

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

Injury No.: 08-071969

Employee: Robert Luster
Employer: Robert Luster (Settled)
Insurer: Missouri Employers Mutual (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, 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 with this supplemental opinion.

The Second Injury Fund argues that employee's bilateral carpal tunnel syndrome does not qualify as "a subsequent compensable injury" for purposes of triggering Second Injury Fund liability under § 287.220.1 RSMo, because "injury" as defined in § 287.020.3 RSMo excludes occupational diseases.

We offer this supplemental opinion to note that we have addressed and rejected an identical argument from the Fund in a number of prior decisions. See, e.g., *Kathleen Peters*, Injury No. 07-114673 (LIRC, March 8, 2012); *Kelly Kirkpatrick*, Injury No. 09-071622 (LIRC, March 8, 2012); *Stephen Green*, Injury No. 07-129027 (LIRC, March 8, 2012); *Michelle Kitson*, Injury No. 09-000988 (LIRC March 8, 2012); *Gloria Stiers*, Injury No. 08-095300 (LIRC March 8, 2012); and *Kevin Hundelt*, Injury No. 09-044470 (LIRC April 16, 2012). The parties are referred to those decisions for our analysis and reasoning pertinent to this argument from the Fund.

We also note that the Western and Eastern Districts of the Missouri Court of Appeals have recently affirmed decisions from the Commission rejecting the same argument advanced by the Fund herein. See *Treasurer of Mo. v. Stiers.*, WD75101 (Oct. 9, 2012), and *Peters v. Treasurer of Mo. As Custodian of Second Injury Fund*, ED98300 (Nov. 6, 2012).

Conclusion

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

The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued February 21, 2012, is attached and incorporated by this reference.

Employee: Robert Luster

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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.

Given at Jefferson City, State of Missouri, this 26th day of November 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee:	Robert Luster	Injury No.: 08-071969
Dependents:	N/A	Before the
Employer:	Robert Luster	Division of Workers' Compensation
Additional Party	Second Injury Fund	Department of Labor and Industrial Relations Of Missouri
Insurer:	Missouri Employers' Mutual	Jefferson City, Missouri
Hearing Date:	November 15, 2011	Checked by: KOB

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: July 1, 2008
5. State location where accident occurred or occupational disease was contracted: Saint Louis, Missouri
6. Was above employee in employ of above employer at time of alleged 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 an occupational disease through repetitive use of his wrists.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: bilateral wrists
14. Nature and extent of any permanent disability: 17.5% of the bilateral wrists
15. Compensation paid to-date for temporary disability: \$1,139.09
16. Value necessary medical aid paid to date by employer/insurer? \$15,248.00

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- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$175.93
- 19. Weekly compensation rate: \$117.29 for PPD
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:

Employer previously settled its risk of liability.

22. Second Injury Fund liability: Yes

20.125 weeks of permanent partial disability from Second Injury Fund	\$2,360.46
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TOTAL:	\$2,360.46
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23. Future requirements awarded: None

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

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Robert Luster	Injury No.: 08-071969
Dependents:	N/A	Before the
Employer:	Robert Luster	Division of Workers' Compensation
Additional Party	Second Injury Fund	Department of Labor and Industrial Relations Of Missouri
Insurer:	Missouri Employers' Mutual	Jefferson City, Missouri
Hearing Date:	November 15, 2011	Checked by: KOB

PRELIMINARIES

The matter of Robert Luster ("Claimant") proceeded to hearing to determine the liability of the Second Injury Fund. Attorney Kerry O'Sullivan represented Claimant. Assistant Attorney General Kristin Frazier represented the Second Injury Fund. Claimant, who was self-employed, resolved his primary claim with Missouri Employers Mutual Insurance ("Insurer").

The parties stipulated that on July 1, 2008, Claimant sustained an occupational disease arising out of and in the course of his work. Employment, venue, notice and timeliness of the claim were established by stipulation. The parties stipulated Claimant earned an average weekly wage of \$175.93, and that the temporary total disability ("TTD") and permanent partial disability ("PPD") rate is \$117.29. Insurer paid \$1,139.09 in TTD and \$15,248.00 in medical benefits. The parties further agreed that in exchange for the Second Injury Fund agreeing to the admission of Dr. Schlafly's report, Claimant would stipulate that the PPD of each wrist does not exceed 17.5% PPD of each wrist. The parties also stipulated Claimant's prior disability is 100% PPD of the right eye.

