

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

Injury No.: 06-045414

Employee: Wayne Knepper
Employer: Midwest Coating of Mid Missouri
Insurer: The Netherlands Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 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 Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 14, 2013. The award and decision of Administrative Law Judge Victorine R. Mahon, issued May 14, 2013, 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 21st day of November 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

DISSENTING OPINION FILED
James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Wayne Knepper

DISSENTING OPINION

Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I am convinced the administrative law judge erred in concluding that employee is permanently and totally disabled as a result of his 2006 work injury.

Employee was 56 years old at the time of the hearing before the administrative law judge. Employee has a robust work history which includes experience in meat cutting, carpentry, baking, and heavy labor jobs. In May 2006, employee developed dermatitis in his right hand as a result of his work for employer involving the use of sprayers to stain wood. Employee underwent surgery and suffered an infection while in the hospital. Employee continues to suffer from some pain, swelling, and loss of sensation in his right hand, and must avoid contact with any industrial chemicals.

In his testimony, employee admitted that he suffers from a number of other disabling conditions which are completely unrelated to the 2006 work injury. Employee has emphysema, which significantly limits his stamina and ability to perform physical tasks. Employee also suffers from congestive heart failure which makes him dizzy and leads to shortness of breath. Employee no longer does any yard work and will not even run a vacuum in his home because of his heart condition. Finally, employee has neuropathy in both feet which produces a constant burning sensation. Employee explained that this condition is so severe at times that he feels unable to walk.

The vocational expert, Terry Cordray, evaluated employee and opined that he is not permanently and totally disabled. Mr. Cordray explained that based on employee's work history and medical restrictions, there are a number of jobs employee can perform, and identified job listings in employee's area for such positions. Mr. Cordray credibly opined that employee could work in the food industry, as a cashier, in small engine repair, or provide locksmith services. Even employee's vocational expert, Wilbur Swearingin, admitted that there are a number of sedentary jobs which employee could perform. Mr. Swearingin did offer the ultimate opinion that employee is permanently and totally disabled, but unlike Mr. Cordray, who considered the restrictions imposed by all of the doctors, Mr. Swearingin wholly ignored the restrictions from Dr. Parmet. It should be noted that out of two evaluating doctors and two vocational experts, Mr. Swearingin provides the only expert opinion on this record that employee is permanently and totally disabled as a result of the work injury.

Employee's disability resulting from the work injury is solely limited to his right hand. I am convinced that Mr. Cordray offered the more credible and persuasive testimony in this matter when he opined that employee's work injury does not render him permanently and totally disabled. I believe the evidence best supports a finding that employee suffered 37.5% permanent partial disability of the right upper extremity at the 175-week level, with an additional 10 weeks for disfigurement. If employee is permanently and totally disabled, it is only after factoring in the numerous other disabling conditions from which he suffers, including congestive heart failure, emphysema, and neuropathy of the lower extremities.

Employee: Wayne Knepper

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For the foregoing reasons, I would modify the award of the administrative law judge and award permanent partial rather than permanent total disability benefits to employee. Because the majority has determined otherwise, I respectfully dissent.

James G. Avery, Jr., Member

AWARD

Employee: Wayne Knepper

Injury No. 06-045414

Dependents: N/A

Employer: Midwest Coating of Mid Missouri

Additional Party: Treasurer of Missouri as Custodian
of the Second Injury Fund

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

Insurer: The Netherlands Insurance Company

Hearing Date: March 20, 2013

VRM/ps

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: May 9, 2006.
5. State location where accident occurred or occupational disease was contracted:
Ozark, Christian County, Missouri.
6. Was above Claimant 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 Claimant was doing and how accident occurred or occupational disease contracted: Claimant applied chemicals in the course of his employment. The occupational exposure to the chemicals caused injury to Claimant's upper extremities.
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 upper extremities at the 175-week level.
14. Nature and extent of any permanent disability: Permanent Total Disability.
15. Compensation paid to-date for temporary disability: \$20,675.04.
16. Value necessary medical aid paid to date by employer/insurer? \$25,770.76.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Average Weekly Wage: \$727.52.
19. Weekly Compensation Rate: \$485.01 (PTD) / \$365.08 (PPD)
20. Method wages computation: Stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable:
(See below)
22. Second Injury Fund liability: No.
23. Future requirements of the award:

Beginning January 22, 2007, and continuing for the remainder of Claimant's lifetime, Employer/Insurer shall pay to Claimant the weekly sum of \$485.01, for permanent total disability arising from the work related injuries Claimant sustained on or about May 9, 2006, subject to review and modification as provided by law.

Employer/Insurer shall provide future medical to Claimant to cure and relieve the effects of the work injury.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: John Newman, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Wayne Knepper

Injury No. 06-045414

Dependents: N/A

Employer: Midwest Coating of Mid Missouri

Additional Party: Treasurer of Missouri as Custodian
of the Second Injury Fund

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

Insurer: The Netherlands Insurance Company

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VRM/ps

INTRODUCTION

The parties appeared before the undersigned administrative law judge for a final hearing to determine the liability of Midwest Coating of Mid Missouri (Employer) and The Netherlands Insurance Company (Insurer), as well as the Second Injury Fund (the Fund). Wayne Knepper (Claimant) appeared with his attorney of record, John Newman. James Blickhan appeared on behalf of Employer/Insurer. Assistant Attorney General Skyler Burks represented the Second Injury Fund. Mr. Knepper alleges two injuries from exposure to chemicals at work. Both cases were tried together. Injury No. 06-045414 pertains to an injury date of May 9, 2006. The second claim – Injury No. 07-135626 – is to have occurred on or about July 16, 2007. A briefing scheduled was supplied to the parties.

The parties stipulated to the following facts and limited the issues as follows:

STIPULATIONS

1. On May 9, 2006 and July 16, 2007, the parties were protected by and subject to the Missouri Workers' Compensation Laws. Employer was fully insured by The Netherlands Insurance Company.
2. On or about May 9, 2006, Claimant sustained an injury through an exposure to chemicals that is medically and causally related to his work with Employer. The injury arose out of and was within the course of Claimant's employment with Employer. Employer/Insurer accepts compensability for the May 9, 2006 injury, but denies any and all liability for any subsequent injury which is alleged to have occurred on or about July 16, 2007.

3. Claimant's average weekly wage is sufficient to yield a permanent total disability and temporary total disability rate of \$485.01. The applicable permanent partial disability rates are the statutory maximum for each injury date.¹
4. Employer/Insurer paid medical care in conjunction with Injury No. 06-045414 in the amount of \$25,770.76, and temporary total disability payments totaling \$20,675.04. Employer/Insurer paid nothing with respect to the alleged 2007 injury.
5. The alleged injury of May 9, 2006 occurred in Ozark, Christian County, Missouri. The parties agree that venue and jurisdiction is appropriate in Springfield, Greene County, Missouri, as to both cases. There also is no dispute as to statute of limitations in either case.
6. There is no dispute as to notice with respect to Injury No. 06-045414.

ISSUES
(Injury No. 06-045414)

1. What is the nature and extent of Claimant's disability?
2. What is the liability of Employer/Insurer for Claimant's disability?
3. What is the liability of the Second Injury Fund for the Claimant's disability?
4. What is Employer/Insurer's liability for future medical treatment?
5. What, if any, is the extent of disfigurement from the primary injury?
6. Claimant's attorney also seeks a 25 percent fee of any amounts awarded.

ISSUES
(Injury No. 07-135626)

1. Did Claimant sustain an injury by accident or occupational disease on or about July 16, 2007?
2. Did the alleged injury arise out of and within the course of employment with Midwest Coating of Mid Missouri?
3. Is the alleged injury medically and causally related to the work at Midwest Coating of Mid Missouri?
4. Did Claimant provide notice of the injury to Employer, as required by law?
5. What is the nature and extent of Claimant's disability?
6. What is the liability of Employer/Insurer for Claimant's disability?
7. What is the liability of the Second Injury Fund for the Claimant's disability?
8. What is Employer/Insurer's liability for future medical treatment?
9. What, if any, is the extent of disfigurement from the alleged primary injury?
10. Claimant's attorney also seeks a 25 percent fee of any amounts awarded.

