

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

Injury No.: 02-148680

Employee: Phil Maez

Employers: (1) Maez Engineering, LLC; (2) Anderson Construction Co.;
(3) Wildeck; (4) Siemens Dematic.

Insurer: (1) Uninsured; (2) Uninsured; (3) Sentry Insurance Co.; (4) Unknown

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

Date of Accident: October 17, 2002

Place and County of Accident: Kansas City, Jackson County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. We have reviewed the evidence, read the briefs of the parties, and considered the relevant portions of the record. Pursuant to section 286.090 RSMo, the Commission modifies the award and decision of the administrative law judge dated September 22, 2006.

I. Preliminary Matters

The issue on appeal is whether or not Second Injury Fund liability was placed in issue for the July 6 and 7, 2006, hearing in this matter and, if so whether or not the Second Injury Fund has any liability to employee.

The administrative law judge denied employee compensation from the Second Injury Fund because employee failed to specifically raise Second Injury Fund liability as an issue for the hearing. This was because Second Injury Fund liability was not listed separately in the parties stipulated issues.

Employee filed an Application for Review with the Commission alleging the administrative law judge erred by denying an award against the Second Injury Fund for permanent partial disability or, in the alternative, by failing to qualify the Award as a Partial Final Award given that the issue of SIF liability for permanent disability was not addressed.

The Commission, as discussed below, finds that Second Injury Fund liability was placed in issue for the hearing, and furthermore, that employee is entitled to permanent partial disability benefits from the Second Injury Fund. Consequently, that part of the administrative law judge's award denying employee Second Injury Fund benefits is reversed.

II. Second Injury Fund Liability: General Principles of Law

In a workers' compensation proceeding, the employee has the burden to prove by a preponderance of credible evidence all material elements of his claim, including Second Injury Fund liability. *Meilves v. Morris*, 422 S.W.2d 335, 339 (Mo. 1968). The employee must prove the nature and extent of any disability by a reasonable degree of certainty. *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo.App. 1995).

Section 287.220 RSMo provides that in a case of permanent partial disability under section 287.220 RSMo, there must be a finding that there was a pre-existing permanent disability that was a hindrance or obstacle to employment or re-employment.

In considering Second Injury Fund liability, and paraphrasing the language of the Missouri Court of Appeals, Eastern District, in the case of *Messex v. Sachs Electric Company*, 989 S.W.2d 206, 214 (Mo.App. E.D. 1999), the Commission must decide if there is competent and substantial evidence of a preexisting disability and if there is a failure of proof, any claim against the fund must fail. As succinctly stated by the court at pages 214 and 215:

“When a claim is made against the Fund for permanent disability compensation, statutory language and case law make it mandatory that the claimant provide evidence to support a finding, among other elements, that he had a preexisting permanent ‘disability’. Section 287.220.1; *Leutzinger v. Treasurer of Missouri, Custodian of Second Injury Fund*, 895 S.W.2d 591 (Mo.App. E.D.1995) (emphasis added). The disability, whether known or unknown, must exist at the time the work-related injury was sustained and be of such seriousness as to constitute a hindrance or obstacle to employment or re-employment should the employee become unemployed. *Id.*; *Garcia v. St. Louis County*, 916 S.W.2d 263, 266 (Mo.App. E.D.1995).

. . . Fund liability is only triggered by a finding of the presence of an actual and measurable disability at the time the work injury is sustained.”

III. Findings of Fact and Conclusions of Law

In both his March 10, 2003, original Claim for Compensation and his February 14, 2005, Amended Claim for Compensation, employee asserted a claim against the Second Injury Fund based on injuries to his neck and right arm that occurred prior to the work accident on October 17, 2002. Additionally, one of the stipulated issues at the hearing was “the nature and extent of the disability sustained by the Employee.” One category of Second Injury Fund liability is permanent disability. RSMo. 287.220. The afore-quoted issue does not restrict the disability determination to employer’s liability.

At the hearing, employee presented evidence regarding his prior disabilities. The Second Injury Fund made no objection to the presentation of this evidence. Employee also offered the deposition testimony of his medical expert Dr. Koprivica. Dr. Koprivica testified at his deposition as to employee’s primary work injury and prior disabilities. He assigned ratings to all of these injuries and disabilities, including the combination effect of them, and assigned an enhancement value of 20%. The Second Injury Fund did not object to the introduction of this evidence.

Based upon the foregoing the Commission concludes that Second Injury Fund liability was an issue at the hearing. Therefore, we will next look to see if the Second Injury Fund is liable to employee for benefits.

The only expert medical evidence in the record regarding employee’s prior disabilities is that of Dr. Koprivica. Dr. Koprivica assigned preexisting disability ratings of 25% of the body as a whole referable to employee’s neck and 15% for a prior right elbow fracture at the 210 week level. He testified that employee sustained a 30% permanent partial disability of his left elbow at the 210 week level. Dr. Koprivica further testified that the combination of employee’s work injury and prior disabilities further enhanced employee’s overall disability by 20%. Based upon this evidence, employee is entitled to 38.9 weeks of permanent partial disability from the Second Injury Fund.^[1]

IV. Conclusion

The Commission determines and concludes that Second Injury Fund liability was properly placed in issue for the hearing on July 6 and 7, 2006. The Commission further finds that the Second Injury Fund is liable to employee for 38.9 weeks of permanent partial disability benefits as a result of the combination of his primary work injury and preexisting injuries.

The portion of the administrative law judge’s September 22, 2006, award and decision denying benefits to employee against the Second Injury Fund is reversed; employee is entitled to 38.9 weeks of permanent partial disability compensation from the Second Injury Fund based on the synergistic effect of the combination of his primary injury and preexisting disabilities. In all other respects, the award and decision of the administrative law judge is affirmed.

The award and decision of Administrative Law Judge Kenneth Cain, issued September 22, 2006, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

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 19th day of July 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

11 25% x 400 = 100 weeks
+ 15 % x 210 = 31.5 weeks
+ 30% x 210 = 63 weeks
194.5 weeks x 20% = 38.9 weeks

AWARD

Employee: Phil Maez

Injury No. 02-148680

Dependents: N/A

Employer: Alleged: (1) Maez Engineering, LLC; (2) Anderson Construction Company;
(3) Wildeck; (4) Siemens Dematic.

Insurer: (1) Uninsured; (2) Uninsured; (3) Sentry Insurance Co.; (4) Unknown.

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

Hearing Date: July 6 and July 7, 2006

Briefs: Initial briefs filed August 6, 2006; subsequent suggestions filed. Checked by: KJC/dc

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: October 17, 2002.
5. State location where accident occurred or occupational disease was contracted: Kansas City, Jackson County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee, while in the course and scope of his employment as a self-employed consultant/construction laborer for Maez Engineering, LLC, sustained an accident when he fell 15 feet from a mezzanine under construction. He was working as a subcontractor for Anderson Construction Company, which was a subcontractor for Wildeck when the accident occurred.
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: left elbow, forearm, hand and upper extremity.
14. Nature and extent of any permanent disability: Complex laceration of the flexor compartment of the left forearm, chronic bursitis of the left elbow, and complex injuries requiring surgical repair of the left thumb, left index, left little and ring fingers of the left hand.
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? \$38,048.77
18. Employee's average weekly wages: \$464.24
19. Weekly compensation rate: \$309.49 per week.
20. Method of wages computation: §287.250.

