loss, 20 weeks for tinnitus, 60 weeks for vertigo, 50 weeks for the hernia, 10 weeks for the low back, and 11.6 weeks for the left shoulder. The sum of these amounts is 231.6 weeks. Employee has met the 50-week threshold.

We credit Dr. Lichtenfeld and find that these preexisting conditions combine with employee's primary injury to result in greater disability than the simple sum. We agree with the administrative law judge that a 15% load factor is appropriate to represent this synergistic effect. We have found that employee's preexisting conditions amount to 231.6 weeks of permanent partial disability. Employee's primary injury resulted in 28.75% permanent partial disability of the left knee, or 46 weeks of permanent partial disability. The sum of these two amounts is 277.6 weeks. When we multiply the sum by the 15% load factor, the result is 41.64 weeks.

We conclude that the Second Injury Fund is liable for 41.64 weeks of permanent partial disability benefits.

**Award**

We modify the award of the administrative law judge as to the extent of Second Injury Fund liability.

The stipulated rate of compensation is \$389.04. The Second Injury Fund is liable to employee for \$16,199.63 in permanent partial disability benefits.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Employee: Fred Hoven

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Any past due compensation shall bear interest as provided by law.

The award and decision of Administrative Law Judge Suzette Carlisle is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

Given at Jefferson City, State of Missouri, this 19<sup>th</sup> 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.: 07-125562

Dependents: N/A

Employer: Sachs Electric Co. (Settled)

Additional: Second Injury Fund

Insurer: Zurich American Insurance Co. (Settled)

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

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: September 10, 2007
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 injured his left knee when he slipped and fell at work.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Left knee
14. Nature and extent of any permanent disability: 28.75% of the left knee (Settled)
15. Compensation paid to-date for temporary disability: \$1,167.13
16. Value necessary medical aid paid to date by employer/insurer? \$20,880.19

Employee: Fred Hoven

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$1,200.00
- 19. Weekly compensation rate: \$742.72//\$389.04
- 20. Method wages computation: Stipulated

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

Employer settled prior to hearing

22. Second Injury Fund liability: Yes

12.9 weeks of permanent partial disability from Second Injury Fund	\$5,018.62
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<b>TOTAL:</b>	<b>\$5,018.62</b>
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23. Future requirements awarded: None

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

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

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Fred Hoven

Injury No.: 07-125562

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. Jurisdiction properly lies with the DWC. The record closed after presentation of the evidence.

Prior to the start of the hearing, the Employer (Sachs Electric) and their Insurer (Zurich American Insurance Co.) settled their claim with Claimant and did not participate in the hearing. 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 September 10, 2007:

1. Claimant was employed by the Employer and sustained an accident which arose out of and in the course of employment in St. Louis City, located in Missouri;
2. The venue is proper in St. Louis City;
3. The Employer and Claimant operated under the Missouri Workers' Compensation Law<sup>1</sup>;
4. The Employer's liability was fully insured;
5. The Employer had notice of the injury;
6. The 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 \$742.72 and \$389.04 for PPD;
8. The Employer paid TTD benefits totaling \$1,167.13;
9. The Employer paid medical benefits totaling \$20,880.19; and
10. Claimant sustained 28.75% PPD of the left knee from the primary injury

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<sup>1</sup> All references in this award to the Employer also refer to the Insurer. All references are to the 2005 Revised Statutes of Missouri 2005 unless otherwise stated.

### Issues

The sole issue for disposition is the nature and extent of the Second Injury Fund liability for permanent partial disability, if any.

### Exhibits

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 the record and were not placed there by the undersigned administrative law judge.

### FINDINGS OF FACT

All evidence was reviewed but only evidence needed to support this award will be summarized below.

1. Claimant graduated from high school and completed some coursework through Local 1 apprenticeship training.
2. Claimant is a member of IBW-Local 1, and received the assignment from the union hall. Employer hired Claimant in the summer of 1989 and worked through December 24, 2008. Claimant worked as an electrician, foreman, and 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. On September 10, 2007, Claimant slipped and fell and injured his left knee at work. Claimant treated at Concentra and was diagnosed with a knee strain and sprain of a medial collateral ligament. Medication was prescribed and work restrictions were imposed. An MRI showed cartilage damage to the knee.
4. On November 15, 2007, Dr. Christopher R. Rothrock performed arthroscopic surgery on Claimant's left knee.
5. Claimant can no longer squat or kneel on his left knee. At work he used a stool as needed. On steps the knee is weak, buckles, and is painful. The left knee is worse than the preexisting right knee problems.

#### *Preexisting medical conditions*

6. Left ear ringing began in the 1980's. A hearing test was performed which showed diminished hearing at high pitched sounds. Medication did not help. Prior to 2007, Claimant had trouble hearing at work due to background noise. Claimant asked co-employees to repeat their statements or he moved to another room. At night, the ringing annoyed Claimant when he tried to sleep.

