

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

Injury No.: 99-146915

Employee: David Kammeier
Employer: A. R. Fleming Printing Company
Insurer: Missouri Printers Group Insurance Trust
aka Missouri Printing Industry Trust
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Dismissed)

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated October 2, 2008. The award and decision of Administrative Law Judge Suzette Carlisle, issued October 2, 2008, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 1st day of April 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: David Kammeier Injury No.: 99-146915
Dependents: N/A Before the
Employer: A.R. Fleming Printing Company **Division of Workers'**
Additional Party: Second Injury Fund (Dismissed) Department of Labor and Industrial **Compensation**
Insurer: Missouri Printers Group Insurance Trust Aka Missouri Printing Industry Trust Jefferson City, Missouri
Hearing Date: June 17 and June 30, 2008 Checked by: SC:kob

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
 - 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
 - Date of accident or onset of occupational disease: October 1, 1999
 - State location where accident occurred or occupational disease was contracted: St. Louis County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
 - 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 peripheral neuropathy from prolonged exposure to chemicals at work.
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: Bilateral hands, legs, and feet
 - Nature and extent of any permanent disability: Permanent Total Disability against Employer

15. Compensation paid to-date for temporary disability: \$253,640.33
16. Value necessary medical aid paid to date by employer/insurer? \$42,323.05

Employee: David Kammeier

Injury No.:99-146915

17. Value necessary medical aid not furnished by employer/insurer? N/A

- Employee's average weekly wages: Sufficient to reach maximum rates of compensation

19. Weekly compensation rate: \$578.48/\$303.01

20. Method wages computation: By stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Permanent total disability benefits in the amount of \$578.48 from Employer/Insurer beginning June 19, 2006, for Claimant's lifetime

Employer/Insurer shall receive a credit for overpayment of temporary total disability in the amount of \$578.48 per week from June 19, 2006 through December 5, 2007

22. Second Injury Fund liability: Dismissed prior to hearing

Total: TO BE DETERMINED

23. Future requirements awarded: **As outlined in the award**

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: David Kammeier

Injury No.: 99-146915

Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	A.R. Fleming Printing Company	Department of Labor and Industrial
Additional Party:	Missouri Printers Group Insurance Trust Ala Missouri Printing Industry Trust	Relations of Missouri Jefferson City, Missouri
Insurer:	June 17 and June 30, 2008	Checked by: SC:kob

STATEMENT OF THE CASE

A Temporary Award was issued by Judge Joseph Denigan in the above captioned matter on October 18, 2000. The judge found for David Kammeier, ("Claimant") on notice, but denied issues related to occupational disease, liability for medical expenses, and Temporary Total Disability ("TTD"). On April 6, 2001, the Labor and Industrial Relations Commission ("Commission") reversed the trial judge and found Claimant established medical causation, and awarded TTD and medical benefits. On January 15, 2002, the Court of Appeals affirmed the Commission.

On June 17, 2008, a hearing was held for a final award in this matter at the Missouri Division of Workers' Compensation ("DWC") St. Louis office at the request of Claimant, pursuant to Section 287.450 RSMo (2000). Attorney Dean Christianson represented Claimant. Attorney Mark Anson represented A.R. Fleming Printing Company ("Employer") and Missouri Printers Group Ins. Trust, also known as Missouri Printing Industry Trust ("Insurer"). The record closed on June 30, 2008 after submission of Employer and Insurer's Exhibit 6. Hearing venue is correct, and jurisdiction properly lies with DWC.

STIPULATIONS

The parties stipulated that on or about October 1, 1999:

- Claimant was employed by Employer;
- The alleged injury occurred in St. Louis County, Missouri;
- Employer and Claimant operated under the provisions of the Missouri Workers' Compensation Law;
- Employer's liability was fully insured by Insurer;
- A Claim for Compensation was filed within the time prescribed by law;
- Claimant's average weekly wage was sufficient to reach maximum rates of compensation; \$578.48 for TTD and Permanent Total Disability ("PTD") and \$303.01 for Permanent Partial Disability ("PPD");
- Employer paid \$253,640.33 in TTD benefits, representing 438 3/7 weeks, from October 1, 1999 through December 5, 2007;
- Employer paid \$42,323.05 in medical benefits; and
- The Court took judicial notice of the DWC file which contains the transcript and exhibits from the first hearing on October 18, 2000.