COMPENSATION PAYABLE

21. Amount of compensation payable:
unpaid medical expenses: \$38,048.77
18 weeks for temporary total disability @ 309.49 per week = \$5,570.82.
63 weeks of permanent partial disability from employer at \$309.49 per week = \$19,497.87
6 weeks of disfigurement at \$309.49 per week = \$1,856.94.
N/A permanent total disability benefits from Employer

22. Second Injury Fund liability: None

TOTAL: \$64,974.40

23. Future requirements awarded: None.

Said payments to begin as of date of the award and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the Claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of the following attorney for reasonable and necessary legal services rendered to the Claimant: Mr. Randy Alberhasky.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Phil Maez

Injury No: 02-148680

Dependents: N/A

Employer: (1) Maez Engineering, LLC; (2) Anderson Construction Co.; (3) Wildeck;
(4) Siemens-Dematic

Insurer: (1) Uninsured; (2) Uninsured; (3) Sentry; (4) Unknown

Additional Party: State Treasurer as Custodian of Second Injury Fund

Hearing Date: July 6 and July 7, 2006

Briefs: Initial briefs filed August 6, 2006, suggestions filed later

Checked by: KJC/dc

Notice of the hearing set for July 6, 2006, was sent to all the parties at the last known addresses. The alleged Employer, Anderson Construction Company, failed to appear at the hearing. The notice was sent by certified mail. Thus, Anderson Construction Company was in default.

The remaining parties appeared at the hearing and entered into various admissions and stipulations. The remaining

issues were as follows:

1. Employee/Employer relationship;
2. Whether the alleged Employee was working for Maez Engineering, LLC, at the time of the accident and whether the accident arose out of and in the course and scope of the alleged Employee's employment with Maez Engineering, LLC;
3. Whether Anderson Construction Company was an employer or a statutory employer of the alleged Employee;
4. Whether Wildeck was an employer or statutory employer of the alleged Employee;
5. Whether Siemens-Dematic was an employer or statutory employer of the alleged Employee;
6. Whether the alleged Employee sustained an accident within the meaning of the Workers' Compensation Act;
7. Whether the alleged Employee provided notice of the accident as required by law;
8. Whether the claim for compensation was filed within the time prescribed by law as to all parties;
9. The compensation rate;
10. Liability for 18 weeks of past temporary total disability benefits in the amount of \$5,608;
11. Liability for \$38,048.77 in past medical aid;
12. The nature and extent of the disability sustained by the Employee;
13. Liability of the State Treasurer as Custodian of the Second Injury Fund for compensation due to the alleged Employer's failure to insure or self-insure;
14. Whether the alleged Employee sustained any disfigurement as a result of the injury;
15. Whether there may be a 15 percent reduction in benefits owed to the alleged Employee due to the alleged Employer's alleged violation of a safety policy;
16. Whether there may be a 15 percent increase in benefits due to the alleged Employers'

violation of a state safety statute;

17. Whether the alleged Employee is entitled to any benefits due to a violation of the alleged Employers' drug policy; and

18. Whether the medical treatment received by the alleged Employee was authorized.

In addition, North Kansas City Hospital, a health-care provider, filed a direct pay medical fee dispute claiming that \$25,187.23 was owed for services rendered. North Kansas City Hospital did not participate in the hearing.

At the hearing, Mr. Phil Maez (hereinafter referred to as Claimant) testified that he was 45-years old. He stated that he had been married for 23 years and that his education consisted of some college. He stated that he now worked for an electrical company. He stated that his prior jobs were for Anderson Construction Company, the postal service and in the construction and remodeling fields.

Claimant testified that Anderson Construction Company built mezzanines. He stated that his salary at the company was \$15 per hour and that he was reimbursed for travel and expenses. He stated that on one occasion he was fired for fighting, but later rehired. He also stated that while employed by Anderson Construction Company, he did an occasional job for Mr. Anderson's son.

Claimant testified that he later became a construction supervisor for Mr. Anderson. He stated that although Mr. Anderson provided the tools used on the job, he used his own wrenches, hammers and hand tools. He stated that Mr. Anderson eventually asked him to form Maez Engineering, LLC. He stated that the Maez Company had no employees and that he was the only officer.

Claimant testified that Wildeck manufactured and sold the mezzanines built by Anderson Construction Company. He stated that Wildeck provided the materials and the blueprints used to build the mezzanines. He stated that Wildeck had to approve any modifications to the original specifications.

Claimant testified that Wildeck required daily progress calls. He stated that Russ Hanson, an employee at Wildeck, made personal visits to the larger job sites. He stated that Wildeck's engineers were contacted if Mr. Hanson could not solve a problem. He stated that on a couple of occasions, Mr. Hanson had Anderson Construction Company fire employees.

Claimant testified that Mr. Anderson also came to the job sites and required progress reports. He stated that Mr. Anderson hired Maez Engineering, LLC, to do only one job, which was in Memphis, Tennessee. He stated that the Memphis job was the only one in which Maez Engineering, LLC ever received a check from Wildeck. He stated that Maez Engineering, LLC, never bid for a job with Wildeck. He stated that Wildeck once hired him personally as a consultant on one job.

Claimant testified that he did not receive any training from Wildeck. He stated that Mr. Anderson provided on-the-job training. He stated that either Mr. Hanson or Mr. Anderson told them when to start and stop working. He stated that most jobs had a start and finish date. He stated that he did not have authority to set his own hours.

Claimant testified that Mr. Anderson bought him a truck to use on the job. He stated that the truck was purchased in his name, because Mr. Anderson could not get financing. He stated that his pay from Mr. Anderson was by check or wire and that he sometimes wrote his own checks on Mr. Anderson's account. He stated that he was not sure if the checks were paid to him in his own name or in the name of Maez Engineering, LLC. He stated that he did not get W-2s or 1099s from

Mr. Anderson.

Claimant testified that either he or Mr. Anderson would hire temporary workers to do the jobs. He stated that neither Maez Engineering, LLC, nor Anderson Construction Company had workers' compensation insurance. He stated, however, that Mr. Anderson purchased liability insurance for Maez Engineering, LLC.

Claimant also testified that prior to the 2002 accident, he had sustained an injury while working for Mr. Anderson. He stated that Mr. Anderson had insurance at that time. He stated that he received a workers' compensation settlement for his injuries.

Claimant testified that his last injury while working for Mr. Anderson occurred on October 17, 2002, on a job at the Grainger Company. He stated that Mr. Anderson told him to go to the job. He stated that he did not bid on the job. He stated that he did not discuss his pay with Mr. Anderson prior to any job. He stated that his pay was the same for the eight years he worked for Mr. Anderson.

Claimant indicated that Siemens-Dematic had purchased the mezzanine for the Grainger job. He stated that Siemens was in the business of buying mezzanines. He stated that after the mezzanine was delivered to the Grainger site, he contacted Mr. Hanson at Wildeck and reported that the kick plate, which held the steel in place, was missing. He stated that both Mr. Hanson and Mr. Anderson told him to build the mezzanine without the missing part.

Claimant testified that his injury occurred when he was on top of the mezzanine and two panels separated due to the absence of the kick plate. He stated that he fell about 15 feet to the floor below. He stated that his arm was cut open during the fall. He stated that he experienced immediate pain. He stated that he had difficulty in breathing. He stated that he was taken to the hospital by ambulance.

Claimant testified he was given pain pills at the hospital. He stated that afterwards he experienced "piercing" pain in his arm for a couple of months. He stated that he was in bed most of the time trying to allow his ribs to heal. He stated that his wife had to help him wash and go to the restroom.

Claimant testified that neither Mr. Anderson nor anyone at Wildeck ever directed him to any medical treatment. He stated that Mr. Anderson told him not to worry about the bills. He also stated that his job for Mr. Anderson was physically demanding and required him to work with materials and equipment weighing up to 700 pounds. He stated that he was released to return to work on February 28, 2003. He stated that he was physically unable to work from October 17, 2002 until the date he was released.