Claimant testified at trial and offered the following exhibits: Settlement Stipulation for the July 1, 2008 date of injury against the Employer/Insurer, Medical Records from Medex, Report of Dr. Bruce Schlafly, Medical Records of ProRehab, Medical Records of Dr. Evan Crandall. The Second Injury Fund offered no additional evidence.

The sole issue is the liability of the Second Injury Fund. The Second Injury Fund has raised as a defense the argument that Claimant's occupational disease of the bilateral wrists is not a "compensable injury" that triggers Second Injury Fund liability under §287.220.

FINDINGS OF FACT

Claimant has been employed as a maintenance man for 28 years. His job, maintaining 95 condominium units at Golfview on the Green, required him to prune trees, perform electrical work, change light bulbs, take care of the garbage, climb ladders, and make all sorts of repairs.

On July 1, 2008, Claimant developed an occupational disease arising out of his work activities as a maintenance man. He had experienced symptoms of numbness. Dr. Evan Crandall, the authorized treating physician, performed bilateral carpal tunnel release surgeries in September and October of 2008. Dr. Crandall released Claimant to return to work full duty on November 25, 2008, and released him from care at maximum medical improvement (“MMI”) on May 7, 2009.

Claimant still has tingling, numbness and difficulty holding cups. He has difficulty lifting. A former Marine, Claimant can no longer hold his own weight to do a push-up. He has lost money because he cannot feel the coins. Claimant can no longer drive, and has difficulty cooking and using heavy skillets. Claimant settled with Insurer for 17.5% PPD each of the left and right wrists, plus a 10% load and two weeks of disfigurement. He has had to pay younger family members to help with his work to deal with the consequences of the carpal tunnel syndrome.

Claimant has a pre-existing disability of his right eye. He lost his entire right eyeball in the Vietnam War, and has no vision, including peripheral vision, on the right side. Claimant's February 10, 2009 examination report from MEDEX notes enucleation of the right eye and 100% loss of vision on the right side. He has a prosthetic eye that he can remove completely. He has to stretch his neck by turning his head very far to the right to be able to see with his left eye. Claimant testified that he compensated for his loss of vision in the right eye by using his sense of touch, but now he cannot feel anything.

Dr. Schlafly and Dr. Crandall both opined that Claimant's work activities were the prevailing factor in the cause of his bilateral carpal tunnel syndrome. Dr. Crandall opined Claimant has a disability rating of 10% PPD in each wrist. Dr. Schlafly gave Claimant a rating of 40% PPD to the left wrist and 25% PPD to the right wrist. Dr. Schlafly also opined that a condition of multiplicity exists which should be compensated by a loading factor.

RULINGS OF LAW

The Second Injury Fund raises a very precise and technical argument based on one of the major revisions to the Missouri Workers’ Compensation Law enacted in 2005, that of changing from a “liberal” construction to a “strict” construction, and the necessity of a compensable “injury” to trigger Second Injury Fund liability. For the reasons herein, I find the altered approach to statutory construction does not absolve the Second Injury Fund from liability in cases such as this, were the primary injury is an occupational disease.

Section 287.220 RSMo provides for Second Injury Fund liability when a worker with preexisting disability “receives a subsequent *compensable injury*.” The Second Injury Fund’s position is based on §287.020.3(5), which provides in relevant part, “the terms “injury” and “personal injuries” shall ... in no case except as specifically provided in this chapter be construed to include occupational disease in any form....” Strict construction means that a statute can be given no broader application than is warranted by its plain and unambiguous terms. *Robinson v. Hooker*, 323 S.W.3d 418, 423 (Mo.App. W.D.2010). A strict construction of a statute presumes nothing that is not expressed. *Id.* If “injury” cannot be construed to

include “occupational disease,” the Second Injury Fund argues the “compensable injury” that triggers its liability cannot be an occupational disease.