ISSUES

The parties submitted the following issues for disposition:

- Did Claimant sustain an occupational disease?
- Did Claimant's condition arise out of and in the course of employment?
- Is Claimant's medical condition medically causally related to his work activities?
- Did Employer receive notice of an occupational disease?
- Is Employer liable for future medical care?

- What is the nature and extent of the Employers liability for either PPD or PTD benefits?
- Who were Claimant's dependents at the time of the alleged injury?

EXHIBITS

Judicial notice was taken of Claimant's Exhibits A-O and Employer and Insurer's Exhibits 1-4 from the first hearing. Claimant's Exhibits P-T and W were admitted. Exhibits T-V are not admitted based on relevance but are retained with the record. Employer and Insurers' Exhibits 5-6 were admitted without objection. Any notations contained in the records were present when admitted into evidence.

FINDINGS OF FACT

All evidence was reviewed, but only evidence supporting this award is referenced below. This Court adopts and reissues all "Findings of Fact" adopted by the Commission from the first hearing and supplemented by the Commission on appeal.

Any objections not expressly ruled upon in the depositions, at trial or in this award are overruled. Based upon previous "Findings of Fact," competent and substantial evidence presented at both hearings and reasonable inferences to be derived, I find the following facts:

Background Facts

1. In 1999, **Claimant** was 59 years old, a high school graduate, and married with two children and four step-children all over the age of eighteen and without physical or mental conditions that impaired their ability to work.
2. Claimant received certificates of completion in printing and computers, but did not finish college, and cannot type or use a personal computer. Claimant stands 5ft 9" tall and weighs 262 pounds.

Employment Facts

3. In 1966, Employer hired Claimant to operate a printing press. For thirty-three years he worked as a pressman, and operated a room-size printing press with two co-employees. One co-employee, called a feeder, brought chemicals to the press. Claimant and the feeder applied most of the chemicals. A third employee was a foreman and operated the press intermittently. Claimant used chemicals to remove ink, and clean machines, rollers, and blankets.
4. Claimant came in contact with 50 different chemicals during his career and averaged contact with ten chemicals per day. Initially, he mixed chemicals but later received them pre-mixed. Chemical spills occurred frequently and sometimes sat for hours before being cleaned.
5. Claimant used the following chemicals at work:
 - **Prestige Step #1**, a color wash chemical which contains Trimethylbenzene, Aromatic Hydrocarbons, and Aliphatic Hydrocarbons, was used to clean presses,
 - **Dyna-Clean**, contains Trimethylbenzene, and was used to clean plates with a sponge up to 50 times a day, but some days not at all,
 - **Emerald JRZ** contains Butoxyethanol and Trimethylbenzene, and was used to clean plates with a sponge by hand,
 - **ARS-F** contains Solvent EB, which is mixed with water to make it spread out and increase surface tension, and
 - **Feboclean Yellow and Feboclean Blue**, are cleaning pastes which contain Trimethylbenzene and were used to clean rollers by hand.

6. Until 1978, Claimant used these and other chemicals and inks in a 20,000 square foot building, divided into three rooms, with ten foot ceilings, no windows or known ventilation. From 1978 until 1999, Claimant worked in a larger building with higher ceilings and a filtration system, which worked poorly and clogged regularly. The room had no windows and contained an emergency door. Claimant occasionally blew ink from his nose.

7. In 1997, Claimant sought medical treatment after he began having numbness and tingling in his feet. Doctors diagnosed peripheral neuropathy and determined it was not caused by heredity or thyroid conditions. Claimant contacted Employer when he and his doctors suspected the condition was related to chemical exposure at work.

8. At Claimant's request, Mr. Joel Braun, Employer's purchasing agent, provided numerous Material Safety Data Sheets ("MSDS"), which identified chemicals used by the company. The chemicals Claimant identified as being used at work were included in the MSDS.

9. Claimant began wearing gloves and masks two years before he stopped working on October 1, 1999. Claimant stopped working because he could no longer perform the work, and has not worked with chemicals since that time.

Physical Complaint Facts

10. Current complaints include a loss of intimacy, difficulty sleeping, burning sensation in his fingertips, decreased ability to grasp or button a shirt, leg numbness below the knee with shooting pain, cold and burning feet, inability to distinguish between hardwood floors and carpet or gas and brake pedals, difficulty putting on tight socks, and tucking or buttoning his shirt. His toes do not bend and he has gained one-hundred pounds from inactivity.