Claimant testified that he still experienced problems due to his injuries. He stated that he wakes up at night in pain. He stated that he hates people due to his anger. He alleged dexterity problems. He stated that he dropped things. He stated that he no longer trusted his left arm. He stated that his fingertips and especially his ring finger were sensitive. He stated that overhead work was difficult.

Claimant testified that the accident resulted in scars on his left elbow and hand. The scar on his elbow was approximately eight inches long and one half to three-quarters inches wide. The scars on his thumb and index finger were about one half to one inch long. He also had some disfigurement on the nail and inner portion of his ring finger.

Claimant testified that prior to his injury at Grainger, he had broken his right arm and injured his ribs in a job-related accident in Texas. He stated that he still experienced pain in his right elbow. He also stated that he had "broken" his neck on three occasions at work. He stated that he missed a year and a half from work the first time. He complained of a limited range of motion in his neck and some paralysis.

Finally, Claimant identified various exhibits admitted into evidence. He stated that he never signed a contract with Wildeck or Anderson Construction concerning the building of the mezzanines. He stated that Exhibit J contained the subcontract agreement between Anderson Construction Company and Wildeck on the Grainger job. He stated that neither he nor Maez Engineering, LLC ever received any pay for work done on that job. He stated that all the income he earned in 2002 was from Anderson Construction Company. He admitted that Maez Engineering, LLC, had its own fax number.

On cross-examination by Maez Engineering, LLC, Claimant testified that the company never bid on a job or signed any contracts with Wildeck. He stated that Maez Engineering, LLC, never furnished him with any equipment, tools, instructions or directions on how to do the jobs. He stated that the company never set his work hours.

Claimant testified that Maez Engineering, LLC had no employees. He stated that he was not paid a set or fixed figure. He stated that he had worked for Anderson Construction for several years prior to the formation of Maez Engineering in the late 1990s. He stated that his job duties, rate of pay and working relationship with Mr. Anderson did not change after the formation of Maez Engineering.

On cross-examination by the Second Injury Fund, Claimant admitted that he occasionally smoked marijuana. He stated that he did not know what opiates were when advised that the medical records from his date of injury showed that he had tested positive for marijuana and opiates.

Claimant indicated that Mr. Anderson asked him to form Maez Engineering as a bidding tool. He related that Wildeck awarded bids based on geography. He stated that Anderson Construction was located in Florida and Maez Engineering in Missouri.

Claimant testified that he did not bid on any jobs. He admitted that Maez Engineering sometimes billed Anderson Construction Company. He admitted that he filed his taxes as being self-employed. He admitted that he listed Maez Engineering on his tax forms as the name of his employer. He stated that his wife did his taxes and that he had no knowledge in that area.

Claimant admitted that he took various deductions and depreciation in his taxes. He admitted that he depreciated tools, a truck, a trailer, two-way radios and a computer and that he deducted over \$20,000 from his earnings for meals, hotels and travel expenses.

Claimant reiterated that he had only worked under the name Maez Engineering on the Tennessee job referred to earlier. Later, he acknowledged that one of the exhibits showed that Maez Engineering, LLC had billed Anderson Construction Company for work on a project in Illinois. He acknowledged that another exhibit showed that Maez Engineering had billed Anderson Construction for work done at a Gap plant, which was not in Illinois or Tennessee. He admitted that Maez Engineering had billed Anderson Construction for \$4,300 on one occasion for reimbursement for tools. He admitted that Maez Engineering had its own checking account. He admitted that Maez Engineering had deposited checks from Anderson Construction in the checking account.

The same attorney represented Wildeck and Siemens-Dematic. On cross-examination by Wildeck and Siemens-Dematic, Claimant acknowledged that the ambulance records from the day of his injury at work showed that his employer was listed as Maez Engineering, LLC. He admitted that he was the only person at the Grainger plant who knew anything about Maez Engineering. He admitted that Maez-Engineering was listed as the guarantor on the hospital bills.

Claimant again admitted that hospital records noted marijuana and opiates in his system. He admitted that the hospital records stated that he was not on any medication at the time the blood samples for the drug testing were obtained. He stated, however that he understood that the hospital had provided him with morphine.

Claimant acknowledged that the Missouri Secretary of State's office's records showed that as of July 2006, Maez

Engineering, LLC was still in active status. He admitted that he had hired an attorney to defend the company in his workers' compensation case.

Claimant admitted that all of his employers other than the alleged employer, Anderson Construction Company, had provided him W-2 tax forms. He stated that the only company Maez Engineering, LLC, ever billed for services was Anderson Construction Company. Next, he was confronted with a bill from Maez Engineering to a Dean Anderson Construction Company for services rendered. He was confronted with a bill from Maez Engineering to Wildeck for work done in Oklahoma. He was also confronted with seven other bills from Maez Engineering to Wildeck for services rendered. He admitted that the bills to Wildeck stated that Maez Engineering was a subcontractor.

Claimant was confronted with one bill, which stated that Maez Engineering was to pay 10 percent of the contract price to Anderson Construction Company. When asked why an alleged employee had to pay his alleged employer 10 percent of a contract price, Claimant responded that the payment had nothing to do with Anderson Construction Company referring business to Maez Engineering. He also acknowledged that all the bills contained his name as the installer/owner of Maez Engineering.

Claimant admitted that one document showed that Maez Engineering was to provide a certificate of insurance to Wildeck. He admitted that one document stated that Maez Engineering was to indemnify and hold harmless Wildeck for any work done under the contract.

Claimant admitted that one job's profitability statement showed that Maez Engineering had a net loss of \$1,896.04 for work done on a project. When asked how an employee could have a net loss on a job, he stated that he never experienced a loss.

Next, Claimant testified that Maez Engineering, LLC, did not pay wages to anyone. He was then confronted with documents showing that Maez Engineering had made 20 or more payments to his wife, plus payments to his daughters, Danielle and Nicole, and to Chris Tohak and David Rivera. He admitted that records showed that Maez Engineering had provided 1099 tax forms to both Mr. Tohak and Mr. Rivera.

Claimant admitted that Maez Engineering, LLC's, profit and loss statement showed that the company had listed finance charges for various tools as a loss. He admitted that the company listed the truck allegedly paid for by Mr. Anderson as a loss for tax purposes. He admitted that Maez Engineering had purchased liability insurance.

Claimant admitted that subsequent to his fall at work in October 2002, Maez Engineering continued to receive payments. He stated that subsequent to his fall at work, his wife received a \$3,000 and two \$6,000 payments by checks from Maez Engineering and that his daughter received a \$15 payment.

On redirect examination, Claimant testified that on the day of the accident, he was "pretty drugged up" when he got to the hospital. He stated that Wildeck never provided any safety equipment to use on the jobs. He stated that Anderson Construction Company did not provide safety equipment for the Grainger job. He also stated that he never obtained a Wildeck job without Mr. Anderson's involvement.

Ms. Diana Maez, Claimant's wife, testified at the hearing on Claimant's behalf. She stated that she was taking college courses towards a degree. She stated that she worked in the accounting field.

Ms. Maez testified that in her job with an accounting firm, she prepared financial statements and helped with payroll and sales tax returns. She stated that she kept the records for Maez Engineering, LLC. She denied being an employee. She stated that Mr. Anderson advised them to create an LLC to protect their personal assets. She did not explain why or how an LLC was needed to protect an alleged employee's assets.

Ms. Maez testified that the company had no payroll expenses. She stated that any checks written to her or her husband or their daughters were “draws” on the company. She never explained what she meant by “draws” on the company.

Ms. Maez admitted that Maez Engineering, LLC, had issued 1099s. She stated that the company was writing checks to subcontractors and that someone had to issue a 1099 to make sure that the income was reported. She never explained why her husband’s company was writing checks to subcontractors if her husband was merely an employee of another company as alleged. She stated that Maez Engineering, LLC, never gave out W-2s or withheld employment taxes.