Claimant was under no physician-imposed restrictions. No hearing aids or surgery were provided.

7. 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 2007, Claimant was afraid of heights, and needed to hold onto something to avoid losing his balance. Claimant reported complaints to his primary care physician. Medical evidence shows the first prescription for vertigo was dated June 10, 2008, with limited results. Doctors advised him to be careful when getting up and climbing ladders. Claimant performed his work duties, but did not inform the Employer about the vertigo.
8. Claimant had a prior **right knee** surgery by Dr. Burke on May 23, 2002 for a meniscus tear. Before 2007, 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.
9. 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 Claimant from care on July 12, 2005.
10. Dr. Daniel G. Hafenrichter surgically repaired Claimant's **left inguinal hernia** on May 17, 2006. Ongoing problems include soreness and an achy feeling. Claimant was cautious with lifting after surgery. He sought help when lifting if needed.
11. Over time, Claimant developed complaints with both 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.
12. 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**.
13. 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.
14. 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.

15. Right wrist problems included tingling into the fingers, and decreased right grip strength.
16. Claimant stopped working for Employer in 2008, a year after the first right carpal tunnel release.
17. 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.
18. On June 10, 2009, Dr. Bruce Schlafly performed a repeat **right carpal tunnel release**.
19. On August 10, 2009, Dr. Bruce Schlafly performed a **left carpal tunnel release** and a **left ulnar nerve transposition**.
20. On November 3, 2009, Dr. Schlafly opined Claimant became disabled June 10, 2009 and returned him to work full duty on November 16, 2009. Claimant settled the claim prior to the hearing. The stipulation is not in evidence.
21. 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. The left elbow is tender when placed on a table.
22. 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.
23. Claimant's medications include an anti-inflammatory, two pain relievers, cholesterol medication, an aspirin, and valium for dizziness and vertigo.

***Expert Medical Opinion***

24. **Mark Lichtenfeld, M.D.**, examined Claimant on March 23, 2010, and issued a report at the request of his attorney.
25. For the September 10, 2007 injury, Dr. Lichtenfeld diagnosed a left knee sprain, left medial collateral ligament sprain, tear of the medial and lateral meniscus, and extensive horizontal tear of the body and posterior horn of the left medial meniscus, and degeneration of the lateral meniscus, post surgical meniscectomies, and left knee effusion.

26. Dr. Lichtenfeld further opined the diagnoses were caused by the 2007 work injury, and rated 37.5% PPD of the left knee.
27. Dr. Lichtenfeld rated the following preexisting disabilities:
- For the hands:**
  - a. 37.5% PPD of the right wrist for carpal tunnel syndrome
  - b. 35% PPD of the left wrist for carpal tunnel syndrome
  - c. The two injuries create a synergistic effect, and a 15% loading factor should apply
  - For the elbows:**
  - d. 35% PPD of the left elbow for cubital tunnel syndrome
  - e. 17.5% PPD of the right elbow
  - f. The injuries create a synergistic effect and a 15% loading factor should apply
  - g. 32.5% PPD of the right knee
  - h. 15% PPD of the body for vertigo
  - i. 15% PPD of the body for tinnitus in the left ear
  - j. 12.5% PPD of the body for a hernia
  - k. 27.5% PPD of the left shoulder
28. Dr. Lichtenfeld opined the disabilities combined with the 2007 work injury to create a synergistic effect, and created a significant obstacle and/or hindrance to employment or reemployment.

**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 SIF, 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 permanent partial disability equivalent to: 28.75% of the right knee (46 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 employment or reemployment.
3. I find Claimant reached MMI in January 2010 from bilateral carpal tunnel syndrome and cubital tunnel syndrome, after Dr. Schlafly returned him to work full duty. No follow up appointments were scheduled or requested. I find Claimant's bilateral upper extremity conditions do not combine with the left knee injury to create a hindrance or obstacle to employment or reemployment. I find the level of disability was not determined at the time of the last injury, because Claimant treated more than two years after the left knee injury. See *Garcia v. St. Louis County*, 916 S.W.2d 263, 266 (Mo. App. 1995) and *Cardwell v. Treasurer of State of Missouri, as Custodian of the Second Injury Fund*, 249 S.W.3d 902,911 (Mo.App. 2008).
4. 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

5. I find the credible evidence establishes that the last injury, combined with the pre-existing permanent partial disabilities, caused 15% greater overall disability than the independent sum of the disabilities. The Second Injury Fund liability is calculated as follows: 46 weeks for last injury + 40 weeks for preexisting injuries = 86 weeks x 15% = 12.9 weeks of overall greater disability.

### CONCLUSION

The Second Injury Fund is liable for permanent partial disability benefits as outlined in this award. The attorney for the 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*