

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

Injury No.: 09-071622

Employee: Kelly Kirkpatrick
Employer: VPI Headwear/Venture Products (Settled)
Insurer: Missouri Employers Mutual 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. Having read the briefs, heard the parties' arguments, reviewed the evidence and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge by this supplemental opinion.

We offer this supplemental opinion to address the primary argument raised in the brief of the Second Injury Fund.

Second Injury Fund Argument

The Second Injury Fund argues that employee's cubital tunnel syndrome does not qualify as "a subsequent compensable injury" for purposes of triggering Second Injury Fund liability under § 287.220.1 RSMo, which provides, as follows:

...If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed,...receives a subsequent compensable injury resulting in additional permanent partial disability...so that the degree or percentage of disability,...caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined

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disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for.
(Emphasis added).

We summarize our understanding of the Second Injury Fund's legal reasoning and argument as applied to the facts of this claim: "Injury" as defined in § 287.020.3 RSMo excludes occupational diseases. Employee's cubital tunnel syndrome is an occupational disease. Thus, employee's cubital tunnel syndrome is not an "injury." Employee's cubital tunnel syndrome is not a "subsequent compensable injury" that can trigger Second Injury Fund liability under § 287.220.1.

Discussion

The Second Injury Fund argument fails. The Second Injury Fund fails to give effect to the complete definition of injury in § 287.020.3. The complete definition includes occupational diseases within the definition of "injury" where specifically provided in Chapter 287.

Section 287.020.3(5) RSMo states:

The terms "injury" and "personal injuries" shall mean violence to the physical structure of the body and to the personal property which is used to make up the physical structure of the body, such as artificial dentures, artificial limbs, glass eyes, eyeglasses, and other prostheses which are placed in or on the body to replace the physical structure and such disease or infection as naturally results therefrom. *These terms shall in no case except as specifically provided in this chapter be construed to include occupational disease in any form, nor shall they be construed to include any contagious or infectious disease contracted during the course of the employment, nor shall they include death due to natural causes occurring while the worker is at work.*

(Emphasis added).

Chapter 287 specifically provides for injuries by occupational disease and specifically says those injuries are compensable.

Section 287.067 RSMo states, in relevant part:

2. An injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

3. An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. An occupational disease due to repetitive motion is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and

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disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

8. With regard to occupational disease due to repetitive motion, if the exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than three months and the evidence demonstrates that the exposure to the repetitive motion with the immediate prior employer was the prevailing factor in causing the injury, the prior employer shall be liable for such occupational disease.
(Emphasis added).

The above sections specifically refer to a condition of ill caused by occupational disease as an "injury." That is, the legislature specifically provided that the term "injury" includes occupational disease and that injuries by occupational disease are compensable.

Based upon the foregoing, we construe the term "injury" as it appears in the phrase "subsequent compensable injury" in § 287.220.1 to include occupational diseases.

Conclusion

We affirm and adopt the award of the administrative law judge as supplemented herein. We approve and affirm 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.

The award and decision of Administrative Law Judge Maureen Tilley, issued July 29, 2011, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 8th day of March 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Kelly Kirkpatrick Injury No.: 09-071622
Employer: VPI Headwear/Venture Products (Settled)
Insurer: Missouri Employers Mutual Insurance Co. (Settled)
Additional Party: Treasurer of Missouri as Custodian of the Second Injury Fund
Hearing Date: June 8, 2011 Checked by: MT/rf

SUMMARY OF FINDINGS

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 2, 2009.
5. State location where accident occurred or occupational disease contracted: Oran, Scott County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident happened or occupational disease contracted: Thee repetitively and forcefully used her left upper extremity causing the injury.
12. Did accident or occupational disease cause death? No.

13. Parts of body injured by accident or occupational disease: Left elbow (210 level).
14. Nature and extent of any permanent disability: 17.5% of the left elbow.
15. Compensation paid-to date for temporary total disability: \$979.97
16. Value necessary medical aid paid to date by employer-insurer: \$7,526.10
17. Value necessary medical aid not furnished by employer-insurer: \$0.00
18. Employee's average weekly wage: \$270.78
19. Weekly compensation rate: \$180.52 TTD/PPD
20. Method wages computed: By agreement.
21. Amount of compensation payable: See findings.
22. Second Injury Fund liability: See findings .
23. Future Requirements Awarded: None.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

The Compensation awarded to the Employee 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 Employee: D. Matthew Edwards.