¹ The statutory maximum rate for permanent partial disability is \$389.04 for the July 2007 injury, and \$365.08 for the May 2006 injury. The maximum permanent partial disability rate for the May 2006 injury was erroneously recited on the record as being \$376.55.

EXHIBITS

Claimant offered the following exhibits which were received into evidence:

- A. Medical Records – various providers
- B. Curriculum Vitae – Dr. David Volarich
- C. Report – Dr. David Volarich
- D. Deposition – Dr. David Volarich
- E. Curriculum Vitae – Mr. Wilbur Swearingin (vocational expert)
- F. Report – Mr. Wilbur Swearingin

Employer/Insurer offered the following exhibit which was received into evidence:

- 1. Deposition – Dr. Allen Parmet, with attached exhibits
- 2. Deposition – Mr. Terry Cordray (vocational expert), with attached exhibits

The Second Injury Fund offered no exhibits.

FINDINGS OF FACT²

Claimant was born November 11, 1956, and is 56 years old. He lives with his mother in Branson West, Missouri. Claimant performed poorly in school and initially left in 4th grade. Claimant believed he could have dyslexia, but there is no formal documentation of a learning disability. He later returned to a parochial school, but again left during the 9th grade, after which he mowed lawns for a living. He thereafter was convicted of armed robbery and spent 10 years in the Oregon State Prison. During his incarceration, he attempted to learn meat cutting and cabinet making. He was released in 1989 and successfully completed his parole.

After his release from prison, Claimant moved to Missouri to be with his mother who had lost her husband. Claimant obtained a job on an assembly line deboning poultry. He left that job because he found the exposure to the cold intolerable. He subsequently held a number of labor intensive jobs that included loading and unloading products, forklift operation, and truck driving. At one point, Claimant went to work for his brother-in-law, Kenneth Vucovich, who owned and operated a bakery in Branson, Missouri. Claimant flipped donuts, made deliveries and cleaned floors. Mr. Vucovich, who testified at the hearing, said Claimant was a good laborer, but he could not follow a written recipe. Mr. Vucovich also did not allow Claimant to run the cash registers because he believed Claimant was incapable of accurately counting change. Mr. Vucovich was unaware of Claimant having any physical restrictions at the time Claimant worked for him. Claimant quit working for Mr. Vucovich in 1996.

Claimant subsequently went to work for Midwest Coating as a general laborer. He painted, applied stain and varnish, applied insulation, applied texture, and sprayed fire retardants onto buildings under construction. Claimant was especially talented at applying fire retardants and

² Only facts necessary to support the Award are summarized. Objections not expressly addressed at the hearing or in this Award are now overruled. Any marks or highlighting contained in the exhibits were not placed there by the Administrative Law Judge, but were present when the exhibit was admitted into evidence.

enjoyed that work. This required Claimant to mix the chemicals in a concrete mixer and apply them through a fire hose. Claimant liked his job.

May 9, 2006 Injury

On May 9, 2006, while staining cabinets at Employer's shop, Claimant noticed large cracks on his right hand and fingers. His right hand began to swell and become red. The redness extended from his hand into his right wrist and forearm. When the condition did not improve that evening, Claimant went to Skaggs Hospital in Branson, Missouri, the following day.

Dr. Robert Wilke initially examined Claimant on May 10, 2006, and then referred him to Dr. John Moore who diagnosed Claimant with cellulitis of the right hand with an early possible abscess formation. Claimant immediately underwent intravenous medication through a port in the arm. When Claimant showed no improvement by the following day, he was referred to Dr. Hugh Harris in Springfield, Missouri. At Cox Hospital, Dr. Harris performed wound debridement and irrigation with incision and drainage of the right middle finger, causing Claimant to be hospitalized for five days. During the hospitalization, Claimant was diagnosed with Methicillin Resistant Staphylococcus Aureus (MRSA) infection of the right hand and right middle finger. A second incision and drainage procedure was performed during the hospital stay.

Claimant had multiple postoperative visits with Dr. Harris from May to mid-December 2006. On July 7, 2006, Dr. Harris allowed Claimant to return to work. Claimant attempted to return to work at a job site in St. Louis. On July 15 and July 16, 2006, Claimant was spraying a chemical fire retardant and developed swelling and pain that was not restricted to right arm. On July 20, 2006, Dr. Harris restricted Claimant from working. As of July 25, 2006, Dr. Harris indicated that Claimant suffered from a MRSA abscess with residual inflammation and dermatitis. He further indicated that "it appears highly suggestive that he had a reaction to toxic chemicals at work." (Exhibit 1, tab 2). Claimant was seen by an infectious disease specialist for a consultation in October who adjusted medications and instructed Claimant on a skin cleansing regime. On November 28, 2006, Dr. Harris said Claimant was unable to return to his usual work duties due to a severe allergy to the fireproofing chemicals used at work. Dr. Harris wrote in applicable part, as follows:

The patient has a very severe allergic dermatitis with skin breakdown due to fireproofing chemical materials used at work. This resulted in skin breakdown and secondary infection from methicillin resistant staphylococcus aureus organism requiring debridement. The wound [sic] are healed. He still has residual stiffness and limitation of finger motion although it is improving. He has some residual sensory impairment, which also appears to be improving, though still a significant factor in his index and middle fingers. He has developed triggering in the middle and small fingers, which in the case other middle finger is improved, but still present. He will continue his anti-inflammatory medications. He will be seen back in three weeks.

(Ex. 1, tab 2).

On December 19, 2006, Dr. Harris wrote that Claimant not only had seen Dr. Haddow, the infectious disease specialist at Skaggs Hospital, but had undergone a dermatology evaluation and a significant list of chemicals has been identified to which Claimant had a rather marked reaction. Dr. Harris stated that from an orthopedic standpoint, Claimant had reached maximum medical improvement, but for his recurrent trigger phenomenon Claimant may need additional treatment in the future, including injections and possible surgical release. He also recommended electrodiagnostic studies in an attempt to further delineate the sensory changes Claimant had been experiencing.

Dr. Randall Cross also treated Claimant. He imposed full-time restrictions. On November 21, 2006, Dr. Cross wrote:

He cannot have any direct or even casual exposure with any spraying of the fire retardants and also no aerosolized chemicals. He cannot even handle the containers. He can drive or operate machinery. He cannot be in close proximity or downwind of anyone else spraying or using the chemical fire retardants. He can use hand tools or power tools provided they do not contain any residue of the chemicals. (he is hypersensitive to petroleum distillates, Naptha, silicates, solvents, per the actual test results of Dr. Pinella).

(Ex. A, tab 1).

Dr. Raffaele Pennella's handwritten medical record entry of September 21, 2006, indicates that Claimant likely suffered irritant or allergic dermatitis from some antigen at work. In a September 22, 2006 handwritten notation, Dr. Pennella confirms that Claimant had a "Only slight reaction to #17 – gave Pt info on that CL + Me-Isothiazolinone." (Ex. A, tab 8). Dr. Pennella was not deposed. It is not possible to fully decipher all of his handwritten remarks, but it is clear that Dr. Pennella found Claimant had a positive reaction to at least one chemical.

Alleged July 16, 2007 Injury

Claimant never returned to work after the July 16, 2006 incident. As noted above, Dr. Harris found that from an orthopedic standpoint, Claimant had reached maximum medical improvement on December 19, 2006. It is evident that the July 16, 2007 injury date is an error. There is no credible evidence that Claimant sustained a new injury in 2007. Moreover, the credible evidence in the record supports the finding that there also was no new injury in July **2006**. Rather, the problem Claimant's experienced in July 2006 appears to be a recurrence of the original injury of May 9, 2006.

