

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

Injury No.: 04-016151

Employee: Daniel W. Mahoney
Employer: AOL Time Warner (Settled)
Insurer: Self-Insured (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Date of Accident: February 27, 2004

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. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 11, 2006. The award and decision of Administrative Law Judge Rebecca S. Magruder, issued December 11, 2006, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 19th day of September 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

**AWARD
AS TO SECOND INJURY FUND ONLY**

Employee: Daniel W. Mahoney Injury No.: 04-016151

Employer: AOL Time Warner (Settled)

Additional Party: Missouri State Treasurer, Custodian, Second Injury Fund

Insurer: Self-Insured (Settled)

Hearing Date: October 27, 2006

Checked by: RSM/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 R.S. Mo?
Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: February 27, 2004.
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 an authorized self-insurer under the Missouri Workers' Compensation Act? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Daniel W. Mahoney was wrapping skids of product with a wrap gun and injured his right wrist while in the scope and course of his employment with AOL Time Warner.
12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: right wrist.
14. Nature and extent of any permanent disability: Permanent total disability as to Second Injury Fund.
15. Compensation paid to-date for temporary disability: \$4,554.65.
16. Value necessary medical aid paid to date by employer/insurer? \$32,172.33.
17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$605.37.
19. Weekly compensation rate: \$403.58/347.05.

20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable:

24 weeks of permanent, partial disability from Employer/Insurer - \$9,110.06 (already paid).

22. Second Injury Fund liability: Yes.

Permanent total disability benefits from Second Injury Fund:

Weekly differential of \$56.53 payable by Second Injury Fund for 24 weeks beginning February 4, 2005; and thereafter \$403.58 per week for life.

23. Future requirements awarded.

Said payments to begin as of the date of this award and to be payable and be subject to modification and review as provided by law. The award of compensation against the Second Injury Fund is subject to a lien by Frank Eppright for necessary legal services rendered to the Claimant in the amount of twenty-five percent (25%).

FINDINGS OF FACT and RULINGS OF LAW

Employee: Daniel W. Mahoney Injury No.: 04-016151

Employer: AOL Time Warner (settled)

Additional Party: Missouri State Treasurer, Custodian, Second Injury Fund

Insurer: Self-insured (settled)

On October 27, 2006, the parties appeared for hearing. The Division has jurisdiction to hear this case pursuant to §287.110 R.S.Mo. The Claimant, Daniel W. Mahoney, appeared in person and with counsel, Frank Eppright. The Employer, AOL Time Warner, Self-Insured, has previously settled its liability with Claimant and did not appear. The Second Injury Fund appeared through Assistant Attorney General Jason Lloyd.

STIPULATIONS

At the hearing the parties stipulated to the following:

- (1) that the Employer was operating under and subject to the provisions of the Missouri Workers' Compensation law and was an authorized self-insured entity;
- (2) that Daniel W. Mahoney was its employee operating under and subject to the Missouri Workers' Compensation law in Kansas City, Jackson County, Missouri;
- (3) that the Claimant, Daniel Mahoney, sustained an injury arising out of and in the course of employment at AOL Time Warner on February 27, 2004;
- (4) that the Employer had notice of the claim and a timely claim for compensation was filed;
- (5) that Employee's compensation rate is \$403.58/347.05 per week;
- (6) that past temporary total benefits of \$4,554.65 have been paid by the Employer;
- (7) that medical benefits have been provided by the Employer totaling \$32,172.33.

ISSUES

The parties have requested the Division to determine the following issue:

(1) the liability, if any, of the Second Injury Fund, pursuant to §287.220, R.S.Mo. 2000.

The Employee alleges that he is permanently and totally disabled by the combined effects of the disability resulting from his February 27, 2004 on-the-job injury and the disabilities pre-existing that injury. The Second Injury Fund contests this claim. The Claimant's evidence consisted of his testimony, the deposition testimony of Dr. P. Brent Koprivica and numerous medical records, as well as the testimony of Claimant's vocational expert, Mary Titterington.