FINDINGS OF FACT AND RULINGS OF LAW

On June 8, 2011, Kelly Kirkpatrick, the employee appeared in person and by her attorney, D. Matthew Edwards, for a final award hearing. The Employer/Insurer was not represented at the hearing having previously settled their liability. The Missouri State Treasurer as Custodian of the Second Injury Fund was represented at the Hearing by Assistant Attorney General Frank Rodman. The Court took administrative notice of all of the records contained within the files of the Division of Workers' Compensation. The record was closed on June 8, 2011 and the parties filed their briefs on the due date of July 12, 2011. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a summary of the evidence and the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS:

1. Covered Employer - On or about September 2, 2009, VPI Headwear/Venture Products was operating under and subject to the provisions of the Missouri Workers' Compensation Act and their liability was fully insured by Missouri Employer's Mutual.
2. Covered Employee - On or about September 2, 2009, Kelly Kirkpatrick was an employee of VPI Headwear/Venture Products and was working under the Missouri Workers' Compensation Act.
3. Notice - Employer had notice of Employee's occupational disease.
4. Statute of Limitations - Employee's claim was filed within the time allowed by law.
5. Average Weekly Wage and Rate - The Employee's Average Weekly Wage is \$270.78 and her rate for TTD, PPD and PTD purposes is \$180.52.
6. Medical Causation - Employee's injury was medically causally related to the occupational disease.
7. Medical Aid Furnished - Employer/Insurer furnished \$7,526.10 in medical aid to Employee.
8. Temporary Disability Paid by Employer/Insurer - Employer/Insurer paid \$979.97 in temporary total disability benefits to Employee, which represents 5 3/7 weeks for the period of March 3, 2010 through April 9, 2010.
9. Previously Incurred Medical - There is no claim for previously incurred medical.
10. Mileage or other Medical - There is no claim for mileage or other medical expenses under Mo. Rev. Stat. §287.140.
11. Additional or Future Medical - There is no claim for additional or future medical aid.
12. Additional TTD or TPD - There is no claim for additional TTD or TPD benefits.
13. Permanent Total Disability - There is no claim for permanent total disability benefits.

ISSUES:

1. Occupational Disease - Whether on or about September 2, 2009 the employee sustained an occupational disease that arose out of and in the course of her employment?
2. Permanent Partial Disability and Second Injury Fund Liability - What is the liability of the Second Injury Fund and what is the nature and extent of that liability/disability?

EXHIBITS:

The following exhibits were offered into evidence:

Employee's Exhibits:

- A. Copy of Stipulation for Compromise Settlement for Injury No. 07-130848.
- B. Copy of Stipulation for Compromise Settlement for Injury No. 09-071622.
- C. Medical Records from St. Francis Medical Center.
- D. Medical Records from Heartland Plastic & Hand Surgery – Dr. David Deisher.
- E. Deposition of Dr. James Palen.

Second Injury Fund Exhibits: None.

SUMMARY OF THE EVIDENCE

Testimony of Kelly Kirkpatrick

Kelly Kirkpatrick testified that she is currently 49 years old and resides in Vanduser, Missouri with her husband of 21 years, Marvin Kirkpatrick. The employee was married and living with Marvin as of September 2, 2009.

Prior Work and Medical History

The employee testified that for the majority of her life she has worked as a seamstress in multiple garment factories throughout Southeast Missouri. Beginning in 1985, she sewed skirts at Grove Company in Sikeston. In 1987, she moved to the Thorngate factory in Chaffee sewing men's suits. In 1990, she went to work at the Columbia Sports Wear factory in Chaffee sewing repairs on coats.

Beginning in 1995, she began working for VPI Headwear in Oran. The employee stated VPI made baseball caps and her job until 2007 was stuffing visors for the caps. The employee described her job process of picking up a "moon" shaped piece of plastic with her left hand, bending the plastic with both hands, picking up the visor cloth with her left hand and then turning the cloth inside out and stretching it over the plastic. She would then seam up the hole, which required her to pull hard with her right hand to stretch the cloth while sewing. On a normal day, the employee stated that she repeated this process about 1000 times. The employee stated that despite her lengthy employment, she only earned minimum wage with no benefits.

Leading up to November 2007, the employee stated that both of her hands began going numb and to sleep. At night the pain was so bad that it would wake her up. While working, her hands were also painful and would up both arms to her shoulders and neck.