11. Claimant uses a cane 90% of the time when outside. He has fallen at least thirty times, fracturing his ankle on one occasion. He uses a seat to take a shower. He becomes "squeamish" after sitting longer than forty minutes or standing more than ten minutes. Since the first hearing, pain has increased in both hands; however, numbness and range of motion remain the same as it was during the first hearing.

12. Claimant can no longer make wooden projects; hold a golf club, bend or squat. He avoids places where chemicals are used.

13. Dr. Burns prescribed Neurontin and Cymbalta for peripheral neuropathy, which is helpful. He takes medication for other conditions, and tires easily from the combined effect from medication.

14. Claimant is awake by 11 a.m. and takes a nap at 2 p.m. due to exhaustion. He performs light household chores, lifts up to 40 pounds, waist high, walks to the corner and back, plays with the dog, and walks in the pool everyday.

15. Claimant's testimony was credible.

Subsequent Employment Facts

16. After Claimant stopped working for Employer, he worked three days as a driver for Allegiant Bank. However, Claimant quit due to exhaustion and difficulty getting in and out of the car. He has not worked since that time.

Medical and Expert Opinion Facts

17. **Dr. Pearlman**, a board certified neurologist, examined Claimant in December 1997 at his primary physician's request, diagnosed peripheral neuropathy and opined it was caused by either family history, diabetes or exposure to

solvents. Later, Dr. Pearlman ruled out family history, diabetes and thyroid problems, but did not reach an opinion on causation. However, Dr. Pearlman did not rule out the possibility that peripheral neuropathy was caused by Claimant's exposure to toxic chemicals at work.

18. In July 1999, **Dr. Tipu Sultan**, a physician with St. Louis Environmental and Allergy Health Center, provided a records review and ordered tests to determine if any substances at work affected Claimant. Results showed a 5.3 level of Trimethylbenzene, more than four times the average. Dr. Sultan opined this level of exposure can cause peripheral neuropathy and recommended a six month separation from work.

19. **Dr. David Peeples**, a board certified neurologist, provided an Independent Medical Examination ("IME") on October 8, 1999, at Employer's request. Dr. Peeples reviewed a list of chemicals used by the company, diagnosed peripheral neuropathy, and found Claimant's exposure to Benzenes, including Trimethylbenzene, and hydrocarbons caused demyelinating peripheral neuropathy, despite the absence of this side effect from MSDS, based on a reasonable degree of medical certainty,.

20. Dr. Peeples found toxic chemical exposure was the "predominant cause" of Claimant's condition, even if he suffered from "significant underlying B-12 deficiency and hypothyroidism." Dr. Peeples ruled out family history as the source of neuropathy.

21. **Dr. Christopher Long** is an associate professor of forensic toxicology with a master's degree in medical biology and pharmacology/toxicology, PhD in toxicology with board certification in forensic toxicology. Dr. Long testified by deposition for Employer. The last treatment records he reviewed were from 1999. He performed a records review.

22. Dr. Long disagreed with Dr. Martinez's opinion that printing companies used chemicals which contain impurities, and that Trimethylbenzene is a marker chemical that contains other organic solvents.

23. Dr. Long believed a sufficient level of chemical exposure was needed before a positive test result occurred. To determine exposure, he suggested an evaluation of the chemicals, routes of exposure, and clinical symptoms supporting the exposure to determine if the toxicity and chemicals line up, which Dr. Long found did not in this case.

24. Dr. Long found no evidence Claimant was exposed to Benzene, Xylene, Toluene or Trimethylbenzene, and opined chemical exposure affects the central nervous system, not peripheral nerves. He found no connection between Trimethylbenzene, Benzene and analogs of Benzene, print or organic solvents, and the development of peripheral neuropathy. Dr. Long, a former MSDS writer, found MSDS did not list peripheral neuropathy as a side effect, as required by law.

25. Dr. Long believed the presence of Trimethylbenzene in Claimant's test most likely resulted from smoking, not chemical exposure at work.