Ms. Maez acknowledged that one invoice stated that Maez Engineering was to pay 10 percent to Anderson Construction Company. She stated that if a job were billed to Wildeck and if Mr. Anderson told them that they had to pay him 10 percent of the contract price, they paid the 10 percent. She stated that it did not happen very often and that she could not recall any other such instances.

Ms. Maez testified that she prepared the 2002 income tax return for Maez Engineering, LLC. She stated that the income tax form showed that the company had a net profit of \$19,628 after she used the deductions and depreciation.

On cross-examination by Wildeck and Siemens, Ms. Maez testified that she had worked for the accounting firm for 12 years. She stated that she did bookkeeping and financial statements and worked with payroll taxes, W-2 tax forms and federal taxes in her job. She stated that although Claimant’s alleged employer reimbursed him for mileage, she still claimed mileage as a tax deduction in filing his tax returns. She stated that her employer reimbursed her for mileage and that she did not claim mileage for tax purposes in computing her taxable earnings.

Ms. Maez testified that she did not know if she had properly claimed depreciation for tools and equipment in computing Claimant’s tax returns. She admitted that in the profit and loss statement for Maez Engineering for the year 2001, she showed profits at over \$19,000, but claimed only \$17,337 as profits in the tax returns. She admitted that she claimed a deduction based on mileage for the Toyota truck, which she stated that Mr. Anderson bought.

Finally, Ms. Maez was asked whether she considered it unusual that Claimant as an alleged employee of Anderson Construction Company never received a W-2. She did not answer the question, but instead responded that Mr. Anderson never provided a W-2.

Claimant also offered into evidence the deposition testimony of two fact witnesses. Mr. Paul Mihelich, a sales manager for Wildeck, testified by deposition on November 6, 2003, that Wildeck sold mezzanines and then hired subcontractors to do the installation work if the customer did not choose to do its own construction or hire the work out. He stated that he replaced Russ Hanson at Wildeck.

Mr. Mihelich testified that Siemens-Dematic was one of Wildeck’s hundreds of distributors. He stated that many distributors did their own installation work. He stated that if the installation was contracted to Wildeck, the distributor had very little involvement and that Wildeck would hire a subcontractor to do the actual installation work. He stated that after the mezzanine was constructed, the distributor would usually install a conveyor.

Mr. Mihelich admitted that Wildeck required contractors to make a daily progress report. He stated that Wildeck did not control whom or how many employees the contractor hired to do the work. He stated that Wildeck did not control the work hours or schedules. He admitted that some jobs had a deadline.

Mr. Mihelich testified that Wildeck considered geography, price and past experience in deciding which contractor to use on a project. He stated that Wildeck never used its own employees to do the installation work. He stated that on the Grainger project in Kansas City, Siemens had no control over the subcontractors Wildeck hired to do the installation.

Mr. Mihelich testified that Anderson Construction did installation work for Wildeck for about 10 years. He stated that the relationship had terminated about six months earlier over what he believed were financial issues. He stated that Siemens purchased the mezzanine for the Grainger project and contracted with Wildeck to install it. He stated that Wildeck then hired Anderson Construction to do the actual installation.

Finally, Mr. Mihelich indicated that he was not personally involved with the Grainger project. He also stated that Wildeck did not hire Maez Engineering, LLC, as a subcontractor on the Grainger project.

Mr. Russ Hanson testified by deposition on January 26, 2005. Claimant offered the deposition into evidence. The direct examination of Mr. Hanson, however, was by his former employer, Wildeck. Mr. Hanson testified that he had worked as the installation manager for Wildeck and that he now worked for a construction company.

Mr. Hanson testified that Claimant “ran” jobs for Anderson Construction Company and for himself under the name Maez Engineering. He stated that in his job at Wildeck he hired subcontractors to build the mezzanines. He stated that although Wildeck occasionally did some training of the contractors on how to build the mezzanines, the training was not required and that he had no knowledge as to whether Claimant ever participated in any of the training.

Mr. Hanson testified that he initially met Claimant when Mr. Anderson introduced them and stated that “Phil is one of my, you know, my lead guys, you know, and he’s going to be around for a while.” He stated that Wildeck only participated in the construction of maybe four of every 30 mezzanines sold to customers. He stated that the contractor had control over the number of employees hired to do the work, although Wildeck for safety concerns would not allow the contractor to do the work alone.

Mr. Hanson denied that a contractor had to make daily progress reports. He stated that Wildeck paid the contractor on the job and never a worker individually. He stated that Wildeck might have paid Maez Engineering, but not Claimant individually. He stated that any payments made to Maez Engineering were due to a successful bid on a contract.

Finally, Mr. Hanson testified that he believed that Anderson Construction was the contractor on the Grainger job and that Claimant was working for Mr. Anderson. He stated that after Claimant’s injury, Wildeck sent another person to finish the job.

On cross-examination by Claimant, Mr. Hanson testified that he believed that he had contracted with Maez Engineering twice to do installation work. He admitted that he could get a contractor to fire a worker, because the contractor did not want to jeopardize the relationship with Wildeck. He admitted that he became angry with Claimant after the accident, when he heard that Claimant’s own actions had contributed to the injury. He stated that after the accident he spoke with Mr. Anderson about insurance and that Mr. Anderson told him that he had hired Claimant as a subcontractor and that, therefore, Claimant was responsible for his own insurance.

Claimant’s Exhibits F and G showed that Mr. Anderson did not appear for the depositions. Exhibit J was the contract for the installation of the mezzanine at the Grainger plant. Wildeck was listed as the contractor and Anderson Construction as the subcontractor. Attached was a document entitled “Certificate of Liability Insurance” dated October 21, 2002, which listed Phil Maez, Maez Engineering, LLC, as the insured and Anderson Construction, Inc. as the certificate holder. The insurance covered interstate fire and casualty.

Claimant’s Exhibit L contained a document entitled purchase order and listed Maez Engineering, LLC, as the vendor and stated that the shipment was to be made to Anderson Construction, Inc. The item listed was a mezzanine with a description of “installation of mezzanine as per drawing @ W.W. Grainger/Kansas City, Mo.” The date on the purchase order was October 9, 2002.

Page 6 of Exhibit L contained a document from Anderson Construction, Inc. showing that 19 checks were paid to Maez Engineering, LLC, for the period April 23, 2002 to January 11, 2003. Other documents in the exhibit were various bills and invoices from Maez Engineering, LLC for work done on the installation of various mezzanines.

Exhibit O was Claimant's 2002 income tax returns filed jointly with his wife. Claimant listed himself as being self-employed. He listed his business as Maez Engineering, LLC. He listed his job as engineering consultant. His returns also showed that he paid \$1,387 in self-employment taxes. The gross receipts for his business were \$90,742 and by deductions, expenses and depreciation he reduced his taxable income to \$19,628 less the \$1,387 for self-employment taxes. His deductions, expenses and depreciation were for his car and truck, interest, office, renting and leasing vehicles, machinery and equipment, commissions, fees, supplies, travel, gasoline, utilities and for repairs and maintenance on equipment. He took a total of \$71,114 in expenses, deductions and depreciation.

The medical evidence consisted of the deposition testimony of Dr. P. Brent Koprivica and numerous reports and records. Dr. Koprivica, who testified on Claimant's behalf, examined Claimant on May 16, 2003. He concluded that in the fall at work, Claimant had "most likely" sustained a digital neuroma of the left ring finger, resulting in marked sensitivity. He also stated that the fall had resulted in a complex laceration of the flexor compartment of Claimant's left forearm with chronic bursitis of the elbow and a "moderately" severe loss of strength of the left hand. He concluded that Claimant had sustained a permanent partial disability of 30 percent of the left upper extremity at the 210-week level as a result of the fall at work.