Current Condition

Claimant continues to have problems with his right hand and the MRSA. His right hand is always swollen and ashen. His hand continues to break open. He also has satellite breakouts on other parts of his body. The skin on his palm flakes off continuously. His hand is sensitive to multiple chemicals. Claimant attempts to avoid touching or breathing any chemicals. Because the feeling in his right hand is greatly diminished, he experiences difficulty in performing everyday tasks such as buttoning his shirt, tying shoes, or picking up change. He is unable to completely close his fist. While he used to be ambidextrous, he no longer can use his right hand

to write. He does not type and does not know how to turn on a computer. He can read a paper, but struggles with big words. Claimant tries to help around the house, but cannot vacuum, mow, or weed-eat. He can help prepare meals and perform laundry if he is very careful with the detergents. He no longer can participate fully in a number of hobbies. Claimant's motorcycle has been modified so that he can still ride for short distances.

Expert Opinions

Dr. Allen Parmet – saw Claimant for an independent medical examination on February 25, 2010, at the request of Employer/Insurer. Dr. Parmet related that Dr. Randall Cross saw Claimant for a follow-up on January 21, 2007, and on that date Dr. Cross had found that Claimant was at maximum medical improvement. He was of the opinion that Claimant was at maximum medical improvement at the time of the examination. Dr. Parmet has treated individuals with chemical reaction, contact dermatitis, and MRSA. Dr. Parmet gave no separate ratings or causation opinion as to the alleged July 16, 2007 injury.

At the time Dr. Parmet examined Claimant, he observed edema and hyperkeratosis. He said that Claimant's skin was thickened, scaly, cracking, dry, and exhibited "chronic contact dermatitis" that will never change. He believed this was a permanent condition directly resulted from the use of toxic and irritant chemicals in Claimant's job. Dr. Parmet's opinion differs from that of Dr. Volarich in that he did not believe Claimant had an allergic response that would be related to an occupational exposure.

Dr. Parmet further diagnosed Claimant with having had MRSA. While he believed MRSA was not caused by Claimant's occupational exposure, the right hand injury created an opening for the MRSA infection, and thus, also was work-related. Dr. Parmet distinguished this MRSA infection from Claimant's chronic MRSA colonization that he said was not work-related. As Dr. Parmet explained, a very large percentage of the general population carries MRSA on their skin, which is not a work-related condition. Dr. Parmet agreed on cross-examination, however, the MRSA is going to bother Claimant more than a normal MRSA carrier because he already has chronic breaches of the skin.

Dr. Parmet rated Claimant as having a 35 percent permanent partial disability of the right upper extremity at the 160-week level due to chronic residual dermatitis, lymphedema, and neurologic impairment from the MRSA infection. Dr. Parmet did not find any other conditions causally related to Employee's work injury. Like Dr. Volarich, Dr. Parmet did not rate any preexisting conditions. Dr. Parmet said Claimant could routinely lift 25 pounds on a frequent basis, 40 pounds occasionally, and he should avoid further exposure to irritants and drying solutions.

While Dr. Parmet initially said Claimant needed no further treatment in relation to his occupational exposure, he recommended that Claimant use an over-the-counter moisturizer daily. Dr. Parmet cautioned that if Claimant's hand became reinfected, he may need antibiotics and to be seen by a dermatologist to deal with acute outbreaks.

Dr. Parmet reviewed the report of Terry Cordray. Dr. Parmet was of the opinion, from a medical perspective, that Claimant was employable in the open labor market.

Dr. David Volarich – examined Claimant on April 18, 2007, at the request of Claimant's counsel. Dr. Volarich stated that Claimant was at maximum medical improvement as of the date he examined Claimant.

Dr. Volarich opined that the exposure to the work chemicals including petroleum distillates, naphtha, and silicates pertaining to causing right hand contact dermatitis with skin breakdown is the substantial contributing factor, as well as the prevailing or primary factor causing not only the contact dermatitis and allergic response, but also the deep seated methicillin resistant staphylococcus aureus (MRSA) infection of the right hand requiring two separate surgical incision and drainage procedures. He said any recurrent exposure to petroleum based products causes flare-ups of the contact dermatitis and development of a satellite skin lesion. He rated Claimant as having a 40 percent permanent partial disability of the right hand due to the chemical exposure causing contact dermatitis and infection. He said the rating accounted for the chronic swelling of the hand, the hypertrophic callus formation, and loss of motion in all digits of the dominant hand.

Dr. Volarich also rated Claimant as having a 15 percent permanent partial disability of the body as a whole due to the allergic response that occurred as a result of the exposure to petroleum distillates, naphtha, and silicates that continue to cause sensitivity upon accident exposure. The rating also accounts for the development of satellite skin lesions when the allergic response has been aggravated. Dr. Volarich said the combination of these disabilities creates a substantially greater disability than their simple sum.

Dr. Volarich acknowledged that while Claimant had been working with the chemicals in his job with Employer for a number of years, some hypersensitivity, as in Claimant's case, takes a long time to develop. With respect to the MRSA, Dr. Volarich conceded that it is uncertain where Claimant contracted the disease, but he was predisposed to the disease because of the open wounds on his hands. Dr. Volarich imposed the following restriction on Claimant as a result of the work-related conditions:

- Minimize repetitive gripping, pinching, squeezing, pushing, pulling, twisting, rotary motions and similar tasks;
- Avoid impact and vibratory trauma to the right hand;
- Avoid handling weights greater than three to five pounds with the right upper extremity, although Claimant could handle weights with the right arm dependent, close to the body, up to 15 pounds;
- Avoid contact with petroleum distillates, naphtha and silicate products as Dr. Volarich said exposure to these chemicals would very aggressively trigger claimant's exposure and cause new skin lesions and cause his dermatitis to worsen.

Dr. Volarich recommended that Claimant undergo a vocational assessment since Claimant was 50 years old with a limited education and a work career primarily limited to labor-type jobs. These limitations were compounded by the fact that claimant must avoid chemical contact. Dr. Volarich further opined that Claimant needed over-the-counter anti-inflammatory products, as well as a cortisone-type preparation, for his hand symptoms.

Dr. Volarich's ratings were given with respect to the injuries leading up to May 9, 2006, only. Dr. Volarich did not rate any impairment due to the July 2007 claim. Conspicuously absent from Dr. Volarich's opinion and testimony is any reference to preexisting disabilities that would combine with the alleged injury of May 9, 2006.

Vocational Assessments

Terry L. Cordray – Mr. Cordray has been a board certified vocational rehabilitation counselor since 1975. He personally interviewed Claimant and administered occupational testing. Mr. Cordray found that Claimant tested at below normal intelligence. Claimant had told Mr. Cordray he had dyslexia, but Mr. Cordray had no documentation of that alleged learning disability. Mr. Cordray said if that was true, he would anticipate that Claimant's intelligence quotient would be higher, since the test would be affected by Claimant's reading impairment. Mr. Cordray looked at the restrictions placed upon Claimant by Dr. Volarich and Dr. Parmet. Using either physician's restrictions, Claimant cannot return to any of his past work, but Mr. Cordray believed there were sedentary and some light jobs available to him.

Mr. Cordray opined that Claimant's limitations in reading, writing, spelling, and his self-described dyslexia would be the most significant impediments to performing various jobs. Even given these conditions, as well as the physician imposed restrictions, Mr. Cordray opined that Claimant was capable of working in retail sales, as a hotel desk clerk, in box office positions, cashiering jobs, restaurant hosting, telemarketing, and reservationist jobs. Mr. Cordray indicated that these types of jobs were available in the Branson tourism area. He believed they would be available year round. Mr. Cordray stated not only was Claimant employable, but he was placeable because of his age and solid work history.

Although Mr. Cordray initially testified that Claimant also could work as a locksmith, in food service, or in small engine repair, he agreed on cross-examination that Claimant might be limited by the specific duties of the particular job, or by exposure to solvents if they were used in the position. Mr. Cordray agreed that he would expect Claimant to only be able to read at the 3rd grade level and was not surprised that Claimant's math abilities were commensurate with a 4th grader. Mr. Cordray agreed Claimant could not work in a retail sales position that required him to complete reports or paperwork. Likewise, he would eliminate from consideration any hotel desk clerk jobs that required clerical skills.