26. During deposition, Dr. Long did not recall preparing a report on June 3, in 2000 for Employer's former counsel regarding causation. Dr. Long listed four "facts which support Dr. Peeples's opinion that Claimant's condition is work related":

1. The report of Trimethylbenzene by Accu-Chem Laboratories establishes exposure,
2. The Toluene that was in the print shop has been reported as causing neuropathies,
3. Trimethylbenzenes are similar in structure to Toluene and would be compared as producing neuropathies,
4. There has been a weak association between exposure to trichloroethane (another onsite chemical) with other solvents in producing neuropathies.

Dr. Long concluded he "could not state to a reasonable degree of scientific certainty that these chemicals did

not cause neuropathy.”

27. Dr. Long based his change of opinion on developing a better understanding of the topic and additional information becoming available.

28. **Richard Parent, PhD**, a toxicologist, testified for Employer, and found no connection between the chemicals Claimant used at work and peripheral neuropathy, based on internet searches he performed.

29. **Dr. Lee Heutel**, a board certified retired IME examiner with toxic chemical exposure, provided a records review on January 17, 2004 at Employer’s request. Prior to deposition, Dr. Heutel failed three tests to become board certified in toxicology, and remained uncertified at the time of deposition. Dr. Heutel listed twenty-six chemicals Claimant was potentially exposed to at work but found no actual exposure to chemicals.

30. Based on Dr. Heutel’s experience and research, he found no connection between use of Trimethylbenzene, Toluene and Xylene, and the development of peripheral neuropathy.

31. **Dr. Terry Martinez**, a board certified toxicologist, with a PhD in pharmacology and five board certifications, testified live at the second hearing for Claimant. On November 19, 2006, Dr. Martinez provided a records review and reached a causation opinion based upon Claimant’s history of exposure to fifty chemicals, ten per day, long work hours, poor ventilation, no protective gear, products used, medical records, MSDS, published literature, and on line research.

32. Dr. Martinez found MSDS contained chemicals known to cause peripheral neuropathy; which Claimant was exposed to in the workplace, including Toluene, Xylene, N-hexane, and Trimethylbenzene, which contains Benzene, a known cause of peripheral neuropathy.

33. Dr. Martinez opined Claimant’s exposure to chemicals at work was a significant contributing factor which caused peripheral neuropathy, based on the elimination of other risk factors.

34. Dr. Martinez found Trimethylbenzene did not cause peripheral neuropathy; however it contains Benzene which does cause peripheral neuropathy, based on a reasonable degree of professional and toxicological certainty. Dr. Martinez concluded the presence of Trimethylbenzene in Claimant’s bloodstream indicated other Benzene chemicals were once present but his body eliminated traces of the chemical after thirty hours.

35. Dr. Martinez noted printers were frequently exposed to chemical mixtures, which contain Benzene. Dr. Martinez found printers used industrial grade chemicals which contain organic solvents and toxic chemicals not chemicals listed on the label. Dr. Martinez found Claimant was exposed to everything in the printing atmosphere because chemicals are inhaled or absorbed through skin.

36. **Dr. David Volarich**, board certified occupational medicine physician, examined Claimant for an IME on June 19, 2006, and found forearm and calf weakness, sensory abnormalities of the fingers, joints, and below the mid-shin, no deep tendon reflexes in upper or lower extremities, decreased vibratory sense, a positive Romberg test, low point discrimination, greater than eight millimeters, normal being less than five, bilateral thenar atrophy of both hands, inability to toe walk, limited ability to heel and tandem walk, and squat.

37. Dr. Volarich diagnosed severe peripheral neuropathy of the upper and lower extremities. He eliminated hyperthyroidism, diabetes, viruses, alcoholism, tumors, chemotherapy, and B-12 deficiency as sources of the medical condition.

38. Dr. Volarich found prolonged exposure to multiple chemicals at work was the substantial contributing and prevailing factors that caused peripheral neuropathy. Dr. Volarich found exposure to Xylene, Toluene, Hexane, and Dyna Clean, halogenated hydrocarbons, other solvents and organic phosphates substantially contributed to the development of peripheral neuropathy. Dr. Volarich noted mixing or heating chemicals also created unknown toxins, but he did not believe Trimethylbenzene caused peripheral neuropathy.

39. Dr. Volarich determined Claimant was permanently and totally disabled, and unable to work full time as a pressman or in any full-time position, due to chemical exposure at work leading up to October 1999.