Dr. Koprivica also concluded that Claimant had a loss of range of motion of the right arm consistent with a prior injury to the radial head of the right elbow. He rated Claimant's disability at 15 percent at the elbow or 210-week level. He stated that Claimant's preexisting neck injury had resulted in an anterior cervical discectomy and fusion at C6-7 and a permanent partial disability of 25 percent to the body as a whole. He stated that both the prior neck and upper extremity injuries had resulted in restrictions in Claimant's ability to do overhead activities and in placing his neck in awkward positions. He stated that both injuries had hindered Claimant's ability to work in the construction field and were an obstacle to him in getting certain jobs.

Dr. Koprivica concluded that due to the combined effect of the disability from Claimant's October 2002 accident and his preexisting conditions, that there was a 20 percent "enhancement" of Claimant's disability above the simple sum of the disability from the impairments considered individually. He also concluded that Claimant was temporarily and totally disabled from October 17, 2002 until Dr. Harl released him from treatment in February 2003. He stated that Claimant was not capable of doing construction work during that period.

Finally, Dr. Koprivica testified that the treatment Claimant received was necessary to help cure and relieve Claimant from the effects of the October 2002 accident.

LAW

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After considering all the evidence, including the testimony at the hearing, the depositions, the medical reports and records, the other exhibits, and observing the appearances and demeanor of the witnesses at the hearing, I find and believe that Claimant was working as an independent contractor for Maez Engineering, LLC when he sustained the injury on October 17, 2002, while constructing the mezzanine at the Grainger plant. I also find, however, that, pursuant to §287.040 RSMo. (1993), that Anderson Construction and Wildeck were his statutory employers.

Thus, I find that while Maez Engineering, LLC was primarily liable for Claimant's injuries, Anderson Construction Company and Wildeck, were also liable in that order. I find that Maez Engineering, LLC and Anderson Construction Company did not have workers' compensation insurance coverage. I find that Wildeck, the general contractor, on the job had such coverage. I also find that because Maez Engineering, LLC and Anderson Construction Company did not have workers' compensation insurance coverage, that Wildeck, as the statutory employer, is liable for the benefits. Wildeck, as a statutory employer, however, may bring an action against Anderson Construction Company and or Maez Engineering, LLC, whose liability was primary to Wildeck's, to recover any benefits paid by Wildeck in the workers' compensation case. Claimant did

not prove the Second Injury Fund's liability for benefits as set out in the award.

Case law provides that the employee has the burden of proving all material elements of his claim. Fisher v. Archdiocese St. Louis-Cardinal Richter Inst., 793 S.W. 2d 195 Mo. App. E.D. 1990); Griggs v. A.B. Chance Co., 503 S.W. 2d 697 (Mo. App. W.D. 1973); Hall v. Country Kitchen Restaurant, 936 S.W. 2d 917 (Mo. App. S.D. 1997).

An employer is defined as a person using the services of another for pay. §287.030.1(1) RSMo (1993); White v. Dallas & Mavis Forwarding Co., Inc., 857 S.W. 2d 278 (Mo. App. W.D. 1993). To establish an employer/employee relationship, an express contract, either written or oral, need not be shown. Kelsall v. Riss & Co., 165 S.W. 2d 329 (Mo. App. E.D. 1942). Courts in trying to determine whether an employer/employee relationship exists, look to the amount of control the alleged employer has over the alleged employee's work activities. White; Hutchinson v. St. Louis Altenheim, 858 S.W. 304 (Mo. App. E.D. 1993); Ceradsky v. Mid-America Dairymen, Inc., 583 S.W. 2d 193 (Mo. App. W.D. 1979); Howard v. Winebrenner, 499 S.W. 2d 389 (Mo. 1973).

Courts have noted that payment by wages, rather than by the job provides strong evidence of the existence of an employment relationship. Pratt v. Reed & Brown Hauling Co., 361 S.W. 2d 57 (Mo. App. W.D. 1960). In contrast, an independent contractor is defined as someone who contracts to do work according to his or her own methods without being subject to the control of the other party to the contract except as to the ultimate result of the work being performed. White.

Courts look to a number of factors in determining whether an alleged employee is an independent contractor. The amount of control the alleged employer either exercises or has the right to exercise over the injured person is crucial. Cole v. Town & Country Exteriors, 837 S.W. 2d 580 (Mo. App. E.D. 1992). Courts also look at whether the alleged employee must use his own tools, equipment, supplies and materials, whether the contract is for a specific piece of work at a fixed price, the method of payment whether by time or by the job, whether the work is usually done under supervision, whether the alleged employee may hire assistants, and whether the work is part of the regular business of the alleged employer. Ceradsky; Cove; Maltz vs. Jackoway-Katz Cap Co., 82 S.W. 909 (Mo. 1935). Another crucial factor is whether the alleged employer has the power to summarily discharge the alleged employee. White; Miller v. Hirschbach Motor Lines, Inc., 714 S.W. 2d 652 (Mo. App. S.D. 1986).

Neither Claimant nor his wife made credible witnesses on the issue of whether Claimant was an independent contractor or an employee. The evidence clearly showed that Claimant was an independent contractor. He owned his own business, Maez Engineering, LLC. The most credible evidence showed that his company was in the business of building mezzanines. The injury occurred while he was building a mezzanine. In addition, the most credible, competent evidence showed that he bid for jobs to build mezzanines through his business. There were numerous invoices for payments from his business to Wildeck and Anderson Construction Company for services rendered.

Claimant offered no evidence or explanation as to why if he were an employee, he would be sending invoices for payments to his alleged employer, Anderson Construction Company, instead of being paid wages. Similarly, he offered no explanation as to why if he were an employee, one of the invoices showed that he was required to pay 10 percent of the money he received from Wildeck for building one of the mezzanines to Anderson Construction Company, his alleged employer.

The most credible, competent evidence also showed that Claimant's company, Maez Engineering, LLC, had employees and conducted business. Claimant's wife testified that she kept the books for Maez Engineering, LLC. She denied that she was an employee. The evidence showed otherwise. Both Claimant and his wife admitted that she sent out invoices for payments. She reconciled the books. There were at least 20 checks in one year from Maez Engineering, LLC for payments to Claimant's wife. Neither Claimant nor his wife offered a credible explanation as to why the company was making payments to his wife, if she were not an employee.

There were also checks from Maez Engineering, LLC to Claimant's two daughters. Maez Engineering even provided 1099 tax forms to two workers. Claimant's allegation that Maez Engineering, LLC had no employees was not credible. Furthermore, he did not explain why a company, which he alleged existed only on paper was making payments to

subcontractors and providing 1099 tax forms. He did not explain why an employee would be providing 1099 tax forms.

The medical records provided further evidence that Claimant was an independent contractor and not an employee. Hospital and ambulance records from the day of the accident listed Claimant's employer as Maez Engineering, LLC. The evidence clearly showed that Claimant provided the information. He did not explain why if he believed that Anderson Construction Company was his employer, he told the ambulance drivers and hospital personnel that Maez Engineering, LLC was his employer.

Hospital records further showed that Maez Engineering LLC was listed as the guarantor on the hospital bills. Other hospital records, including those from the emergency room, listed Maez Engineering, LLC as Claimant's employer. It was significant that on the day of the accident and prior to when he had filed any workers' compensation claims, Claimant alleged that his employer was Maez Engineering, LLC and not Anderson Construction Company or Wildeck.