FINDINGS AND RULINGS

Daniel W. Mahoney is a fifty-one year old former employee of AOL Time Warner. He had been employed by AOL Time Warner since August 19, 1995 in various capacities. On February 27, 2004, Mahoney injured his right upper extremity while operating a wrap gun while in the course and scope of his employment at AOL Time Warner. Mahoney was seen by occupational doctors until his care was referred to Dr. Allen Guinn, III. Dr. Guinn diagnosed a right wrist TFCC tear and scapholunate tear and performed surgery on April 3, 2004 on Mahoney's right wrist at Lee's Summit Hospital. Following the surgery Mahoney had physical therapy and was released on October 28, 2004 with restrictions of modified duty, no lifting of 30 pounds, no climbing ladders and no limited repetitive motion. Mahoney settled his workers' compensation claim with AOL Time Warner for 15% permanent partial disability to the right wrist at the 175 week level on January 21, 2005.

Following Mahoney's release from Dr. Guinn, he has continued to have sharp pains in his right upper extremity, swelling, joint pain, intolerance to cold, numbness in the tips of his fingers and the palms of his hand and decreased grip, grasp and pinching.

Mahoney attempted to return to work but was unable to do so and last worked on February 3, 2005.

Mahoney had numerous physical disabilities which pre-dated the February 27, 2004 injury. On February 22, 1988 Mahoney was employed at General/Jerrold Division, and injured his right and left upper extremities and cervical area. The injury resulted in Mahoney having surgery by Dr. Gerald R. McNamara on his right upper extremity. The diagnosis was that of tenosynovitis, dorsum right wrist; volar synovitis; lipoma volar right wrist; and ringer trigger finger. The surgery was that of aspiration dorsum of the right wrist with synovectomy; excision of lipoma and synovitis, volar wrist; release A-1 trigger finger, right hand. In addition to this surgery, Mahoney had physical therapy to his right and left upper extremities and cervical area. On February 17, 1999, Mahoney settled his workers' compensation claim for 17.5% to the body as a whole referable to his left and right upper extremity and his neck. As a result of his February 22, 1998 injury, Mahoney continued to have problems in both upper extremities, with chronic soreness and pain and numbness and tingling in both hands. Mahoney also had pain radiating into the back of his head regarding his neck injury and pain radiating into the shoulders, arms and hands and limited motion of his neck.

Additionally, Mahoney developed bilateral carpal tunnel syndrome while employed at Guardian Alarm Company on February 21, 1992. . The carpal tunnel syndrome resulted in two carpal tunnel surgeries done by Dr. John B. Moore at Baptist Medical center, the first being on the right on July 29, 1992 and the second being on the left on August, 1992. Mahoney eventually settled his workers' compensation claim for 12.5% permanent partial disability to the body as a whole on February 22, 1993.

Following the carpal tunnel surgery and his release from Dr. Moore, Mahoney continued to have chronic soreness and pain in both upper extremities, limited ability to raise his arms above his head, inability to lift heavy object due to his pain, numbness and tingling in both hands, burning pain radiating up both arms.

Mahoney testified to chronic low back problems between September 2, 1988 and February 27, 2004. The medical records indicate that Mahoney saw two chiropractors, a Dr. Ritchie and a Dr. Beckley 140 times for back and neck complaints between September 2, 1998 and February 27, 2004. Additionally, Mahoney treated with Dr. Linda Dorzab, his family doctor, for cervical, left shoulder and thoracic pain

in January, 1999 and missed several weeks from work because of the pain in his back.

Further, Mahoney had two heart attacks which resulted in him having two stents implanted. He was seen from 2000 to 2003 for his cardiac events at Shawnee Mission Medical Center, Olathe Medical Center, Cardiology Services, St. Luke's, St. Luke's South, Cardiovascular Consultants, Dr. Linda Dorzab, St. Joseph's Hospital and Menorah Medical Center. On January 2, 2003, after Mahoney had been off work because of his heart attacks, Dr. Randall Thompson, his cardiologist at Cardiovascular Consultants, gave him a return to work slip requiring him to avoid extreme exertion and to avoid very hot or cold temperatures above 90 degrees or below 35 degrees.