Wilbur Swearingin – is a vocational rehabilitation expert who testified live at the hearing. He performed a vocational evaluation after meeting with Claimant on January 9, 2008. Considering the restrictions imposed on Claimant by Dr. Volarich, Mr. Swearingin concluded that Claimant was unable to perform any sedentary or light work as defined in the Dictionary of Occupational Titles (DOT). Mr. Swearingin concluded that Claimant was permanently and totally disabled solely as a result of the injuries suffered on May 9, 2006. He identified no preexisting disabilities that posed a hindrance or obstacle to employment or reemployment.

As Mr. Swearingin explained, significant limitations of reaching or handling eliminate a large number of occupations that a person could otherwise perform. Mr. Swearingin testified that fingering involves picking, pinching or otherwise working primarily with the fingers. Fingering

is needed to perform most unskilled sedentary jobs. He explained that the loss of manual dexterity narrows the sedentary and light ranges of work much more than it does medium, heavy or very heavy ranges of work. This loss of manual dexterity was confirmed through the results of the Purdue pegboard test. Claimant's scores on the test placed him in the first percentile on his right hand and less than first percentile when using both hands, meaning that 99 percent of the population who take the test would perform better than Claimant.

Mr. Swearingin noted that Claimant first left school in the fourth grade due to reading difficulties. He later returned to school, but then quit school permanently during the ninth grade, and had no further education. Mr. Swearingin addressed the issue of dyslexia. He noted there was no documentation of such learning disability, and suggested that one with such dyslexia might perform poorly in reading but demonstrate high math skills. That is not the case with Claimant. Claimant's test results on the Wide Range Achievement Test 4 (WRAT-4) were consistent with having completed the fourth grade. He reads at the equivalent of a 3.9 grade student, spells at the third grade level, and performs math at the 4.3 grade level. These results are marginal for the needs of everyday living. Moreover, Claimant is not a candidate for advanced vocational training or retraining. Considering Claimant's physical impairments, medical restrictions, allergic reactions caused by his work exposure, marginal education, advancing age, and history of manual type work, Mr. Swearingin concluded that it was unlikely that any Employer would consider hiring Claimant.

Mr. Swearingin admitted on cross-examination that an OASIS computer search did identify jobs that Claimant might be physically capable of performing, but they were not jobs commonly available. Moreover, Claimant's restriction on exposure to chemicals would preclude him from working in some occupations that he otherwise might be able to perform, such as light housekeeping.

Mr. Swearingin summarized that Claimant cannot perform his past work, he has a poor education, lack of transferable job skills, an inability to be retrained, and is physically incapable of performing skills that are hand intensive. Mr. Swearingin disagreed with Mr. Cordray that Claimant could work in ticket sales, as a hotel clerk, or in food service, including that as a host.

Disfigurement

Claimant's right hand is highly discolored with an ashen, cracked, and flakey appearance. It encompasses the entire hand. Given the dimensions of the disfigurement and its severity, I would assess 10 weeks of disability for disfigurement if Claimant was permanent partially disabled.

Additional Findings

I find that Claimant reached maximum medical improvement as of January 22, 2007, the last date on which Dr. Cross evaluated Claimant and found him to be at maximum medical improvement.

As to credibility, all experts are well qualified. Both physicians agree that Claimant has a chronic, permanent condition caused by his exposure to chemicals at work. Moreover, as Dr. Parmet stated, Claimant will always have more difficulty because he also is a MRSA carrier. I find that the medical records support the opinions of Dr. Volarich. To the extent that Dr. Volarich and Dr. Parmet disagree, I find the independent medical opinion of Dr. Volarich more credible and persuasive. I also find the vocational opinion of Mr. Swearingin more credible and persuasive in this case, for the reasons discussed below.

CONCLUSIONS OF LAW

A claimant in a workers' compensation proceeding has the burden of proving all elements of a claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 911 (Mo. App. E.D. 2008). When a claimant has alleged permanent total disability, he must prove his inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident. § 287.020.6 RSMo Cum. Supp. 2005.³ In determining whether Claimant can return to employment, Missouri law allows consideration of an employee's age, education, along with physical abilities. *BAXI v. United Technologies Automotive*, 956 S.W.2d 340 (Mo. App. E.D. 1997). The central question is whether, in the ordinary course of business, would an employer reasonably be expected to hire Claimant in his physical condition. *Ransburg v. Great Plains Drilling*, 22 S.W.3d 726, 732 (Mo. App. W.D. 2000), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.2d 220 (Mo. banc 2003).

2006 Injury

Claimant has a limited education and no GED. He has limited math, reading, and spelling skills. Irrespective of whether he had dyslexia, he has below normal I.Q. It is evident that Claimant cannot compete on the open labor market for the jobs identified by Mr. Cordray because Claimant is unable to make change or even feel the difference between the coins in his pocket. He cannot complete reports. He does not know how to run a computer. He is unable to work in housekeeping or janitorial service because he has to be careful about exposures to chemicals. While he can function adequately in his home, where he can control his environment, he no longer can function in his chosen occupation or in any of his past jobs. Quite persuasive is the testimony of Claimant's brother-in-law who had hired Claimant to work with him in his bakery many years ago. Mr. Vucovich said even then he would not have allowed Claimant to work the cash register, but now Mr. Vucovich would not even have him around food given the appearance of Claimant's hand. This clearly counters Mr. Cordray's opinion that Claimant could work in food service. Mr. Cordray also suggested that Claimant could work as a locksmith or in small engine repair, but he conceded he did not know if chemicals were used in those occupations.

Given all of the facts of this case, and seriously considering all of the employment opportunities that may be available in the Branson area, I conclude that Claimant is not employable in the open labor market. He is permanently and totally disabled from the May 9, 2006 injury, alone. His

³ The date of the first injury is alleged to have occurred in May 2006, after the 2005 amendments to the Workers' Compensation Law. All future references to statutory provisions in this Award are to the Missouri statutes in effect at the time of the alleged injuries.

permanent total disability is as a direct result of the chemical exposure and injuries to his right hand and body as a whole on May 9, 2006.

Disfigurement

Section 287.190.4 RSMo, provides that if an employee is seriously and permanently disfigured about the head, neck, or arms, the Division may allow up to 40 weeks of disability for the disfigurement. At the time of the hearing, not having an opportunity to review all of the evidence, I advised the parties that Claimant's disfigurement would be equal to 10 weeks of disability. Now, having completed a review of the entire record and having concluded that Claimant is permanently and totally disabled, Claimant, by law, is not entitled to an additional amount for disfigurement. *See Akers v. Warson Garden Apartments*, 961 S.W.2d 50, 57-58 (Mo. 1998) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003) (holding that an additional amount for disfigurement may be awarded only when disability is partial in degree).

Future Medical Treatment

Section 287.140 RSMo, requires that an employer provide medical care that would cure or relieve the effects of the work injury. Dr. Parmet's testimony established that Claimant required over-the-counter emollients for the permanent condition of his hands. He conceded that Claimant would benefit from appointments with a dermatologist should he have bacterial infections, but it is not clear whether Dr. Parmet related this latter recommendation to the work injury. Dr. Volarich also recommended over-the-counter anti-inflammatories and cortisone medications. The medical records also suggest that Claimant had the potential for a recurrent trigger phenomenon, requiring additional treatment. There is substantial and competent evidence to support the conclusion that Claimant will need future medical treatment to treat and alleviate the injuries that he sustained from the May 9, 2006 injury. Employer/Insurer shall provide such future medical treatment as is required to cure and relieve the effects of the work-related injury.

Liability of the Second Injury Fund

The Second Injury Fund is triggered only when an employee has a preexisting permanent partial disability, whether from a compensable injury or otherwise. § 287.220.1 RSMo 2000. Neither physician identified any preexisting permanent partial disability that posed a hindrance or obstacle to employment or reemployment. In any event, Claimant is permanently and totally disabled from the May 9, 2006 injury, alone. Therefore, the Second Injury Fund has no liability.