40. Dr Volarich found Claimant had attained maximum medical improvement (“MMI”). He recommended limited repetitive gripping, pinching, squeezing, pushing, and similar tasks, avoid impact and vibrating hand trauma, wear anti-vibration gloves and support straps, and limit weight lifting to three pounds away from the body and ten pounds close to the body.

41. Dr. Volarich recommended Claimant avoid all stooping, squatting, crawling, impact, and similar movements, use caution on uneven terrain, use a cane, limit weight bearing to 15 minutes or as tolerated, and pad surfaces when kneeling.

42. Also, Dr. Volarich recommended ongoing medication, magnetic insoles, vitamin B-6 and B-12, rest as needed during the day, strength training, and non-impact aerobic activities.

43. **Mr. Timothy G. Lalk**, a certified vocational rehabilitation counselor, interviewed Claimant on May 30, 2006 and found him credible.

44. Mr. Lalk found Claimant was unable to secure or maintain employment or compete for work in the open labor market, based upon medical records, Claimant’s history, and presentation. Mr. Lalk observed Claimant’s poor balance when walking and inability to stand and walk safely, and concluded employers would not hire Claimant due to his “inability to work a full day, perform repetitive manual activities using a keyboard, assembling, driving or recording simple information, and the need to sit in order to work.”

45. No doctor restricted Claimant’s ability to drive, but Mr. Lalk did not recommend he work as an insurance seller based on his complaints when driving.

46. Mr. Lalk did not administer tests because Claimant demonstrated ability to perform academic work based on college level computer courses he completed in the past. Nevertheless, Mr. Lalk opined Claimant’s age prevented him from learning new skills, and potential employers would not train Claimant or hire him in management.

47. Mr. Lalk found Claimant unable to perform sedentary work because he needed to nap during the day because of fatigue. Mr. Lalk did not recommend vocational rehabilitation services due to Claimant’s inability to work at the sedentary level for a full workday.

RULINGS OF LAW

This Court adopts and incorporates as if fully set forth herein all previous “Rulings of Law” to the extent they do not conflict with the rulings contained herein. Based upon the prior and above “Findings of Fact”, credible testimony, competent and substantial evidence presented at both hearings, and the applicable law of the State of Missouri, this Court finds the following:

1-3. Claimant developed peripheral neuropathy due to prolonged chemical exposure that arose out of and in the course of his employment, and is medically causally related to his work

Claimant asserts he developed peripheral neuropathy from exposure to toxic chemicals at work. Employer contends there is no evidence Claimant was exposed to chemicals at work that would cause peripheral neuropathy, and Claimant has other conditions which are known to cause the condition.

The issues of occupational disease, arising out of and in the course of employment and causation have been decided in

Claimant's favor in the temporary proceeding. To modify a temporary award, the ALJ in the final award must find there was "additional significant evidence" not before the ALJ at the temporary award. *Jennings v. Station Casino St. Charles*, 196 S.W.3d 552, 558 (Mo.App. 2006) (*citations omitted*). As discussed below, Employer has not met his burden of proof to modify the prior findings.

Claimant has the burden of proving all essential elements of a claim, including causation. *Decker v. Square D Co.*, 974 S.W.2d 667, 670 (Mo.App. 1998). Claimant bears the burden of proving a direct causal relationship between the conditions of employment and the occupational disease. *Id.* Generally, a claimant's medical expert in an occupational disease case must establish within a "reasonable probability" that the disease was caused by conditions in the work place. *Pippin v. St. Joe Minerals Corp.*, 799 S.W.2d 898, 902. (Mo.App. 1999) (*citations omitted*) (*abrogated*). Courts have defined probable to mean that which is founded in reason and experience and inclines the mind to believe, but leaves room for doubt. *Id.* In any event, the mere "possibility" that other factors could have contributed to cause the illness does not necessarily defeat a claim based on occupational disease. *Sheehan v. Springfield Seed & Floral, Inc.*, 733 S.W.2d 795, 797 (Mo. App. 1987).

I find Claimant's testimony credible that he was exposed to chemical products during his thirty-three year career with Employer. Furthermore, MSDS reflect of these products.