The employee stated that she reported her bilateral hand problems to the employer and was dispensed various wrist braces to wear. Eventually, the employer authorized her for medical care

with Dr. Cooper at Saint Francis Occupational Medicine. The employee stated that Dr. Cooper placed her on light duty and sent her for a nerve test. After obtaining the test, Dr. Cooper referred her to a specialist for her hands.

The employee testified that she was then referred to Dr. Deisher by the work comp insurer. After seeing Dr. Deisher, it was the employee's understanding that she had carpal tunnel in both hands. She received a steroid injection in her left hand, which did not improve the symptoms. Subsequently, Dr. Deisher recommended and the employee underwent carpal tunnel surgery with the left wrist operated in May 2008 and the right wrist operated in October 2008.

The employee stated that the surgeries helped because her hands were not as numb or painful. Despite the improvement, the employee stated that she still had occasional numbness in her fingers; her grip strength declined and she could not open jars and sometimes had problems with door knobs; she drops things because her hands will release; and she experiences ongoing swelling in both hands.

Left Elbow Injury

After Dr. Deisher released her to full duty, the employee stated that she was assigned to new sewing jobs. The new jobs included: putting size boards on hats in which she would pick up and hold the hat tightly while sewing with the right; putting the crown on the brim in which she would pick up the crown with her left hand and pull hard with her left hand while sewing; and, putting sweat bands on hats in which she would hold the hat tightly with her left hand and put on the sweat with her right hand.

The employee began noticing that her pinky and ring finger on her left hand would go numb and her left elbow would throb. The employee stated that she had some level of similar symptoms throughout her career at VPI Headwear, but it became really bad around December 2009.

The employee was again referred by work comp to Dr. Deisher for medical care. She received a special brace for her left elbow to wear when she slept, but her symptoms did not improve. She recalled next being sent to see another work comp doctor, Dr. Howard, by the employer's new work comp insurer. It was the employee's understanding that she needed left elbow surgery and she was sent back to Dr. Deisher for treatment. The employee stated that she underwent surgery by Dr. Deisher on her left elbow in 2010.

The employee stated the surgery helped because the pain and numbness decreased, but she still experiences ongoing symptoms. Her left elbow will ache especially when she tries to lift groceries or laundry. Her left hand is even weaker after the elbow surgery and she cannot lift very much. She also finds that she will drop things more often when trying to grip with her left hand. She still experiences occasional pain and numbness in her pinky and ring finger on her left hand. The employee stated that when her hands hurt or are swelling, the only thing she can do is either rest or take Ibuprofen.

Following her release from Dr. Deisher's care, the employee stated that her employer laid her off due to "lack of work." The employee stated that she has not been able to find new employment because she only knows seamstress work and her hands limit what she can lift or perform.

At home, the employee stated that her hands limit her ability to do simple tasks. She needs help opening jars. She can fold about half a basket of laundry, but then has to rest because her left elbow will ache. She has to use both hands to pick up or steady breakable plates and dishes. She can no longer carry water out to her dogs because the bucket is too heavy.

The employee stated that she formerly enjoyed throwing darts with her husband, but her hands will not work properly to play well. Even simple tasks such as reading are difficult because her hands hurt while trying to grip and steady the book. She has to alternate hands while driving because they will ache if she tries to drive one handed too long. At night, sometimes her hands and elbow will wake her if they go numb and she has to lay them straight when she goes to sleep.

The employee identified Exhibits A and B as the settlements that she reached with the different insurers for the employer regarding her wrist and elbow injuries.

Exhibits

Employee's Exhibit A – Copy of Stipulation for Compromise Settlement for Injury No. 07-130848

Exhibit A, which is also in the Division's records, reflects a settlement between the employee and VPI Headwear through their insurer, employer's insurance group, based upon a 16% disability of the left wrist and 16% of the right wrist with a 10% loading factor for a November 30, 2007 (12/5/2007) work injury (Employee's Exhibit A, A1). The settlement states that \$14,932.73 in medical care and \$1,997.39 in TTD was paid by employer's insurance group. The settlement was approved by the Division on August 17, 2010. *Id.*

Employee's Exhibit B – Copy of Stipulation for Compromise Settlement for Injury No. 09-071622

Exhibit B, which is again contained in the Division's records, is a copy of the approved settlement between the employee and VPI Headwear through their later insurer, Missouri Employers' Mutual Insurance, based upon a permanent partial disability of 17.5% of the left elbow at the 210 week level, which was also approved on August 17, 2010 (Employee's Exhibit B, B1).