2007 Alleged Injury

There is no evidence supporting the contention that Claimant suffered a separate injury on or about July 16, 2007. Even assuming that the date of the alleged injury should have been recited on the Claim for Compensation as July 16, 2006, it is clear that Claimant did not suffer a new event, but had a flare-up of the May 9, 2006 injury. Claimant has failed to sustain his burden that he suffered a new injury on July 16, 2007. Therefore, compensation is denied on that basis, and all other issues relating to the alleged July 16, 2007 injury are moot.

Summary

Beginning December 19, 2006, and continuing for the remainder of Claimant's lifetime, Employer/Insurer shall pay to Claimant the weekly sum of \$485.01, for permanent total disability arising from the work-related injuries Claimant sustained on or about May 9, 2006.

Employer/Insurer shall provide future medical care to Claimant to cure or relieve the effects of the work injury that occurred on or about May 9, 2006.

As Claimant failed to prove a new injury or disability stemming from July 16, 2007, no benefits are awarded.

The Second Injury Fund has no liability with respect to the injury occurring on or about May 9, 2006, or the alleged injury of July 16, 2007.

Attorney John Newman shall have a lien of 25 percent of all amounts awarded as a reasonable fee for necessary legal services rendered to Claimant.

Made by: /s/ Victorine R. Mahon
Victorine R. Mahon
Administrative Law Judge
Division of Workers' Compensation

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

Injury No.: 07-135626

Employee: Wayne Knepper
Employer: Midwest Coating of Mid Missouri
Insurer: The Netherlands Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 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 Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 14, 2013, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Victorine R. Mahon, issued May 14, 2013, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 21st day of November 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Wayne Knepper

Injury No. 07-135626

Dependents: N/A

Employer: Midwest Coating of Mid Missouri

Additional Party: Treasurer of Missouri as Custodian
of the Second Injury Fund

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

Insurer: The Netherlands Insurance Company

Hearing Date: March 20, 2013

VRM/ps

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? No.
3. Was there an accident or incident of occupational disease under the Law? No.
4. Date of accident or onset of occupational disease: Alleged July 16, 2007.
5. State location where accident occurred or occupational disease was contracted:
There was no accident or occupational disease on the date of July 16, 2007.
6. Was above Claimant in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? No.
8. Did accident or occupational disease arise out of and in the course of the employment?
No.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work Claimant was doing and how accident occurred or occupational disease contracted: Claimant alleged he was injured while applying chemicals.
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: None.

14. Nature and extent of any permanent disability: None.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? None.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Average Weekly Wage: \$727.52.
19. Weekly Compensation Rate: \$485.01 (PTD) / \$389.04 (PPD)
20. Method wages computation: Stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable: None.
22. Second Injury Fund liability: None.
23. Future requirements of the award: None.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Wayne Knepper

Injury No. 07-135626

Dependents: N/A

Employer: Midwest Coating of Mid Missouri

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

Additional Party: Treasurer of Missouri as Custodian
of the Second Injury Fund

Insurer: The Netherlands Insurance Company

Hearing Date: March 20, 2013

VRM/ps

INTRODUCTION

The parties appeared before the undersigned administrative law judge for a final hearing to determine the liability of Midwest Coating of Mid Missouri (Employer) and The Netherlands Insurance Company (Insurer), as well as the Second Injury Fund (the Fund). Wayne Knepper (Claimant) appeared with his attorney of record, John Newman. James Blickhan appeared on behalf of Employer/Insurer. Assistant Attorney General Skyler Burks represented the Second Injury Fund. Mr. Knepper alleges two injuries from exposure to chemicals at work. Both cases were tried together. Injury No. 06-045414 pertains to an injury date of May 9, 2006. The second claim – Injury No. 07-135626 – is to have occurred on or about July 16, 2007. A briefing scheduled was supplied to the parties.

The parties stipulated to the following facts and limited the issues as follows:

STIPULATIONS

1. On May 9, 2006 and July 16, 2007, the parties were protected by and subject to the Missouri Workers' Compensation Law. Employer was fully insured The Netherlands Insurance Company.
2. On or about May 9, 2006, Claimant sustained an injury through an exposure to chemicals that is medically and causally related to his work with Employer. The injury arose out of and was within the course of Claimant's employment with Employer. Employer/Insurer accepts compensability for the May 9, 2006 injury, but denies any and all liability for any subsequent injury which is alleged to have occurred on or about July 16, 2007.

3. Claimant's average weekly wage is sufficient to yield a permanent total disability and temporary total disability rate of \$485.01. The applicable permanent partial disability rates are the statutory maximum for each injury date.¹
4. Employer/Insurer paid medical care in conjunction with Injury No. 06-045414 in the amount of \$25,770.76, and temporary total disability payments totaling \$20,675.04. Employer/Insurer paid nothing with respect to the alleged 2007 injury.
5. The alleged injury of May 9, 2006 occurred in Ozark, Christian County, Missouri. The parties agree that venue and jurisdiction is appropriate in Springfield, Greene County, Missouri as to both cases. There also is no dispute as to statute of limitations in either case.
6. There is no dispute as to notice with respect to Injury No. 06-045414.

ISSUES
(Injury No. 06-045414)

1. What is the nature and extent of Claimant's disability?
2. What is the liability of Employer/Insurer for Claimant's disability?
3. What is the liability of the Second Injury Fund for the Claimant's disability?
4. What is Employer/Insurer's liability for future medical treatment?
5. What, if any, is the extent of disfigurement from the primary injury?
6. Claimant's attorney also seeks a 25 percent fee of any amounts awarded.

ISSUES
(Injury No. 07-135626)

1. Did Claimant sustain an injury by accident or occupational disease on or about July 16, 2007?
2. Did the alleged injury arise out of and within the course of employment with Midwest Coating of Mid Missouri?
3. Is the alleged injury medically and causally related to the work at Midwest Coating of Mid Missouri?
4. Did Claimant provide notice of the injury to Employer, as required by law?
5. What is the nature and extent of Claimant's disability?
6. What is the liability of Employer/Insurer for Claimant's disability?
7. What is the liability of the Second Injury Fund for the Claimant's disability?
8. What is Employer/Insurer's liability for future medical treatment?
9. What, if any, is the extent of disfigurement from the alleged primary injury?
10. Claimant's attorney also seeks a 25 percent fee of any amounts awarded.

¹ The statutory maximum rate for permanent partial disability is \$389.04 for the July 2007 injury, and \$365.08 for the May 2006 injury. The maximum permanent partial disability rate for the May 2006 injury was erroneously recited on the record as being \$376.55.

EXHIBITS

Claimant offered the following exhibits which were received into evidence:

- A. Medical Records – various providers
- B. Curriculum Vitae – Dr. David Volarich
- C. Report – Dr. David Volarich
- D. Deposition – Dr. David Volarich
- E. Curriculum Vitae – Mr. Wilbur Swearingin (vocational expert)
- F. Report – Mr. Wilbur Swearingin

Employer/Insurer offered the following exhibit which was received into evidence:

- 1. Deposition – Dr. Allen Parmet, with attached exhibits
- 2. Deposition – Mr. Terry Cordray (vocational expert), with attached exhibits

The Second Injury Fund offered no exhibits.

FINDINGS OF FACT²

Claimant was born November 11, 1956, and is 56 years old. He lives with his mother in Branson West, Missouri. Claimant performed poorly in school and initially left in 4th grade. Claimant believed he could have dyslexia, but there is no formal documentation of a learning disability. He later returned to a parochial school, but again left during the 9th grade, after which he mowed lawns for a living. He thereafter was convicted of armed robbery and spent 10 years in the Oregon State Prison. During his incarceration, he attempted to learn meat cutting and cabinet making. He was released in 1989 and successfully completed his parole.