In addition to his heart problems, Mahoney has been treated for obesity before February 27, 2004 at St. Joseph's Hospital and Truman Medical Center and was diagnosed with diabetes in 2001 by his family physician, Dr. Linda Dorzab. Dr. Dorzab on January 7, 2003 and January 28, 2003 gave Mahoney substantial work restrictions. These restrictions included restrictions on lifting, standing, sitting and environmental restrictions.

Mahoney testified that as he developed the above-mentioned pre-existing conditions, his work duties at AOL Time Warner changed because of his inability to perform the various tasks of his employment.

To Mahoney's credit he continued to work and AOL Time Warner was able to accommodate his restrictions until his last injury of February 27, 2004.

Dr. P. Brent Koprivica, an occupational physician, testified on behalf of Mahoney by deposition that the employee was, in his opinion, unable to work due to a combination of his conditions that pre-dated February 27, 2004 and the February 27, 2004 injury itself.

Mary Titterington, a vocational expert, testified on behalf of Mahoney that he was unemployable due to a combination of his various restrictions.

The Second Injury Fund did not put on any medical or vocational evidence.

Mahoney, himself, testified that he felt he was no longer capable of any gainful employment.

Mahoney claims he is permanently totally disabled. §287.020.5 RSMo 1986 defines total disability as the inability to return to any employment and not merely...to return to the employment in which the employee was engaged at the time of the accident. Terms "any employment" mean "any reasonable or normal employment or occupation." Fletcher v. Second Injury Fund, 1992 S.W.2d 402 (Mo.App.1996); Crum v. Sachs Electric, 786 S.W.2d 131(Mo.App.1989); Kowalski v. M-G Metals and Sales, 631 S.W.2d 919 (Mo.App. 1992); Groce v. Pyle, 315 S.W.2d 482 (Mo.App. 1958). It is not necessary that an individual be completely inactive or inert in order to meet the statutory definition of permanent total disability. It is necessary, however, that the employee be unable to compete in the open labor market. See Fletcher v. Second Injury Fund, Cearcy v. McDonnell Douglas Aircraft, 894 S.W.2d 1173 (Mo.App.1995); Reiner v. Treasurer, 837 S.W.2d 363 (Mo.App.1992); Brown v. Treasurer, 795 S.W.2d 478 (Mo.App. 1990).

Missouri courts have repeatedly held that the test for determining permanent total disability is whether the individual is able to compete in the open labor market and whether an employer in the usual course of business would be reasonably expected to employ the employee in his present physical condition. Sullivan v. Masters Jackson Paving Company, 35 S.W.3d 879 (Mo.App.S.D. 2001). See Garcia v. St. Louis County, 916 S.W.2d 263 (Mo.App. 1995); Lawrence v. RV-III School District, 834 S.W.2d 789 (Mo.App. 1992). Thus, a determination of permanent total disability focuses on the ability or inability of the employee to perform the usual duties of various employments in the manner that such duties are customarily performed by the average person engaged in such employment. Gordon v. Tri-State Motor Transit, 908 S.W.2d 849 (Mo.App. 1995). Courts have held that various factors may be considered, including claimant's physical and mental condition, age, education, job experience and skills in making a determination as to whether the claimant was permanently, totally disabled. See Tiller v. 166 Auto Auction, 941 S.W.2d 863 (Mo.App. 1997); and Olds v. Treasurer, 864 S.W.2d (Mo.App. 1993).

In order to establish Second Injury Fund liability for permanent, total disability benefits, Mahoney must prove the following: (1) that he has permanent disability resulting in a compensable work-related injury; (2) that he

has permanent disability predating the compensable work-related injury which is of "such seriousness as to constitute a hindrance or obstacle to employment or to obtain reemployment if the employee becomes unemployable", §287.220.1 RSMo 1994; Garribay v. Treasurer, 930 S.W.2d 57 (Mo.App. 1996); Rose v. Treasurer, 899 S.W.2d 563 (Mo.App.1995); Leutzinger v. Treasurer, 895 S.W.2d 591 (Mo.App. 1995); and Wuebbeling v. West County Drywall, 898 S.W.2s 615 (Mo.App. 1995); (3) that the combined effect of the disability resulting from the work-related injury and the disability that is attributable to all conditions existing at the time the last injury was sustained results in permanent, total disability, Boring v. Treasurer, 947 S.W.2d 483 (Mo.App. 1997); Reiner v. Treasurer, 837 S.W.2d 152 (Mo.App 1994).

