

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

Injury No.: 09-000988

Employee: Michelle Kitson  
Employer: Verizon Communications (Settled)  
Insurer: National Union Fire Insurance Company (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 right wrist injury 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 argument and legal reasoning as applied to the facts of this claim: "Injury" as defined in § 287.020.3 RSMo excludes occupational diseases. Employee's right wrist injury is an occupational disease. Thus, employee's right wrist injury is not an "injury." Employee has failed to prove she suffered a "subsequent compensable injury" under § 287.220.1, so the Second Injury Fund is not implicated in this matter.

### 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 Chief Administrative Law Judge Grant C. Gorman, issued October 20, 2011 is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 8<sup>th</sup> day of March 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
James Avery, Member

\_\_\_\_\_  
Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

## AWARD

Employee: Michelle Kitson

Injury No. 09-000988

Dependents: None

Employer: Verizon Communications (settled)

Additional Party: Second Injury Fund

Insurer: National Union Fire Ins. Co. (settled)

Hearing Date: July 25, 2011

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Checked by: GCG/ch

### 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: January 5, 2009
5. State location where accident occurred or occupational disease was contracted: St. Charles 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 occurred or occupational disease contracted:  
Claimant sustained injury to the right wrist from repetitive use in the course and scope of employment.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right wrist.
14. Nature and extent of any permanent disability: Primary: 15% right wrist.  
pre-existing: 25% of the left knee; 20% left foot (150 week level).
15. Compensation paid to-date for temporary disability: Unknown
16. Value necessary medical aid paid to date by employer/insurer? Unknown

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- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: Undetermined
- 19. Weekly compensation rate: \$404.66 for PPD benefits.
- 20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

21. Amount of compensation payable: Settled

22. Second Injury Fund liability: Yes

14.4 weeks of permanent partial disability from Second Injury Fund \$5,827.10

TOTAL: \$5,827.10

23. Future requirements awarded: None

Said payments to begin as of the date of this award 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 20% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Michael Goldberg

Employee: Michelle Kitson

Injury No. 09-000988

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

Employee: Michelle Kitson

Injury No: 09-000988

Dependents: None

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Employer: Verizon Communications (settled)

Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Additional Party Second Injury Fund

Insurer: National Union Fire Ins. Co. (settled)

Checked by: GCG/ch

### **PRELIMINARY STATEMENT**

The parties appeared before the undersigned Administrative Law Judge on July 25, 2011, for a final hearing to determine the liability of the Second Injury Fund in the matter of Michelle Kitson (Claimant). Attorney Michael Goldberg represented Claimant. Rule 13 Certified Law Student Ellen Albers supervised by Assistant Attorney General Tracey Cordia represented the Second Injury Fund. Employer, Verizon Communications, and its Insurer, previously settled with Claimant and did not participate in the hearing. Mr. Goldberg requested a fee in the amount of 20%.

The parties stipulated to the following:

1. On or about June 5, 2009, Claimant sustained an occupational disease arising out of and in the course and scope of employment that resulted in injury to Claimant. The injury occurred in St. Charles County, Missouri.
2. Claimant was an employee of Employer pursuant to Chapter 287 RSMo.
3. Venue is proper in St. Charles County.
4. Employer received proper notice of the claim.
5. Claimant filed the claim within the time allowed by law.
6. The applicable rate of compensation is \$404.66 for permanent partial disability (PPD) benefits.

The sole issue to be determined is:

1. What is the nature and extent of Second Injury Fund liability?

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### **SUMMARY OF THE EVIDENCE**

Only evidence necessary to support the award will be summarized. Any objections not expressly ruled on during the hearing or in this award are now overruled. To the extent there are marks or highlights contained in the exhibits, those markings were made prior to being made part of this record, and were not placed thereon by the Administrative Law Judge.

#### *Exhibits*

Claimant offered Exhibits A through D, which were received into evidence without objection. The Second Injury Fund did not offer any exhibits.