Employee's Exhibit C – Medical Records from St. Francis Medical Center

On December 13, 2007, the Employee was seen by Dr. Glen Cooper at the request of Venture Products for complaints of numbness and tingling in both hands, bilateral shoulder pain and pain in the left side of her neck (Employee's Exhibit C, C5). The employee described her work activities of stuffing visors and Dr. Cooper completed a physical examination. *Id.* Dr. Cooper

assessed pain and paresthesia in both hands and possible carpal tunnel syndrome (Employee's Exhibit C, C6). At the follow-up examination of January 7, 2008, Dr. Cooper assessed "clinical carpal tunnel syndrome" and requested nerve conduction studies to be undertaken (Employee's Exhibit C, C12).

The nerve conduction study of January 21, 2008 revealed "moderate to severe bilateral carpal tunnel syndrome, right greater than left." (Employee's Exhibit C, C17). Notably, no abnormal findings were made regarding the ulnar nerve or cubital tunnel syndrome. Following the testing, Dr. Cooper diagnosed bilateral carpal tunnel syndrome and recommended referral to a surgeon for evaluation and treatment (Employee's Exhibit C, C24).

Dr. Cooper issued a follow-up report at the request of the workers' compensation adjustor dated March 14, 2008 addressing causation and whether the Employee also had diabetic neuropathy (Employee's Exhibit C, C27). Dr. Cooper opined that his physical examinations, his review of the employee's past medical records and the nerve conduction test, which showed "healthy ulnar nerves," all supported a finding that the employee had no evidence of diabetic neuropathy and instead suffered from median nerve entrapment. *Id.* Dr. Cooper believed the prevailing factor in causing the carpal tunnel syndrome was the employee's "work-related hand intensive tasks." *Id.*

Employee's Exhibit D – Medical Records from Heartland Plastic & Hand Surgery - Dr. David Deisher

On March 26, 2008, the employee was referred by work comp to Dr. David Deisher for evaluation of carpal tunnel syndrome (Employee's Exhibit D, D2). Dr. Deisher took a history of the employee's work duties and his physical exam showed "positive Tinel's sign over each carpal tunnel, left more impressive than right," and "mild Tinel's over the right cubital tunnel, but not on the left." *Id.* Dr. Deisher noted that the nerve studies were consistent with carpal tunnel and he provided an injection to the left carpal tunnel. *Id.* At the follow-up exam on April 16, 2008, Dr. Deisher recorded that the injection provided temporary improvement, but the symptoms had returned (Employee's Exhibit D, D4). Dr. Deisher recommended surgery. *Id.*

On May 9, 2008, Dr. Deisher performed a left carpal tunnel release (Employee's Exhibit D, D6). In follow-up, Dr. Deisher noted that the employee's symptoms had improved and he prescribed physical therapy (Employee's Exhibit D, D8).

At the re-evaluation on October 8, 2008, Dr. Deisher noted that the employee had done well from the left carpal tunnel release, but was still experiencing right hand symptoms (Employee's Exhibit D, D18). Dr. Deisher recommended a right carpal tunnel release which was performed on October 15, 2008 (Employee's Exhibit D, D20). Following the surgery, Dr. Deisher noted improvement in symptoms (Employee's Exhibit D, D26).

On December 3, 2008, Dr. Deisher reported that Employee was ready to return to full duty, but noted that Employee had some numbness down the ulnar side of her forearm and 4th and 5th digits (Employee's Exhibit D, D28). Dr. Deisher stated that the prior nerve studies were unremarkable for the ulnar nerve at the elbow and decided to re-evaluate in the future. *Id.* The

employee continued to have some symptoms at the follow-up examination and Dr. Deisher recommended obtaining new nerve conduction testing (Employee's Exhibit D, D30). Repeat nerve conduction studies showed "mild residual carpal tunnel syndrome" and "mild left cubital tunnel syndrome." (Employee's Exhibit D, D32). Following the testing, Dr. Deisher noted that conduction velocity had slowed across the left elbow, which was slightly below normal, but not severe enough to warrant treatment (Employee's Exhibit D, D34). Dr. Deisher stated that he would monitor the condition and prescribed a sleeping brace on March 2, 2009 (Employee's Exhibit D, D36). At the May 2, 2009 appointment, Dr. Deisher assessed low grade cubital tunnel syndrome with just occasional numbness (Employee's Exhibit D, D40). Dr. Deisher recommended observation and for the employee to continue working without limitation. *Id.*