After his release from prison, Claimant moved to Missouri to be with his mother who had lost her husband. Claimant obtained a job on an assembly line deboning poultry. He left that job because he found the exposure to the cold intolerable. He subsequently held a number of labor intensive jobs that included loading and unloading products, forklift operation, and truck driving. At one point, Claimant went to work for his brother-in-law, Kenneth Vuckovich, who owned and operated a bakery in Branson, Missouri. Claimant flipped donuts, made deliveries and cleaned floors. Mr. Vucovich, who testified at the hearing, said Claimant was a good laborer, but he could not follow a written recipe. Mr. Vucovich also did not allow Claimant to run the cash registers because he believed Claimant was incapable of accurately counting change. Mr. Vucovich was unaware of Claimant having any physical restrictions at the time Claimant worked for him. Claimant quit working for Mr. Vucovich in 1996.

Claimant subsequently went to work for Midwest Coating as a general laborer. He painted, applied stain and varnish, applied insulation, applied texture, and sprayed fire retardants onto buildings under construction. Claimant was especially talented at applying fire retardants and

² Only facts necessary to support the Award are summarized. Objections not expressly addressed at the hearing or in this Award are now overruled. Any marks or highlighting contained in the exhibits were not placed there by the Administrative Law Judge, but were present when the exhibit was admitted into evidence.

enjoyed that work. This required Claimant to mix the chemicals in a concrete mixer and apply them through a fire hose. Claimant liked his job.

May 9, 2006 Injury

On May 9, 2006, while staining cabinets at Employer's shop, Claimant noticed large cracks on his right hand and fingers. His right hand began to swell and become red. The redness extended from his hand into his right wrist and forearm. When the condition did not improve that evening, Claimant went to Skaggs Hospital in Branson, Missouri, the following day.

Dr. Robert Wilke initially examined Claimant on May 10, 2006, and then referred him to Dr. John Moore who diagnosed Claimant with cellulitis of the right hand with an early possible abscess formation. Claimant immediately underwent intravenous medication through a port in the arm. When Claimant showed no improvement by the following day, he was referred to Dr. Hugh Harris in Springfield, Missouri. At Cox Hospital, Dr. Harris performed wound debridement and irrigation with incision and drainage of the right middle finger, causing Claimant to be hospitalized for five days. During the hospitalization, Claimant was diagnosed with Methicillin Resistant Staphylococcus Aureus (MRSA) infection of the right hand and right middle finger. A second incision and drainage procedure was performed during the hospital stay.

Claimant had multiple postoperative visits with Dr. Harris from May to mid-December 2006. On July 7, 2006, Dr. Harris allowed Claimant to return to work. Claimant attempted to return to work at a job site in St. Louis. On July 15 and July 16, 2006, Claimant was spraying a chemical fire retardant and developed swelling and pain that was not restricted to right arm. On July 20, 2006, Dr. Harris restricted Claimant from working. As of July 25, 2006, Dr. Harris indicated that Claimant suffered from a MRSA abscess with residual inflammation and dermatitis. He further indicated that "it appears highly suggestive that he had a reaction to toxic chemicals at work." (Exhibit 1, tab 2). Claimant was seen by an infectious disease specialist for a consultation in October who adjusted medications and instructed Claimant on a skin cleansing regime. On November 28, 2006, Dr. Harris said Claimant was unable to return to his usual work duties due to a severe allergy to the fireproofing chemicals used at work. Dr. Harris wrote in applicable part, as follows:

The patient has a very severe allergic dermatitis with skin breakdown due to fireproofing chemical materials used at work. This resulted in skin breakdown and secondary infection from methicillin resistant staphylococcus aureus organism requiring debridement. The wound [sic] are healed. He still has residual stiffness and limitation of finger motion although it is improving. He has some residual sensory impairment, which also appears to be improving, though still a significant factor in his index and middle fingers. He has developed triggering in the middle and small fingers, which in the case other middle finger is improved, but still present. He will continue his anti-inflammatory medications. He will be seen back in three weeks.

(Ex. 1, tab 2).

On December 19, 2006, Dr. Harris wrote that Claimant not only had seen Dr. Haddow, the infectious disease specialist at Skaggs Hospital, but had undergone a dermatology evaluation and a significant list of chemicals has been identified to which Claimant had a rather marked reaction. Dr. Harris stated that from an orthopedic standpoint, Claimant had reached maximum medical improvement, but for his recurrent trigger phenomenon Claimant may need additional treatment in the future, including injections and possible surgical release. He also recommended electrodiagnostic studies in an attempt to further delineate the sensory changes Claimant had been experiencing.

Dr. Randall Cross also treated Claimant. He imposed full-time restrictions. On November 21, 2006, Dr. Cross wrote:

He cannot have any direct or even casual exposure with any spraying of the fire retardants and also no aerosolized chemicals. He cannot even handle the containers. He can drive or operate machinery. He cannot be in close proximity or downwind of anyone else spraying or using the chemical fire retardants. He can use hand tools or power tools provided they do not contain any residue of the chemicals. (he is hypersensitive to petroleum distillates, Naptha, silicates, solvents, per the actual test results of Dr. Pinella).

(Ex. A, tab 1).

Dr. Raffaele Pennella's handwritten medical record entry of September 21, 2006, indicates that Claimant likely suffered irritant or allergic dermatitis from some antigen at work. In a September 22, 2006 handwritten notation, Dr. Pennella confirms that Claimant had a "Only slight reaction to #17 – gave Pt info on that CL + Me-Isothiazolinone." (Ex. A, tab 8). Dr. Pennella was not deposed. It is not possible to fully decipher all of his handwritten remarks, but it is clear that Dr. Pennella found Claimant had a positive reaction to at least one chemical.

Alleged July 16, 2007 Injury

Claimant never returned to work after the July 16, 2006 incident. As noted above, Dr. Harris found that from an orthopedic standpoint, Claimant had reached maximum medical improvement on December 19, 2006. It is evident that the July 16, 2007 injury date is an error. There is no credible evidence that Claimant sustained a new injury in 2007. Moreover, the credible evidence in the record supports the finding that there also was no new injury in July **2006**. Rather, the problem Claimant's experienced in July 2006 appears to be a recurrence of the original injury of May 9, 2006.

Current Condition

Claimant continues to have problems with his right hand and the MRSA. His right hand is always swollen and ashen. His hand continues to break open. He also has satellite breakouts on other parts of his body. The skin on his palm flakes off continuously. His hand is sensitive to multiple chemicals. Claimant attempts to avoid touching or breathing any chemicals. Because the feeling in his right hand is greatly diminished, he experiences difficulty in performing everyday tasks such as buttoning his shirt, tying shoes, or picking up change. He is unable to completely close his fist. While he used to be ambidextrous, he no longer can use his right hand

to write. He does not type and does not know how to turn on a computer. He can read a paper, but struggles with big words. Claimant tries to help around the house, but cannot vacuum, mow, or weed-eat. He can help prepare meals and perform laundry if he is very careful with the detergents. He no longer can participate fully in a number of hobbies. Claimant's motorcycle has been modified so that he can still ride for short distances.

Expert Opinions

Dr. Allen Parmet – saw Claimant for an independent medical examination on February 25, 2010, at the request of Employer/Insurer. Dr. Parmet related that Dr. Randall Cross saw Claimant for a follow-up on January 21, 2007, and on that date Dr. Cross had found that Claimant was at maximum medical improvement. He was of the opinion that Claimant was at maximum medical improvement at the time of the examination. Dr. Parmet has treated individuals with chemical reaction, contact dermatitis, and MRSA. Dr. Parmet gave no separate ratings or causation opinion as to the alleged July 16, 2007 injury.

At the time Dr. Parmet examined Claimant, he observed edema and hyperkeratosis. He said that Claimant's skin was thickened, scaly, cracking, dry, and exhibited "chronic contact dermatitis" that will never change. He believed this was a permanent condition directly resulted from the use of toxic and irritant chemicals in Claimant's job. Dr. Parmet's opinion differs from that of Dr. Volarich in that he did not believe Claimant had an allergic response that would be related to an occupational exposure.