I find the opinions of Drs. Peeples, Sultan, Martinez, and Volarich more credible than the opinions of Drs. Heutel, Long, and Parent. Dr. Peeples found a connection between Benzene, Trimethylbenzene and hydrocarbons, and development of demyelinating peripheral neuropathy, despite the absence of this side effect being listed on MSDS. Dr. Peeples testified not all side effects were listed on MSDS. Dr. Sultan, found four times the average amount of Trimethylbenzene in Claimant's bloodstream and opined it can cause peripheral neuropathy. Trimethylbenzene was found in at least three of the chemicals Claimant testified he used frequently for a number of years. Dr. Martinez found Claimant's exposure to chemicals at work was a significant factor which caused peripheral neuropathy, based on Benzene being an ingredient of Trimethylbenzene and the elimination of other causative factors. Benzene is known to cause peripheral neuropathy, according to Dr. Martinez.

Dr. Volarich concluded Trimethylbenzene did not cause peripheral neuropathy, but found Xylene, Toluene, Hexane, Dyna-Clean, and halogenated hydrocarbons do cause the condition. MSDS and expert testimony establish Claimant used these chemicals as well.

I find Employer presented no additional significant evidence regarding causation at the second hearing. Dr. Heutel is not a toxicologist; he failed the exam three times to become board certified in toxicology, and remained uncertified when deposed. Dr. Heutel is not board certified in neurology, and did not examine Claimant. I find Dr. Heutel's opinion is not credible that no connection exists between use of Trimethylbenzene, Toluene and Xylene, and the development of peripheral neuropathy.

I find Dr. Long's testimony is not credible. Dr. Long, Employer's first toxicologist, initially found support for Dr. Peeples's causation opinion, and refused to say the chemicals did not cause peripheral neuropathy. Later during deposition, Dr. Long did not remember reaching that conclusion in a letter sent to Employer's former counsel eight years ago. Dr. Long's recent opinion that there is no evidence Claimant was exposed to Benzene, Xylene, Toluene or Trimethylbenzene at work is not credible. Nor is his opinion credible that chemical exposure affects the central nervous system, not peripheral nerves.

I find Dr. Parent's opinion is not credible that it was necessary to know the amount of chemical exposure to link the medical condition to symptoms. According to Dr. Martinez, not all ingredients are listed in industrial strength chemicals; therefore, it is not possible to know the amount of exposure a person has over a thirty-three year period.

Furthermore, Drs. Peeples, Sultan, Pearlman, and Volarich ruled out heredity, diabetes, thyroid, B-12 deficiency, and autoimmune conditions as the source of Claimant's neuropathy.

Based on credible testimony by Claimant, expert opinions of Drs. Peeples, Sultan, Martinez, and Volarich, medical records, reports, and MSDS, I find Claimant was exposed to chemicals at work including Prestige Step 1, Dyna Clean, Emerald JRZ, ARS-F, Feboclean Yellow, and Feboclean Blue.

Based on credible testimony of Claimant, Drs. Peeples, Sultan, Martinez, and Volarich, medical records and reports, I find the development of peripheral neuropathy was medically causally related to prolonged chemical exposure at work. I find Claimant met his burden to establish he sustained an occupational disease which arose out of and in the course of his employment with Employer.

4. Notice was proper

Claimant asserts Employer received proper notice of his medical condition. Employer provided no evidence regarding notice at the second hearing. During the first hearing the judge found notice was proper, as Claimant reported the medical condition to Employer after physicians ruled out other causes and he began to suspect a chemical connection. The Commission agreed. At the second hearing, Claimant testified he notified Employer after doctors ruled out other causes and he suspected chemical exposure. I find notice was proper.

5. Claimant is permanently and totally disabled from prolonged chemical exposure at work

Claimant asserts he is permanently and totally disabled from chemical exposure at work. Employer provided no evidence regarding permanency, contending the condition is not work related. This issue was not addressed at the first hearing or by the Commission.

A finding of permanent and total disability requires a claimant to be “unable to return to any employment, not just unable to return to the employment he was engaged in when he was injured.” *Muller v. Treasurer of Missouri*, 87 S.W.3d 36 (Mo. App. 2002) (overruled by *Hampton v. Big Boy Steel Erection*, 21 S.W.3d 220 (Mo. banc 2003)). The test is the claimant's ability to compete in the open labor market. *Id.* The “crucial question is whether or not an employer can reasonably be expected to hire the claimant in his present physical condition and can reasonably expect him to perform the work successfully.” *Id.*

Missouri courts have held that “inability to return to any employment” means that the employee is unable to perform the usual duties of the employment ... in the manner that such duties are customarily performed by the average person engaged in such employment. *Vogel v. Hall Implement Co.*, 551 S.W.2d 922, 926 (Mo.App.1977) (overruled on other grounds by *Hampton*, 121 S.W.3d at 223).