At the August 19, 2009 examination, Dr. Deisher noted that employee reported that her left elbow had gotten worse (Employee's Exhibit D, D42). Dr. Deisher changed his diagnosis to cubital tunnel syndrome and recommended a cubital tunnel release. *Id.* Following the surgical recommendation, Dr. Deisher issued a supplemental report responding to whether the cubital tunnel syndrome was related to the employee's initial 2007 injury (Employee's Exhibit D, D44). Dr. Deisher stated that his initial examination did not reveal evidence of cubital tunnel and the January 2008 nerve tests did not show any slowing of the ulnar nerve at the elbow. *Id.* Instead, Dr. Deisher believed that the cubital tunnel syndrome was "something that has progressively developed over the past year" and that "it would perhaps be more appropriate to list [the cubital tunnel syndrome] as a 'second injury' and not to the initial injury of 12/5/07." *Id. emphasis added.*

On January 27, 2010, the employee was seen again by Dr. Deisher for evaluation of left elbow pain and left cubital tunnel syndrome (Employee's Exhibit D, D45). Dr. Deisher believed that Employee's symptoms were progressively worsening and recommended obtaining new nerve conduction testing. *Id.* Repeat testing showed "mild to moderate bilateral carpal tunnel syndrome" and "mild left cubital tunnel syndrome." (Employee's Exhibit D, D47). Following the tests, Dr. Deisher recommended proceeding with surgery (Employee's Exhibit D, D49).

On March 3, 2010, Dr. Deisher performed a left cubital tunnel decompression (Employee's Exhibit D, D51). Dr. Deisher reported that Employee was doing well following the surgery (Employee's Exhibit D, D55). On May 14, 2010, Dr. Deisher reported that Employee was continuing to improve, but still had occasional discomfort in her left and right arms and numbness (Employee's Exhibit D, D59). Overall, the employee believed the surgery had helped and Dr. Deisher discharged her from care. *Id.*

Employee's Exhibit E – Medical Records from Dr. James Palen

Dr. James Palen is a board certified physician in Cape Girardeau, Missouri (Deposition, page 4-5). Dr. Palen examined the employee on November 2, 2010 and took a medical and work history from the employee and from the medical records, which was recorded in his report (Deposition, page 6-7). Dr. Palen noted that the employee was diagnosed with cubital tunnel syndrome following her carpal tunnel surgeries and returning to work (Deposition, page 7-8).

Dr. Palen recorded that the employee still had numbness in her hands, aching pain with increased use and decreased grip strength which causes her difficulty in writing clearly and dropping things (Deposition, page 8). Dr. Palen also noted that Employee's left elbow also continues aching and she has trouble lifting heavy things in her left arm. *Id.* On physical examination, Dr. Palen found decreased strength in her hands (Deposition, page 9). Dr. Palen opined that Employee's work activities at VPI were the prevailing factor in causing her left cubital tunnel syndrome. *Id.*

Dr. Palen believed that the employee had a 20% permanent partial disability at the level of the left elbow due to her cubital tunnel syndrome (Deposition, page 10). Dr. Palen also believed that the employee had a pre-existing 20% permanent partial disability of each wrist due to the carpal tunnel syndrome. *Id.* Dr. Palen stated that he was aware that the prior stipulated percentages of disability were lower than his ratings (Deposition, page 11). Dr. Palen believed that the combination of the carpal tunnel and cubital tunnel injuries created a greater overall disability than the simple sum of the two disabilities (Deposition, page 10-11).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

APPLICABLE LAW:

- Burden of Proof - An Employee has the burden of proving all the essential elements of a claim for workers' compensation benefits by reasonable probability, not absolute certainty. *McDermott v. City of Northwoods Police Dep't*, 103 S.W.3d 134, 138 (Mo.App. E.D. 2002).
- Occupational Disease – Mo. Rev. Stat. §287.063.2 states that the employer liable for compensation “shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease prior to evidence of disability, regardless of the length of time of such last exposure.” *Emphasis added.* “Evidence of disability” requires evidence of both a disability and an identifiable occupational disease as required by Mo. Rev. Stat. §287.067. As stated in *Allcorn v. Tap Enterprises, Inc.*, 277 S.W.3d 823, 829 (Mo. App. S.D. 2009), “a person cannot be diagnosed with an ‘occupational disease or repetitive trauma’ until a diagnostician makes a causal connection between the underlying medical condition and some work-related activity or exposure.”
- Second Injury Fund Liability for Permanent Partial Disability – Mo. Rev. Stat. §287.220.1 sets forth the following test for finding whether the Second Injury Fund is liable for permanent partial disability benefits:

If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an

amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for.