1. On or about January 5, 2009, Claimant sustained an occupational disease arising out of and in the course and scope of employment that resulted in an injury to Claimant's right wrist.
2. Claimant received medical care as described in Exhibit B.
3. Claimant and Employer settled the workers' compensation claim arising out of the injury for 15% of the right wrist.
4. Claimant has the following limitations or complaints regarding the work injury:  
  
Fatigue, reduced grip strength, and intermittent pain in her right hand.
5. Prior to the date of injury, Claimant had the following disabling injuries or conditions:
  - a. Claimant previously suffered problems with her left knee and left foot. Claimant underwent a surgical procedure for a torn lateral meniscus and a fractured sesamoid bone. Claimant underwent surgery for these conditions. Dr. Robert Orell performed the left knee surgery. Dr. Reed Luikart performed the left foot surgery. Claimant complains of residual problems associated with these prior conditions. Claimant complains of pain and discomfort with prolonged standing and walking. Claimant cannot kneel or squat as a result of the left knee problems. Claimant has difficulty sitting at work for long periods due to increased pain in her knee. Claimant has difficulty with balance due to her left foot. Claimant received medical care as described in Exhibit C.

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*Opinion Evidence*

- 6 Dr. Jerry Meyers examined Claimant, took a history, and issued a report. He found Claimant sustained an accident arising out of and in the course of employment that resulted in injury to Claimant. He provided the following ratings of permanent partial disability:
- b. With respect to the primary injury: 20% of the right wrist.
  - c. With respect to the pre-existing disabilities, which constituted a hindrance and obstacle to employment: 25% of the left knee and 20% of the left foot.
  - d. Dr. Meyers found the combination of her disabilities created a substantially greater disability than the simple sum of each separate injury or illness.

**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. E.D.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. E.D. 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.

The Second Injury Fund asserts as a defense that after the 2005 amendments to Chapter 287 RSMo., Fund liability is not triggered when the primary injury is an occupational disease claim. The argument is essentially that the language of §287.220.1 requires “a subsequent compensable *injury*” to trigger fund liability, and the definition of injury in §287.020.3(5) states that except as specifically provided for in the Chapter it is not to include occupational disease.

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The Fund argues applying strict construction; an occupational disease does not create Fund liability.

However, the definition of “injury” or “personal injury” in Section 287.020.3(5) only excludes occupational diseases **“except as specifically provided in this chapter.”** (emphasis added). Thus the definition of injury can include occupational disease under some circumstances. Section 287.067.2 provides that 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.” (emphasis added) Likewise, §287.067.3 provides “An **injury** due to repetitive motion is recognized as an occupational disease for purposes of this chapter.” (emphasis added). Sections 287.067.2 and 3 both specifically provide for injury by occupational disease. Further, §287.067.3 specifically provides that occupational disease by repetitive motion, which is the primary injury in this case, is an “injury”. The claim against the Second Injury Fund is compensable.

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. On June 5, 2009 Claimant sustained a compensable last injury which resulted in permanent partial disability equivalent to 15% of the right wrist. The testimony and report of Dr. Meyers regarding medical causation are found to be credible with respect to the symptoms and injuries to the right wrist.
2. As of the time the last injury was sustained, Claimant had the following pre-existing permanent partial disabilities, which meet the statutory threshold and were of such seriousness as to constitute a hindrance or obstacle to employment or reemployment:
  - a. 25% of the left knee (40 weeks).
  - b. 20% of the left foot at the 150 week level (30 weeks).

Total weeks for pre-existing disabilities: 70

3. The credible evidence establishes, and the parties stipulate, that the last injury, combined with the pre-existing permanent partial disabilities, causes 15% greater overall disability than the independent sum of the disabilities. The Second Injury Fund liability is calculated as follows: 26.25 weeks for last injury + 70 weeks for pre-existing injuries = 96.25 weeks x 15% = 14.4 weeks of overall greater disability. 14.4 weeks x \$404.66 = \$5,827.10.

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### **CONCLUSION**

The Second Injury Fund is liable to Claimant for \$5,827.10 in permanent partial disability benefits. Attorney Michael Goldberg shall be entitled to an attorney fee of 20% of this award for necessary legal services provided.

Made by: /s/ GRANT C. GORMAN  
Grant C. Gorman  
*Chief Administrative Law Judge*  
*Division of Workers' Compensation*