The flaw in the Second Injury Fund’s position is that it ignores seven key words: “except as specifically provided in this chapter.” Rules of statutory construction require a court to presume “that the legislature intended that every word, clause, sentence, and provision of a statute have effect,” and that “the legislature did not insert verbiage or superfluous language in a statute.” *State ex rel. KCP & L Greater Missouri Operations Co. v. Cook*, 353 S.W.3d 14, 32 (Mo.App. W.D. 2011)(citations omitted).

Chapter 287 is replete with provisions equating “occupational disease” and “injury.”¹ 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”. Because the term “compensable injury” can, and in this case does, include an occupational disease, the Second Injury Fund’s defense is without merit.

The court in *State ex rel. KCP & L Greater Missouri Operations Co. v. Cook*, 353 S.W.3d 14, 18 (Mo.App. W.D. 2011), recently demonstrated the significance of the qualifying language of §287.020.3. In *KCP & L*, the court held that the definition of “accident” in Chapter 287 did NOT include “occupational disease” for purposes of the application of the exclusivity provision of §287.120.² The court noted:

The 2005 amendments eliminated the qualifier that the statutory definition of “accident” applied “unless a different meaning is clearly indicated by the context.” In contrast, the 2005 legislature *retained* similar qualifying language in the definitions of an “injury” and an “occupational disease.”³ Id. at 23

The removal of the qualification from the definition of “accident” resulted in a single, narrow definition, whereas the retention of the qualifying language for “injury” and “occupational

¹ Other provisions include §287.420 (“No proceedings for compensation for any **occupational disease** or repetitive trauma under this chapter shall be maintained unless written notice of the time, place, and nature of the **injury**.”), §287.063.3 (“The statute of limitation referred to in section 287.430 shall not begin to run in cases of **occupational disease** until it becomes reasonably discoverable and apparent that an **injury** has been sustained related to such exposure”)

² The focus on the definition of “accident” and the application of the exclusivity provision distinguishes the *KCP & L* case from the case at hand, which turns on the definition of “injury” and the Second Injury Fund statute.

³ See § 287.020.3(5) (“The [] terms [‘injury’ or ‘personal injuries’] shall in no case *except as specifically provided in this chapter* be construed to include occupational disease in any form.” (emphasis added)); § 287.067.1 (“the term ‘occupational disease’ is hereby defined to mean, *unless a different meaning is clearly indicated by the context*, an identifiable disease arising with or without human fault out of and in the course of employment” (italics added)).

disease” indicates the legislature intended to maintain the established, broader definition of injury.

An injury by occupational disease that rises to a compensable level as against the employer, as was established here by stipulation, is a “compensable injury” for purposes of the Second Injury Fund.

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.

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

1. Claimant sustained a compensable last injury that resulted in permanent partial disability equivalent to 17 1/2 % of the each wrist (61.25 weeks).⁴
2. As of the time the last injury was sustained, Claimant had preexisting permanent partial disability equal to 100% of the right eye (140 weeks), which meets the statutory threshold and was of such seriousness as to constitute a hindrance or obstacle to employment or reemployment.
3. The credible evidence establishes that the last injury, combined with the pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. Claimant has significant ongoing complaints associated with these injuries. Claimant no longer drives, has difficulty holding onto things and has lost money because he cannot feel it going into or out of his pocket. Claimant compensated for his

⁴ Disfigurement is not included in the Second Injury Fund calculation.

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loss of vision on the right by using his sense of touch and now his sense of touch is greatly diminished. Claimant can no longer do pushups or lift any weight. Claimant delegates work.

4. The Second Injury Fund liability is calculated as follows: 61.25 weeks for last injury + 140 weeks for preexisting disability = 201.25 weeks x 10% = 20.125 weeks of overall greater disability.

CONCLUSION

The Second Injury Fund is liable to Claimant for \$2,360.46 in permanent partial disability benefits. Attorney for Claimant shall be entitled to an attorney fee of 25% of this award.

Dated this _____ day of February, 2012

Made by: _____

KARLA OGRODNIK BORESI
Administrative Law Judge
Division of Workers' Compensation