- Compensation from the Second Injury Fund - The purpose of the Second Injury Fund is to encourage employers to hire and retain partially disabled employees, but also to provide the employee compensation for that portion of the disability that can be attributed to a preexisting condition. *Gassen v. Lienbengood*, 134 S.W.3d 75, 79 (Mo. App. W.D. 2004). To be entitled to Fund compensation for permanent partial disability benefits, the employee must establish that the last injury, combined with his pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. *Dunn v. Treas. Of Mo. Second Injury Fund*, 272 S.W.3d 267, 272 (Mo. App. E.D. 2008).

Issue #1- Occupational Disease

There is a dispute as to whether on or about September 2, 2009 the employee sustained a new injury that arose out of and in the course of her employment. A review of the evidence supports the conclusion that the employee sustained a new injury, to-wit: that the cubital tunnel syndrome and resultant surgery was a separate and distinct injury from the preexisting carpal tunnel injuries.

My reasoning for finding an occupational disease which medically caused the employee's injuries includes:

- The employee's uncontradicted testimony was that she developed bilateral hand numbness following years of work as a seamstress and visor stuffer. After undergoing the bilateral carpal tunnel releases, she was returned to full duty in late 2008, but began performing new jobs putting size boards on hats, putting crowns on hat brims and putting on hat sweat bands that required her to repetitively and forcefully use her left hand. She began developing more symptoms in her left hand and elbow after performing these new job duties. Hence, the hazards that she was exposed to were different after she was released from the carpal tunnel injuries.

- A nerve conduction study performed in January 2008 showed bilateral carpal tunnel syndrome, but did not show any elbow problems or evidence of cubital tunnel syndrome. Subsequent retesting in 2009 and 2010 revealed development and worsening of left cubital tunnel syndrome.
- Dr. Cooper assessed work related carpal tunnel syndrome in 2008, but made no positive findings regarding the left elbow or cubital tunnel syndrome.
- Dr. Deisher's initial treatment records in 2008 showed that physical testing was negative for left cubital tunnel. Dr. Deisher's subsequent records show that the left cubital tunnel was not diagnosed until several months after the carpal tunnel surgeries and the cubital tunnel syndrome progressively worsened and became disabling in 2009.
- Dr. Deisher first opined that the left cubital tunnel syndrome was a work related injury in August 2009.
- Dr. Deisher opined in August 2009 that the cubital tunnel syndrome was a "second injury" and not related to prior carpal tunnel injuries of December 5, 2007.
- Dr. Palen believed that the carpal tunnel injuries pre-existed the left cubital tunnel injury.

The Second Injury Fund contends that this claim is not compensable because the employee was exposed to a repetitive motion hazard throughout her employment and they should be considered part and parcel of the same claim. The Second Injury Fund, though, offers no independent medical evidence to support their theory.

To the contrary, the objective medical evidence including nerve conduction testing show that the cubital tunnel syndrome developed and accrued to the level of a disabling condition after the employee completed her treatment for carpal tunnel syndrome. Dr. Deisher, who ultimately treated both conditions, opined that the cubital tunnel was a "second injury."

Therefore, I find that the employee sustained a new occupational disease and injury that arose out of and in the course of her employment which medically caused her left elbow injury. I also find that the employee's work at VPI Headwear was the prevailing factor in causing the employee's left elbow injury.

Issue #2- Liability of the Second Injury Fund and Nature and Extent of that Liability/Disability

There is a dispute as to Second Injury Fund liability and the nature and extent of that liability. Because there is no claim for permanent total disability, the Second Injury Fund's liability is limited to benefits for permanent partial disability. §287.220 requires that the employee meet two requirements to trigger Second Injury Fund liability for permanent partial disability benefits: 1) the pre-existing injury and the subsequent work related injury must meet the statutory threshold requirements as provided in §287.220; and 2) the pre-existing disability combines with the primary injury to create a greater overall disability than the independent sum of the disabilities. An analysis of the records presented and the testimony show that both elements have been met.