Dr. Parmet further diagnosed Claimant with having had MRSA. While he believed MRSA was not caused by Claimant's occupational exposure, the right hand injury created an opening for the MRSA infection, and thus, also was work-related. Dr. Parmet distinguished this MRSA infection from Claimant's chronic MRSA colonization that he said was not work related. As Dr. Parmet explained, a very large percentage of the general population carries MRSA on their skin, which is not a work-related condition. Dr. Parmet agreed on cross-examination, however, the MRSA is going to bother Claimant more than a normal MRSA carrier because he already has chronic breaches of the skin.

Dr. Parmet rated Claimant as having a 35 percent permanent partial disability of the right upper extremity at the 160-week level due to chronic residual dermatitis, lymphedema, and neurologic impairment from the MRSA infection. Dr. Parmet did not find any other conditions causally related to Employee's work injury. Like Dr. Volarich, Dr. Parmet did not rate any preexisting conditions. Dr. Parmet said Claimant could routinely lift 25 pounds on a frequent basis, 40 pounds occasionally, and he should avoid further exposure to irritants and drying solutions.

While Dr. Parmet initially said Claimant needed no further treatment in relation to his occupational exposure, he recommended that Claimant use an over-the-counter moisturizer daily. Dr. Parmet cautioned that if Claimant's hand became reinfected, he may need antibiotics and to be seen by a dermatologist to deal with acute outbreaks.

Dr. Parmet reviewed the report of Terry Cordray. Dr. Parmet was of the opinion, from a medical perspective, that Claimant was employable in the open labor market.

Dr. David Volarich – examined Claimant on April 18, 2007, at the request of Claimant's counsel. Dr. Volarich stated that Claimant was at maximum medical improvement as of the date he examined Claimant. Dr. Volarich's ratings were given with respect to the injuries leading up to May 9, 2006, only. Dr. Volarich did not rate any impairment due to the July 2007 claim.

Dr. Volarich opined that the exposure to the work chemicals including petroleum distillates, naphtha, and silicates pertaining to causing right hand contact dermatitis with skin breakdown is the substantial contributing factor as well as the prevailing or primary factor causing not only the contact dermatitis and allergic response, but also the deep seated methicillin resistant staphylococcus aureus (MRSA) infection of the right hand requiring two separate surgical incision and drainage procedures. He said any recurrent exposure to petroleum based products causes flare-ups of the contact dermatitis and development of a satellite skin lesion. He rated Claimant as having a 40 percent permanent partial disability of the right hand due to the chemical exposure causing contact dermatitis and infection. He said the rating accounted for the chronic swelling of the hand, the hypertrophic callus formation, and loss of motion in all digits of the dominant hand.

Dr. Volarich also rated Claimant as having a 15 percent permanent partial disability of the body as a whole due to the allergic response that occurred as a result of the exposure to petroleum distillates, naphtha, and silicates that continue to cause sensitivity upon accident exposure. The rating also accounts for the development of satellite skin lesions when the allergic response has been aggravated. Dr. Volarich said the combination of these disabilities creates a substantially greater disability than their simple sum.

Dr. Volarich acknowledged that while Claimant had been working with the chemicals in his job with Employer for a number of years, some hypersensitivity, as in Claimant's case, takes a long time to develop. With respect to the MRSA, Dr. Volarich conceded that it is uncertain where Claimant contracted the disease, but he was predisposed to the disease because of the open wounds on his hands. Dr. Volarich imposed the following restriction on Claimant as a result of the work-related conditions:

- Minimize repetitive gripping, pinching, squeezing, pushing, pulling, twisting, rotary motions and similar tasks;
- Avoid impact and vibratory trauma to the right hand;
- Avoid handling weights greater than three to five pounds with the right upper extremity, although Claimant could handle weights with the right arm dependent, close to the body, up to 15 pounds;
- Avoid contact with petroleum distillates, naphtha and silicate products as Dr. Volarich said exposure to these chemicals would very aggressively trigger claimant's exposure and cause new skin lesions and cause his dermatitis to worsen.

Dr. Volarich recommended that Claimant undergo a vocational assessment since Claimant was 50 years old with a limited education and a work career primarily limited to labor-type jobs. These limitations were compounded by the fact that claimant must avoid chemical contact. Dr. Volarich further opined that Claimant needed over-the-counter anti-inflammatory products as well as a cortisone-type preparation for his hand symptoms.

Dr. Volarich's ratings were given with respect to the injuries leading up to May 9, 2006, only. Dr. Volarich did not rate any impairment due to the July 2007 claim. Conspicuously absent from Dr. Volarich's opinion and testimony is any reference to preexisting disabilities that would combine with the alleged injury of May 9, 2006.

Vocational Assessments

Terry L. Cordray – Mr. Cordray has been a board certified vocational rehabilitation counselor since 1975. He personally interviewed Claimant and administered occupational testing. Mr. Cordray found that Claimant tested at below normal intelligence. Claimant had told Mr. Cordray he had dyslexia, but Mr. Cordray had no documentation of that alleged learning disability. Mr. Cordray said if that was true, he would anticipate that Claimant's intelligence quotient would be higher, since the test would be affected by Claimant's reading impairment. Mr. Cordray looked at the restrictions placed upon Claimant by Dr. Volarich and Dr. Parnet. Using either physician's restrictions, Claimant cannot return to any of his past work, but Mr. Cordray believed there were sedentary and some light jobs available to him.

Mr. Cordray opined that Claimant's limitations in reading, writing, spelling, and his self-described dyslexia would be the most significant impediments to performing various jobs. Even given these conditions, as well as the physician imposed restrictions, Mr. Cordray opined that Claimant was capable of working in retail sales, as a hotel desk clerk, in box office positions, cashiering jobs, restaurant hosting, telemarketing, and reservationist jobs. Mr. Cordray indicated that these types of jobs were available in the Branson tourism area. He believed they would be available year round. Mr. Cordray stated not only was Claimant employable, but he was placeable because of his age and solid work history.

Although Mr. Cordray initially testified that Claimant also could work as a locksmith, in food service, or in small engine repair, he agreed on cross-examination that Claimant might be limited by the specific duties of the particular job, or by exposure to solvents if they were used in the position. Mr. Cordray agreed that he would expect Claimant to only be able to read at the 3rd grade level and was not surprised that Claimant's math abilities were commensurate with a 4th grader. Mr. Cordray agreed Claimant could not work in a retail sales position that required him to complete reports or paperwork. Likewise, he would eliminate from consideration any hotel desk clerk jobs that required clerical skills.

Wilbur Swearingin – is a vocational rehabilitation expert who testified live at the hearing. He performed a vocational evaluation after meeting with Claimant on January 9, 2008. Considering the restrictions imposed on Claimant by Dr. Volarich, Mr. Swearingin concluded that Claimant was unable to perform any sedentary or light work as defined in the Dictionary of Occupational Titles (DOT). Mr. Swearingin concluded that Claimant was permanently and totally disabled solely as a result of the injuries suffered on May 9, 2006. He identified no preexisting disabilities that posed a hindrance or obstacle to employment or reemployment.

As Mr. Swearingin explained, significant limitations of reaching or handling eliminate a large number of occupations that a person could otherwise perform. Mr. Swearingin testified that

fingering involves picking, pinching or otherwise working primarily with the fingers. Fingering is needed to perform most unskilled sedentary jobs. He explained that the loss of manual dexterity narrows the sedentary and light ranges of work much more than it does medium, heavy or very heavy ranges of work. This loss of manual dexterity was confirmed through the results of the Purdue pegboard test. Claimant's scores on the test placed him in the first percentile on his right hand and less than first percentile when using both hands, meaning that 99 percent of the population who take the test would perform better than Claimant.