Equally as important, Claimant clearly held himself out as being self-employed. That constituted evidence as to the intent of the parties. Claimant stated in his tax returns that he was self-employed as a consulting engineer for Maez Engineering, LLC. He did not state that he was an employee of either Anderson Construction Company or Wildeck. Also, in one year, he was able to reduce his taxable income from over \$90,000 to approximately \$19,000 by taking various deductions and expenses allowed primarily to self-employed individuals. He took a deduction for self-employment taxes. He claimed deductions and expenses of over \$70,000. He claimed expenses and deductions for utilities, supplies, travel, gasoline, his office and depreciation for tools, equipment and the truck used in his business. His wife admitted that they took a deduction for travel expenses, even though, Claimant's alleged employer allegedly reimbursed him for such expenses.

Claimant admitted that he did not receive any W-2 tax forms from Anderson Construction Company. He admitted that no taxes were withheld from his pay. He stated that his wife prepared their joint tax returns. His wife worked for an accounting firm where she did some payroll taxes and other tax work. She was evasive and failed to provide a credible answer when asked about why an employee would not get a W-2 tax form.

In essence, Claimant alleged that he was an employee when doing so benefited him and he alleged that he was self-employed when he received monetary gain by doing so. For purposes of his workers' compensation case, he needed to be an employee. He alleged that he was an employee. For tax purposes, he benefited by being an independent contractor. He stated in his tax returns that he was an independent contractor. It was significant that he did not amend his tax returns after the injury to allege that he was an employee, if it were true that after the injury he learned all the nuances of what constituted an employee as opposed to an independent contractor.

Finally, Claimant admitted that he used his own wrenches, hammers and hand tools to build the mezzanines. He admitted that he took deductions based on depreciation for the truck he used in his work and which according to his own testimony he did not purchase. He offered no credible, competent evidence, which showed that either Anderson Construction Company or Wildeck exercised such control over his work activities as to make him an employee instead of an independent contractor in light of the evidence referred to above. He clearly failed to prove that he was an employee under the Act.

Case law, however, provides that under certain circumstances there may be statutory employers of independent contractors. See §287.040. Staggs v. Venetian Harper Co., 813 S.W. 2d 883 (Mo. App. E.D. 1991). Such statutory employers are liable for workers' compensation benefits. *Id.* Moreover, there are two types of statutory employers. One is where the employer has work done on or about the premises of the employer and where the injury occurs while the person is performing work done in the usual and ordinary course of business of the employer. See §287.040.1; Wilson v. Unistrut Serv., Co., of St. Louis, Inc., 858 S.W. 2d 729 (Mo. App. W.D. 1993). That section of the Act did not apply in Claimant's case. There was no allegation and no evidence that the Grainger Company where the work was performed was Claimant's employer or that the building of mezzanines was work performed in the usual and ordinary course of business of the Grainger Company.

Section 287.040.3, however, pertains to statutory employers in the construction industry. That section of the Act applied to Claimant's case. That section makes a contractor liable to a subcontractor and the subcontractor's employees.

The liability of a contractor is secondary to the liability of the subcontractor for the subcontractor's employees. Anderson v. Steurer, 391 S.W. 2d 839 (Mo. App. 1965).

The evidence showed that Wildeck was the general contractor on the Grainger job and that Anderson Construction and Maez Engineering, LLC were subcontractors. Wildeck's own employee, Mr. Mihelich admitted that Wildeck was the general contractor. Mr. Hanson, the installation manager for Wildeck on the Grainger job, also admitted that Wildeck was the general contractor. Both admitted and the evidence showed that Anderson Construction Company was a subcontractor on the Grainger job.

The most credible, competent evidence further showed that Maez Engineering was a subcontractor hired by Anderson Construction on the Grainger job. Mr. Hanson testified without objection that Mr. Anderson told him that Anderson Construction did not purchase workers' compensation insurance coverage for Claimant on the Grainger job, because Maez Engineering was a subcontractor. Maez Engineering, LLC even submitted a certificate of insurance for work on the Grainger job. An employee does not need to submit a certificate of insurance. Unfortunately, for the statutory employers the certificate of insurance was for fire and casualty losses and not workers' compensation.

Moreover, Claimant offered no objective or credible evidence in support of his allegation that he was an employee of Anderson Construction on the Grainger job or on any other installation project. He offered no check stubs, documents, income tax returns or evidence in support of his allegation. He argued that he worked for Anderson Construction for more than eight years, but did not produce one piece of documentary or objective evidence in support of his allegation. The evidence clearly showed that Claimant was an independent contractor on the Grainger job.

Claimant also alleged that Siemens-Dematic was his employer. He offered no evidence, however, to support that allegation. The most credible evidence showed that Siemens-Dematic purchased the mezzanine and contracted with Wildeck to build it at the Granger facility. There was no evidence that Siemens hired either Anderson Construction or Maez Engineering. There was no evidence that Siemens had any control over Claimant. There was simply no credible evidence that Siemens-Dematic was Claimant's employer or that it had any liability in the case.

Thus, the evidence clearly showed that Maez Engineering, LLC was Claimant's primary or immediate employer. Under the Workers' Compensation Act, the immediate employer is primarily liable for benefits. See §287.040. Therefore, Maez Engineering, LLC, as Claimant's immediate employer is primarily liable for all benefits awarded to Claimant in this award.

Anderson Construction Company, which hired Maez Engineering, LLC to work on the Grainger job and Wildeck were secondarily liable in that order. Neither Maez Engineering, LLC nor Anderson Construction Company was insured for workers' compensation benefits at the time of Claimant's injury on the Grainger job. Therefore, under §287.040.3 Wildeck, as the general contractor, and the company with insurance is liable to Claimant for workers' compensation benefits as a statutory employer. Because Wildeck's liability was secondary to that of both Maez Engineering, LLC and Anderson Construction Company, Wildeck under the statute may pursue an action against either or both for reimbursement for any payments made in the case to Claimant.

Claimant clearly proved that he sustained a job-related accident. His injury occurred when he was working on a mezzanine for Maez Engineering, LLC and fell fifteen feet to the floor below. He testified that he fell when the floor of the mezzanine separated due to the absence of a kick plate to hold the floor in place. His testimony was credible. The medical records supported his testimony about the fall. The other evidence supported his testimony about building the mezzanine in the course of his employment. He clearly proved that he sustained an accident as defined by Missouri law.

Claimant's employers alleged that Claimant did not provide notice of the accident as required by law. The Act states that the employee must provide his employer with 30 days written notice of the accident. See §287.420. The Act also provides that actual notice is sufficient and that a claim will not fail if the employer was not prejudiced by the failure to receive proper notice. Notice is an affirmative defense.

Claimant's alleged employers, Wildeck and Siemens-Dematic, had earlier argued that Claimant was a self-employed independent contractor. The most credible, competent evidence supported their argument. That also meant that because he was self-employed, his employer had actual and timely notice of the accident. The notice defense fails.

Moreover, the evidence also showed that Anderson Construction Company and Wildeck had actual and timely notice of the accident. Claimant testified that Mr. Anderson had notice of the accident and visited him in the hospital after the accident. Claimant was hospitalized for less than 30 days. No evidence was offered which contradicted Claimant's testimony that Mr. Anderson had actual and timely notice of the accident. Claimant's testimony was credible on that issue.

Similarly, Mr. Hanson's testimony showed that Wildeck had actual and timely notice of the accident. He testified that Wildeck even sent another person to complete the Grainger job. Claimant proved that he provided actual and timely notice. His employers were not prejudiced in anyway by the failure to receive written notice.