For the pre-existing wrist injuries, the evidence shows that the employee underwent right and left carpal tunnel releases in 2008. The employee credibly testified that although the surgery helped,

she continued to experience occasional numbness in her hands, decrease grip strength, swelling in both hands and unconscious releasing of objects in her hands.

Dr. Palen opined that the employee had a pre-existing 20% permanent partial disability at the levels of the left and right wrist. There is no opposing medical opinion. The employer and the employee settled the right wrist injury based upon a 16% permanent partial disability of the right and left wrists at the 175 week level. As such, I find that the settlement is the best evidence of the nature and extent of the right and left wrist injuries and therefore concur that the employee has a 16% permanent partial disability of the left and right wrists, which pre-existed September 2, 2009 work injury and as such meets the statutory threshold.

For the work related left elbow injury, the evidence shows that the employee underwent a left cubital tunnel decompression in 2010. The credible evidence demonstrates that the employee has continued numbness in her left hand, pain in her elbow and even greater decreased grip and strength in her left arm. The employer and the employee settled the September 2, 2009 injury based upon a 17.5% permanent partial disability of the left elbow at the 210 week level. There was no deduction for the prior settlement. Dr. Palen opined that the employee sustained a 20% permanent partial disability of the left elbow despite the settlements. No opposing opinion was offered by the Second Injury Fund. I again find that the settlement is the best evidence of the nature and extent of the left elbow injury and therefore concur that the employee has a 17.5% permanent partial disability of the left elbow at the 210 week level due to the work related injury of September 2, 2009, which again meets the statutory threshold.

Dr. Palen testified that the combination of injuries creates a greater overall disability than the simple sum of the two the injuries. The employee credibly testified as to her limitations resulting from the combination of injuries and inability to obtain new employment due to the injuries. Again there is no opposing medical opinion. Therefore, I find that the combination of the pre-existing left and right wrist injuries combines with the left elbow injury and creates a greater overall disability than the simple sum.

The employee had a pre-existing 16% permanent partial disability of the right wrist and 16% permanent partial disability of the left wrist and a primary 17.5% permanent partial disability at the left elbow. I find that a 15% loading factor is appropriate to quantify the synergistic effect of the limitations created between the pre-existing wrist injuries and primary left elbow injury due to the injuries involving opposing extremities and the resultant problems caused by the combination.

The combined disability of the pre-existing wrist injuries and primary left elbow injury is found to be 106.66 weeks. The simple sum of the pre-existing wrist injuries and primary left elbow injury is 92.75 weeks. The Second Injury Fund is liable to the employee for the amount of disability greater than the simple sum. Therefore, the Second Injury Fund is liable for: $106.66 \text{ weeks} - 92.75 \text{ weeks} = 13.91 \text{ weeks of disability}$. Using the stipulated compensation rate of \$180.52, the Second Injury Fund is ordered to pay the employee: $\text{weeks} * \$180.52/\text{week} = \$2,511.03$.

ATTORNEY'S FEE

D. Matthew Edwards of Burns, Taylor, Heckemeyer & Green, L.L.C. is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

INTEREST

Interest on all sums awarded hereunder shall be paid as provided by law.

Made by:

Maureen Tilley
Administrative Law Judge
Division of Workers' Compensation

CASE SUMMARY			
INJURY NUMBER		ALJ	
09-071622		Maureen Tilley	
EMPLOYEE		EE'S ATTORNEY	
Kelly Kirkpatrick			
EMPLOYER		ER'S ATTORNEY	
VPI Headwear		N/A	
INSURER		INS ATTORNEY	
Missouri Employers Mutual Insurance			
Second Injury Fund		SIF ATTORNEY	
		Frank Rodman	
DATE OF INJURY	HEARING DATE	DATE AWARD WRITTEN	TYPE OF AWARD
9-2-09	July 12, 2011	July 27, 2011	Final
RULING			
<p>ALJ found that EE had sustained an occupational disease to her left upper extremity that was medically and causally related to her work. ALJ found that this was a new injury. SIF had claimed that this was a pre-existing injury. ALJ gave a 15% load. EE's previous injuries were her right and left wrists.</p>			
STATEMENT OF FACTS			
<p>The Employee repetitively and forcefully used her left upper extremity causing the injury. The employee had previous injuries to her right and left wrists. SIF disputed causation.</p>			
POINTS OF INTEREST			
PPD against SIF			
KEY WORDS FOR INDEX TOPICS			
PPD against SIF			