I find Claimant is unable to compete in the open labor market. Dr. Pearlman found Claimant was unable to work in the fall of 1999. In 2006, Dr. Volarich determined Claimant was permanently and totally disabled and unable to work full time as a pressman or in any full time position due to chemical exposure at work, and placed numerous restrictions on Claimant's activities.

Mr. Lalk concluded Claimant was unable to secure or maintain employment or compete for work in the open labor market as Claimant presented with poor balance and inability to stand and walk safely. Mr. Lalk predicted employers would not hire Claimant due to his inability to work a full day, perform repetitive manual activities, use a keyboard, assemble, drive or record simple information, and due to his need to sit and work and take a nap. No contrary medical opinion is in evidence regarding Claimant's ability to work.

Claimant testified he left work because he did not feel he could safely perform the work. He has multiple hand and leg complaints. Since the first hearing, numbness and tingling have remained constant but pain has increased. During the hearing, I observed Claimant walk with a cane and stand after forty minutes because he felt “squeamish.” He described increased numbness when sitting for too long. Claimant's behavior during the hearing was consistent with

his testimony. I find Claimant's testimony credible.

Taking into account Claimant's age, educational background, employment history, lack of transferable skills, disabilities caused by the primary injury, the credible expert opinions of Dr. Volarich and Mr. Lalk, medical records, and Claimant's credible testimony, I find no employer would hire Claimant in his present condition and expect him to successfully perform the required work. I find Claimant is permanently and totally disabled from disabilities caused by the October 1, 1999 occupational disease injury.

5 (a) Commencement Date for Permanent Total Disability Payments

The obligation to pay permanent disability compensation commences under Section 287.160.1 RSMo (2000) on the date claimant's permanent disability begins. ***Kramer v. Labor & Indus. Rel. Com'n***, 799 S.W.2d 142, 145 (Mo. App. 1990) (*Overruled on other grounds by Hampton*, 121 S.W.3d at 223). The parties did not stipulate when Claimant reached MMI. Dr. Sultan recommended a six month separation from work in 1999 but Claimant never returned to work for Employer. After he stopped working for Employer, Claimant worked three days for a different employer but quit due to exhaustion. On June 19, 2006, Dr. Volarich found Claimant had reached MMI. Based on this evidence, I find Claimant reached MMI on June 19, 2006.

I find Employer's liability for PTD should have commenced June 19, 2006. Employer is liable to pay Claimant the sum of \$578.48 per week, retroactive to June 19, 2006 for the remainder of Claimant's lifetime. ***Laterno v. Carnahan***, 640 S.W.2d 470, 471 (Mo. App. 1982). Employer has partially fulfilled this obligation by making weekly payments of \$578.48 from June 19, 2006 through December 5, 2007. Employer is entitled to a credit for TTD payments made after Claimant was no longer temporarily totally disabled. ***Parker v. Mueller Pipeline, Inc.***, 807 S.W.2d 518, 522 (Mo.App. 1991). (*Overruled on other grounds by Hampton*, 121 S.W.3d at 223).

6. Claimant is entitled to future medical benefits

Claimant asserts he is entitled to receive future medical care for the work injury. Employer denies liability. This issue was not addressed at the first hearing or by the Commission.

Section 287.140.1 (RSMo 1999) requires the employee receive and the employer provide medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability to cure and relieve from the effects of the injury. Future medical care must flow from the accident before the employer is held responsible. ***Modlin v. Sun Mark, Inc.*** 699 S.W. 2d 5, 7 (Mo.App. 1985).

Claimant testified he receives prescriptions for his feet, hands, and other medical conditions from Dr. Gibfried, his personal physician. Medication makes him feel tired, but it reduces the amount of pain he would experience without medication. Dr. Pearlman recommended on-going medication for pain and erectile dysfunction, possibly physical therapy, and a walker with instructions on how to use it. Dr. Volarich testified the disease is progressing slowly and will require medication for life, including Neurontin, Cymbalta, and narcotics as needed. Dr. Volarich also recommended magnetic insoles and vitamin B-6 and B-12.