Maez Engineering, LLC argued that Claimant did not file the claim on a timely basis. Wildeck and Siemens-Dematic raised the same argument. The arguments were without merit. The Act provides that the claim must be filed within two years of the date of injury or last payment made on account of the injury by the employer. See §287.430. If the employer does not file the report of injury as required by law, the claim for compensation may be filed within three years of the date of injury or last payment. None of Claimant's employers filed a report of injury.

Claimant's accident occurred on October 17, 2002. He filed his original claim for compensation on March 10, 2003, naming Anderson Construction, Inc., Wildreck (sic) and Siemens-Dematic as his employers. He also alleged that the Second Injury Fund was liable for compensation. The original claim was clearly filed on a timely basis.

Claimant filed an amended claim on February 14, 2005. He named the same parties as employers. The allegations in the amended claim clearly related back to the original claim. Thus, it was filed on a timely basis.

Maez Engineering, LLC, however, argued that Claimant did not timely file a claim for compensation against it. Maez Engineering, LLC was not named as an alleged employer in the original or amended claims as set out above. Claimant filed his claim against Maez Engineering, LLC on June 5, 2006.

Actually, Maez Engineering, LLC, however, was brought into the case prior to June 5, 2006. Wildeck and Siemens-Dematic pursuant to §287.040, filed an application prior to June 2006 to include Maez as a party. Section 287.040 provides that an immediate contractor or subcontractor shall be liable as an employer of the employees of his subcontractor. It also provides that all persons so liable may be made parties to the proceedings on the application of any party. Under that provision Maez Engineering, LLC was brought into the case.

Nowhere in the statutes is there a limitation period pertaining to a party being brought into the proceedings upon an application filed under §287.040. Moreover, statutes must be interpreted in a manner so as to make sense. The provision in §287.040 allowing a party to be added upon an application of a named employer would not make sense if the limitation period contained in §287.430 as cited above were applicable.

If the limitation period contained in §287.430 were applicable an employee such as Claimant could file his claim on the last day possible. The employee could choose not to name his own company as an employer in the claim. The named employer would receive notice of the claim after the limitation period contained in §287.430 had already expired. The named employer would not have the right to add the employee's own company as a party as §287.040 clearly allows. That would make no sense. That would clearly be contrary to what the legislature intended in §287.040.

Moreover, the limitation period in §287.430 only applies to claims brought by the employee against the employer. The provision in §287.040 allowing an employer named in the claim to petition to add another employer has nothing to do with the limitation period between the employee and the employer. Section 287.040 simply provides a means for an

employer named in a claim to add another possible employer whose liability might be primary to that of the named employer.

Finally, even assuming arguendo, that §287.430 applies, Maez Engineering, LLC still failed in its burden of proof. Maez Engineering, LLC offered no evidence or testimony on the issue. Maez Engineering offered no arguments in a brief supporting its position. The uncontroverted evidence showed that Maez Engineering made payments to Claimant's wife subsequent to the October 2002 accident. She testified that the payments were for money owed to Claimant. Maez Engineering, LLC offered no evidence showing that such payments made after the accident by Maez were not made on account of Claimant's injury. Maez offered no evidence as to how long any such payments were made. Maez offered no evidence that the last of such payments were made more than two years prior to the filing of the claim.

In addition, Maez offered no testimony or evidence showing that the company did not pay any of the medical bills incurred in the case. Maez Engineering, LLC simply offered no evidence upon which a finding could be made that the claim was barred because the limitation period contained in §287.430 had expired prior to the filing of the claim. Maez Engineering, LLC failed in its burden of proof.

The parties also failed to agree on the compensation rate. The applicable statute pertaining to the compensation rate at §287.250 provides that if wages are fixed by the week, month or year, the fixed wages should be used to determine the rate. Claimant offered no evidence that his wages were fixed.

The statute further provides that if the employee is paid on an hourly basis, 13 weeks of earnings must be considered. *Id.* That section of the statute may only be used if sufficient information is provided. Claimant testified that he was paid on an hourly basis, but offered no evidence as to the number of hours he worked. He did not offer 13 weeks of his earnings. He even testified that he was not paid for any work done on the Grainger job.

In addition, Claimant offered no evidence as to whether he missed any days from work or as to how many hours he worked on any job during the 13 weeks preceding the Grainger job. He offered no evidence as to whether he missed any regularly scheduled workdays. Basing the compensation rate on his alleged hourly earnings would be speculative at best.

Subsection 4, of §287.250 provides that if the average weekly wages cannot be fairly and justly determined in subsections 1 to 3, the division may determine the average weekly wages in such manner and by such methods as in the opinion of the division, based upon the exceptional facts presented, fairly determines the employee's average weekly wages. Applying that section, Claimant's income tax returns for the year 2002, provides the fairest and most just way to determine his average weekly wages.

Claimant's 2002 income tax returns show that his gross taxable income from his business was \$19,628. Claimant alleged that he last worked on October 17, 2002. That means that he worked 42.28 weeks. The \$19,628 divided by 42.28 weeks, yields an average weekly wage of \$464.24. Two-thirds of that amount equals a compensation rate of \$309.49.

Claimant argued that he was temporarily and totally disabled for 18 weeks. He offered the testimony of Dr. Koprivica in support of his allegation. Dr. Koprivica testified that Claimant was temporarily and totally disabled until late February 2003 when Dr. Harl released Claimant to return to work. Dr. Koprivica was credible in his testimony. Claimant's employers offered no evidence on the issue. Claimant proved that he was temporarily and totally disabled for 18 weeks. At a rate of \$309.49 per week, for 18 weeks, Claimant's employers are liable for \$5,570.82 in temporary total disability benefits. His employers are ordered to pay that amount to him.

Claimant also argued that his employers were liable for \$38,048.77 for past medical aid. Wildeck and Siemens-Dematic argued that the treatment was not authorized. They also vehemently argued that Claimant was a self-employed independent contractor. That argument was clearly inconsistent with the allegation that the treatment was not authorized. The statute provides that the employer has the right to direct the medical treatment. See §287.140. As a self-employed worker, as found in this award, Claimant had the right to direct the medical treatment and to authorize any providers of

medical treatment.

Moreover, the initial treatment was due to an emergency. Claimant fell 15 feet and was bleeding and taken to the hospital by ambulance. Claimant's employers provided no authority showing that an employee needed authorization for treatment in such an emergency situation. There is no such authority. In addition, as noted above, Claimant as a self-employed independent contractor had the right to direct the remainder of the medical treatment.

Claimant proved that the treatment was reasonable and necessary and the charges fair and reasonable. Dr. Koprivica so testified. Dr. Koprivica was credible in his testimony. No evidence was offered, which contradicted his testimony. Claimant's employers offered no evidence on the issue.

Also, as the Missouri Supreme Court found in Martin v. Mid-America Farm Lines, Inc., 769 S.W. 105 (Mo. Banc 1989) once an employee testifies that his visits to the medical providers were the product of his injury and identifies the bills, which relate to the professional services rendered as shown by the medical records in evidence, a factual basis exist for the award of the bills. Once Claimant made such a showing, the burden shifted to his employers to challenge the reasonableness or fairness of the bills or to show that the medical expenses incurred were not related to the injury in question. *Id.* Claimant's employers made no such showing. Claimant proved his employers' liability for the \$38,048.77 incurred for past medical treatment.

Claimant proved that he sustained a permanent partial disability of 30 percent of the left upper extremity rated at the 210-week level as a result of the injuries he sustained in the October 2002 accident. The October 2002 accident resulted in a complex laceration of the flexor compartment of Claimant's left elbow and chronic bursitis, as well as severe trauma and injuries to his left thumb, index and ring fingers. Dr. Koprivica rated Claimant's disability at 30 percent of the left upper extremity at the 210-week level.