Mr. Swearingin noted that Claimant first left school in the fourth grade due to reading difficulties. He later returned to school, but then quit school permanently during the ninth grade, and had no further education. Mr. Swearingin addressed the issue of dyslexia. He noted there was no documentation of such learning disability, and suggested that one with such dyslexia might perform poorly in reading but demonstrate high math skills. That is not the case with Claimant. Claimant's test results on the Wide Range Achievement Test 4 (WRAT-4) were consistent with having completed the fourth grade. He reads at the equivalent of a 3.9 grade student, spells at the third grade level, and performs math at the 4.3 grade level. These results are marginal for the needs of everyday living. Moreover, Claimant is not a candidate for advanced vocational training or retraining. Considering Claimant's physical impairments, medical restrictions, allergic reactions caused by his work exposure, marginal education, advancing age, and history of manual type work, Mr. Swearingin concluded that it was unlikely that any Employer would consider hiring Claimant.

Mr. Swearingin admitted on cross-examination that an OASIS computer search did identify jobs that Claimant might be physically capable of performing, but they were not jobs commonly available. Moreover, Claimant's restriction on exposure to chemicals would preclude him from working in some occupations that he otherwise might be able to perform, such as light housekeeping.

Mr. Swearingin summarized that Claimant cannot perform his past work, he has a poor education, lack of transferable job skills, an inability to be retrained, and is physically incapable of performing skills that are hand intensive. Mr. Swearingin disagreed with Mr. Cordray that Claimant could work in ticket sales, as a hotel clerk, or in food service, including that as a host.

Disfigurement

Claimant's right hand is highly discolored with an ashen, cracked, and flakey appearance. It encompasses the entire hand. Given the dimensions of the disfigurement and its severity, I would assess 10 weeks of disability for disfigurement if Claimant was permanent partially disabled.

Additional Findings

I find that Claimant reached maximum medical improvement as of January 22, 2007, the last date on which Dr. Cross evaluated Claimant and found him to be at maximum medical improvement.

As to credibility, all experts are well qualified. Both physicians agree that Claimant has a chronic, permanent condition caused by his exposure to chemicals at work. Moreover, as Dr. Parmet stated, Claimant will always have more difficulty because he also is a MRSA carrier. I find that the medical records support the opinions of Dr. Volarich. To the extent that Dr. Volarich and Dr. Parmet disagree, I find the independent medical opinion of Dr. Volarich more credible and persuasive. I also find the vocational opinion of Mr. Swearingin more credible and persuasive in this case, for the reasons discussed below.

CONCLUSIONS OF LAW

A claimant in a workers' compensation proceeding has the burden of proving all elements of a claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 911 (Mo. App. E.D. 2008). When a claimant has alleged permanent total disability, he must prove his inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident. § 287.020.6 RSMo Cum. Supp. 2005.³ In determining whether Claimant can return to employment, Missouri law allows consideration of an employee's age, education, along with physical abilities. *BAXI v. United Technologies Automotive*, 956 S.W.2d 340 (Mo. App. E.D. 1997). The central question is whether, in the ordinary course of business, would an employer reasonably be expected to hire Claimant in his physical condition. *Ransburg v. Great Plains Drilling*, 22 S.W.3d 726, 732 (Mo. App. W.D. 2000), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.2d 220 (Mo. banc 2003).

2006 Injury

Claimant has a limited education and no GED. He has limited math, reading, and spelling skills. Irrespective of whether he had dyslexia, he has below normal I.Q. It is evident that Claimant cannot compete on the open labor market for the jobs identified by Mr. Cordray because Claimant is unable to make change or even feel the difference between the coins in his pocket. He cannot complete reports. He does not know how to run a computer. He is unable to work in housekeeping or janitorial service because he has to be careful about exposures to chemicals. While he can function adequately in his home, where he can control his environment, he no longer can function in his chosen occupation or in any of his past jobs. Quite persuasive is the testimony of Claimant's brother-in-law who had hired Claimant to work with him in his bakery many years ago. Mr. Vucovich said even then he would not have allowed Claimant to work the cash register, but now Mr. Vucovich would not even have him around food given the appearance of Claimant's hand. This clearly counters Mr. Cordray's opinion that Claimant could work in food service. Mr. Cordray also suggested that Claimant could work as a locksmith or in small engine repair, but he conceded he did not know if chemicals were used in those occupations.

Given all of the facts of this case, and seriously considering all of the employment opportunities that may be available in the Branson area, I conclude that Claimant is not employable in the open labor market. He is permanently and totally disabled from the May 9, 2006 injury, alone. His

³ The date of the first injury is alleged to have occurred in May 2006, after the 2005 amendments to the Workers' Compensation Law. All future references to statutory provisions in this Award are to the Missouri statutes in effect at the time of the alleged injuries.

permanent total disability is as a direct result of the chemical exposure and injuries to his right hand and body as a whole on May 9, 2006.

Disfigurement

Section 287.190.4 RSMo, provides that if an employee is seriously and permanently disfigured about the head, neck, or arms, the Division may allow up to 40 weeks of disability for the disfigurement. At the time of the hearing, not having an opportunity to review all of the evidence, I advised the parties that Claimant's disfigurement would be equal to 10 weeks of disability. Now, having completed a review of the entire record and having concluded that Claimant is permanently and totally disabled, Claimant, by law, is not entitled to an additional amount for disfigurement. *See Akers v. Warson Garden Apartments*, 961 S.W.2d 50, 57-58 (Mo. 1998) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003) (holding that an additional amount for disfigurement may be awarded only when disability is partial in degree).

Future Medical Treatment

Section 287.140 RSMo, requires that an employer provide medical care that would cure or relieve the effects of the work injury. Dr. Parmet's testimony established that Claimant required over-the-counter emollients for the permanent condition of his hands. He conceded that Claimant would benefit from appointments with a dermatologist should he have bacterial infections, but it is not clear whether Dr. Parmet related this latter recommendation to the work injury. Dr. Volarich also recommended over-the-counter anti-inflammatories and cortisone medications. The medical records also suggest that Claimant had the potential for a recurrent trigger phenomenon, requiring additional treatment. There is substantial and competent evidence to support the conclusion that Claimant will need future medical treatment to treat and alleviate the injuries that he sustained from the May 9, 2006 injury. Employer/Insurer shall provide such future medical treatment as is required to cure and relieve the effects of the work-related injury.

Liability of the Second Injury Fund

The Second Injury Fund is triggered only when an employee has a preexisting permanent partial disability, whether from a compensable injury or otherwise. § 287.220.1 RSMo 2000. Neither physician identified any preexisting permanent partial disability that posed a hindrance or obstacle to employment or reemployment. In any event, Claimant is permanently and totally disabled from the May 9, 2006 injury, alone. Therefore, the Second Injury Fund has no liability.

2007 Alleged Injury

There is no evidence supporting the contention that Claimant suffered a separate injury on or about July 16, 2007. Even assuming that the date of the alleged injury should have been recited on the Claim for Compensation as July 16, 2006, it is clear that Claimant did not suffer a new injury, but had a flare-up of the May 9, 2006 injury. Claimant has failed to sustain his burden that he suffered a new injury on July 16, 2007. Therefore, compensation is denied on that basis, and all other issues relating to the alleged July 16, 2007 injury are moot.

Summary

Beginning January 22, 2007, and continuing for the remainder of Claimant's lifetime, Employer/Insurer shall pay to Claimant the weekly sum of \$485.01, for permanent total disability arising from the work-related injuries Claimant sustained on or about May 9, 2006.

Employer/Insurer shall provide future medical care to Claimant to cure or relieve the effects of the work injury that occurred on or about May 9, 2006.

As Claimant failed to prove a new injury or disability stemming from July 16, 2007, no benefits are awarded in conjunction with Injury No. 07-135626.

The Second Injury Fund has no liability with respect to Injury No. 07-135626. The Second Injury Fund also has no liability with respect to Injury No. 06-045414.

Attorney John Newman shall have a lien of 25 percent of all amounts awarded as a reasonable fee for necessary legal services rendered to Claimant.

Made by: /s/ Victorine R. Mahon
Victorine R. Mahon
Administrative Law Judge
Division of Workers' Compensation