I find Claimant met his burden to show his need for future medical care flows from chemical exposure at work. I find the opinions of Dr. Pearlman and Dr. Volarich credible that the treatment is reasonable and necessary to cure and relieve Claimant from the effects of the work injury. Employer shall provide ongoing medical care which is reasonable and necessary to cure and relieve Claimant from the effects of his work related peripheral neuropathy.

7. The issue of dependency is not ripe for resolution

Claimant asserts that he is entitled to permanent total disability benefits, and upon his death, his spouse Nancy and step-sons, Brian and Michael Farr, may qualify as "dependents" who will claim a right to continued benefits, under ***Schoemehl v. Treasurer of State of Missouri***, 217 S.W. 3d 900 (Mo banc 2007) (*Overtured due to Legislative Action in 2008*). Employer contends neither Claimant's spouse nor her sons would be entitled to benefits.

Section 287.240.4 defines "dependent" as a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or part, upon his wages at the time of the injury. The following persons shall be conclusively presumed to be totally dependent for support upon a deceased employee, and any death benefit shall be payable to them to the exclusion of other total dependents: a) A wife upon a husband with whom she lives or who is legally liable for her support,...b) A natural, posthumous, or adopted child or children, whether legitimate or illegitimate, under the age of eighteen years or over that age if physically or mentally incapacitated from wage earning...

Claimant married Nancy Farr on October 17, 1986, in St. Charles, Missouri, and remained married to her when he contracted an occupational disease, and at the time of the second hearing. Claimant and Nancy Farr had no children born of the marriage, but they both had children from other relationships prior to their marriage. At the time of hearing, Claimant's sons were Brian Kammeier, 42 years old and Jeffrey Kammeier, 38 years old. They were not under eighteen on October 1, 1999, and neither suffered from physical or mental incapacity that inhibited earning capacity. I find Brian and Jeffrey Kammeier are not Claimant's dependents.

At the time of hearing, Nancy Farr had four sons, Brian Farr, 34 year old; Tim Farr, 32 years old; Eric Farr, 28 years old; and Michael Farr, 25 years old. Michael Farr was the only child under 18 when Claimant contracted the occupational disease, but he was not Claimant's natural, posthumous, or adopted child. I find Brian, Tim Eric, and Michael Farr are not Claimant's dependents.

I find it is premature to declare a dependent under Section 287.240.4, as Claimant is alive. In order to apply the statutory definition of "dependent," there must be a "deceased employee." However, the evidence does establish Nancy Farr as the only relative by blood or marriage that was actually dependent for support, in whole or part, upon Claimant's wages at the time of his injury. These findings of fact shall be binding on the parties in the future.

CONCLUSION

Claimant sustained an occupational disease that arose out of and in the course of employment due to prolonged chemical exposure. Employer received proper notice. Claimant is permanently and totally disabled due to the work injury. Employer is liable for weekly PTD benefits of \$578.48 beginning June 19, 2006. Employer shall receive a credit for overpayment of TTD in the amount of \$578.48 per week from June 19, 2006 through December 5, 2007. Claimant's need for future medical care is medically causally related to his work injury and Employer is liable for the care.

Date: _____

Made by: _____

Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey W. Buker
Director
Division of Workers' Compensation

Exhibit W was admitted over Employer/Insurer's objection based on materiality.
Dr. Peoples stated Trimethylbenzene comprised 2% of Prestige Step 1, a chemical used by Claimant since 1986. According to Dr. Long, Xylene and Toluene are analogs of benzene.
Dr. Martinez holds current board certifications from the American Board of Toxicology, Academy of Toxicological

Sciences, and board certifications in Missouri, Illinois, and Indiana.

- Dr. Volarich found decreased pinprick sensation in the hand, no sensation below the metacarpal phalangeal joint of all digits or below the knees.
- Dr. Volarich opined a positive Romberg test reflected advanced peripheral neuropathy as Claimant was unable to maintain balance due to loss of feeling in his feet and inability to identify joint position of his toes.
- Dr. Volarich based his opinion on chemicals contained in the MSDS, and found other chemicals listed on the sheets also contributed to the development of the condition.
- Dr. Gibfried prescribes Neurontin and Cymbalta for Claimant's feet and hands.
- Dr. Volarich opined Neurontin is for nerve pain and Cymbalta controls chronic pain syndrome.