Dr. Koprivica was credible in his opinion. No evidence was offered, which contradicted his opinion. No other ratings were offered in the case. Based on the most credible, competent evidence, Claimant proved that he sustained a permanent partial disability of 30 percent of the left upper extremity rated at the 210-week level. At a rate of \$309.49 per week, for 63 weeks, his employers are liable for \$19,497.87. His employers are ordered to pay that amount to Claimant.

Claimant also argued that the Second Injury Fund was liable for compensation due to the combined effect of the disability he sustained in the October 2002 accident and his preexisting disability. The Second Injury Fund argued that no such benefits could be awarded because Claimant did not make the Fund's liability for such benefits an issue at the hearing.

Claimant's claim for compensation asserted that the Second Injury Fund was liable for such benefits. He did not, however, as the Fund argued, make the Fund's liability for such benefits an issue at the hearing. The only issue specifically pertaining to the Fund raised at the hearing involved the Fund's alleged liability due to the failure of the alleged employers to insure or self-insure their liability for benefits. Those benefits pertain to medical aid needed to cure and relieve the employee from the effects of the injury and not compensation based on disability from the injury on the job combining with preexisting disability. See §287.220.5.

Neither Claimant nor the Second Injury Fund cited any cases, law or authority on the issue of whether benefits may be awarded when a party alleges liability for such benefits in his claim, but does not make liability for such benefits an issue at the hearing. Clearly, however, an assertion in a claim for compensation does not mean that the party is pursuing such an allegation at the hearing. Claims for compensation are often amended and often parties do not pursue every allegation raised in the claim.

Thus, the crucial issue involves prejudice. Would the Second Injury Fund be prejudiced if its alleged liability for such benefits were considered, when its liability was not made an issue at the hearing? The answer is yes. The Second Injury Fund would be prejudiced.

While Claimant's evidence on the issue had been obtained prior to the hearing, the Second Injury Fund's trial strategy and cross-examination of Claimant and his wife might have differed if Claimant had made the Fund's liability for benefits due to his disability from the October 2002 accident combining with his preexisting disability an issue. The Second Injury Fund might have cross-examined Claimant about the alleged preexisting impairments if its liability for such benefits had been made an issue. The Second Injury might have cross-examined Claimant about whether the alleged preexisting impairments had resulted in any disability. The Second Injury Fund might have attempted to show that the preexisting impairments had not resulted in the threshold amounts of disability needed to establish Second Injury Fund liability. See §287.220.

The Second Injury Fund might have also cross-examined Claimant about whether his preexisting impairments were a hindrance or obstacle to his employment or reemployment as is required by the statute to establish Fund liability for such benefits. See §287.220.1 RSMo.1994; Garibay v. Treasurer, 930 S.W.2d 57 (Mo.App. 1966); Rolls v. Treasurer, 895 S.W.2d 591 (Mo.App.1995); Webbeling v. West County Drywall, 898 S.W.2d 615 (Mo.App.1995). In addition, it is possible that the Fund had obtained evidence on those issues, but chose not to offer the evidence because the Fund's liability for such benefits had not been made an issue.

Thus, the Second Injury Fund would clearly be prejudiced if any benefits were awarded based on an issue not raised at the hearing and for which the Fund did not offer any evidence. Claimant was given ample opportunity to raise whatever issues he chose. The parties raised 18 issues at the hearing. Prior to the introduction of any evidence, the parties were specifically asked whether there were any additional issues. All the parties responded in the negative. None of the parties at any time during the hearing asked to add any additional issues. Claimant did not prove the Fund's liability for such benefits.

Likewise, no benefits may be awarded from the Second Injury Fund due to the employers' alleged failure to insure or self-insure, because one of the statutory employers, Wildeck, did insure its liability for workers' compensation benefits. The applicable statute provides that funds may be withdrawn from the Fund to cover medical benefits if the employers are uninsured. See §287.220.5. Claimant had an insured statutory employer, Wildeck. The insured statutory employer is liable for the medical bills pursuant to §287.040. Nothing in the Act allows Claimant to recover the medical bills from both the statutory employer and the Fund. Claimant did not prove the Fund's liability.

Claimant argued that he was entitled to benefits based on disfigurement. The October 2002 accident resulted in a scar on Claimant's left elbow approximately eight inches long and one-half to three-fourths inches wide. The accident resulted in scars on his left thumb and index finger about one-half to one inch long. He had disfigurement on the nail and inner portion of his ring finger. Based on the scars and disfigurement, Claimant is entitled to an additional six weeks of compensation. At a rate of \$309.49 per week, for 6 weeks, he is entitled to \$1,856.94.

Maez Engineering, LLC, as the immediate employer is primarily liable for the disfigurement as well as the compensation for permanent partial and temporary total disability benefits and the medical aid. It is ordered to make such payments. Because it failed to insure or self-insure, however, as did Anderson Construction Company, Wildeck, as the statutory employer, is ordered to make the payments for all such benefits. The payments equal \$64,974.40 (\$19,497.87 for permanent partial disability, \$5,570.82 for temporary total disability, \$38,048.77 for medical aid and \$1,856.94 for disfigurement).

Claimant argued that all benefits awarded in the case should be increased by 15 percent due to his alleged employers' violation of a state safety statute. Claimant's alleged employers, other than Anderson Construction Company, which was in default, argued that benefits should be reduced by 15 percent due to Claimant's violation of a safety policy. Neither Claimant nor his alleged employers offered any evidence. Neither offered any evidence of any such safety policy or as to what state safety statute was violated. Neither met the burden of proof. Neither proved that benefits should be increased or reduced due to any alleged violations of any safety policies or statutes.

Claimant's alleged employers also argued that Claimant was not entitled to any benefits, or that at the minimum, benefits should be reduced by 15 percent due to the accident being either caused by Claimant's use of illegal drugs or because it occurred in connection with his use of illegal drugs. The uncontroverted evidence showed that Claimant had

marijuana and opiates in his system when tested at the hospital on the day of the accident. Claimant admitted that he smoked marijuana. He later stated, however, that he was given medication prior to the testing.

The statute in effect at the time of the accident pertaining to the use of drugs and alcohol was specific. The employer had to prove that it had a policy against the use of drugs and alcohol and that it enforced its policy. Section 287.120 RSMo. (1983). The policy had to be posted in a conspicuous place. The employer had to show that the employee had knowledge of the policy. *Id.*

The August 2005 changes in §287.120 RSMo. (2005) still require the employer to have a policy against the use of drugs and alcohol. Claimant's alleged employers did not meet their burden of proof. The alleged employers offered no evidence that any of Claimant's employers including the statutory employers had any policies against the use of drugs and alcohol. That was required in the statute in effect at the time of Claimant's injury as well in the 2005 changes.

Furthermore, Claimant's alleged employers offered no evidence showing that Claimant had knowledge of any such policies as required by the statute in effect at the time of his accident. His alleged employers offered no evidence that any such policies against the use of drugs and alcohol were enforced as the statute required at the time of his accident. His alleged employers offered no evidence that the accident was caused by Claimant's use of drugs, and that therefore all benefits should be forfeited. His alleged employers clearly failed to prove that benefits should be either forfeited or reduced by the 15 or 50 percent in the statutes due to the accident being caused by Claimant's drug use or in connection with any such use.

In conclusion, the evidence showed that Claimant was an independent contractor. The evidence showed that Maez Engineering, LLC was his immediate employer and that Anderson Construction Company and Wildeck were secondarily liable as statutory employers in that order. Because Maez Engineering, LLC and Anderson Construction Company failed to insure or self-insure, Wildeck, as the statutory employer, is ordered to pay Claimant's workers' compensation benefits as set out in the award.

Date: _____

Made by: _____

Kenneth J. Cain

Chief Judge

Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret

Director

Division of Workers' Compensation