The Claimant has met the first test for establishing Second Injury Fund liability. Based on the evidence as well as the stipulations of the parties, I find that the Claimant sustained a compensable work-related injury while employed by AOL Time Warner on February 27, 2004. That accident resulted in permanent disability to the Claimant's right wrist. I find the amount of that disability is 15 percent permanent partial disability, the same amount of disability the Employee and the Employer/Insurer settled that claim for.

I further find that the Claimant had permanent disability predating his February 27, 2004, injury. Claimant's disability prior to February 27, 2004, was extensive and serious. He had disabling conditions with regard to his low back, neck, upper extremities and heart. He suffered from obesity and diabetes. I find that all of these conditions constitute a hindrance or obstacle to his employment as that phrase has been defined by the courts.

Lastly, I find that the Claimant presented sufficient evidence by way of his own testimony, the testimony of Dr. Koprivica and that of Mary Titterington to persuade me that he is permanently and totally disabled due to the combined effect of the disability resulting from his 2004 accident at work and the disability attributable to his preexisting conditions. The Second Injury Fund did elicit some good cross examination testimony at the trial regarding whether the Claimant was able to compete for gainful employment immediately before the last accident. Claimant undoubtedly had significant disabilities prior to this last accident, said disabilities requiring accommodations. However, the Claimant was, in fact, working at the time of the last accident and was not working in any type of sheltered workshop environment. He was working for AOL Time Warner and performing duties required of him there. While Claimant may have had some difficulties obtaining employment in the open labor market prior to February 27, 2004, given all of his physical impairments, I find that he was at least competitive on the open labor market. He obtained a job and maintained employment at a commercial enterprise until his injury in 2004. I find that the disability from the 2004 injury to Claimant's wrist combined with his prior disabilities caused him to be unemployable. I definitely did not find the last accident alone caused the Claimant to be permanently and totally disabled, nor did I find the Claimant able to compete for gainful employment since his release from treatment with regard to his February 2004 injury. In other words, the only possible defense the Second Injury Fund had in this case involved the Claimant's being totally disabled before the last accident. I carefully considered all the evidence with regard to this theory and ultimately found that it was not persuasive. Instead, I find that the Claimant is indeed permanently and totally disabled as a combined result of the effects of the last accident and his preexisting disabilities.

A claimant must also prove that the pre-existing disability is an obstacle or hindrance to employment in order to establish Second Injury Fund liability within §287.220. I find that Mahoney has clearly met this burden. He undoubtedly had pre-existing physical problems which constituted a hindrance to his employment.

I find Daniel W. Mahoney to be permanently and totally disabled as a result of the combined effects from the February 27, 2004 injury and his pre-existing disabilities; specifically Mahoney's pre-existing low back, obesity, neck problems, diabetes, upper extremities and neck, and heart condition.

Based on the evidence, I find that Mahoney's disability became permanent effective February 4, 2005. The evidence showed that the Employer/Insurer paid temporary total disability benefits and that Mahoney tried to work, but was unable to do so and last worked on February 3, 2005. The Employer/Insurer settled its liability for 15% to the right wrist, or 24 weeks of compensation at \$347.05 per week. The Second Injury Fund is liable for \$56.53 (the difference between \$403.58 and \$347.05), beginning February 4, 2005 and extending for 24 weeks, and thereafter \$403.58 for life. The Second Injury Fund shall remain liable for such benefits for as long as Mahoney remains so disabled or until his death.

The award of compensation against the Second Injury Fund is subject to a lien in the amount of twenty-five percent (25%) to Frank Eppright for necessary legal services rendered to the Claimant.

Date: _____

Made by: _____

Rebecca S. Magruder
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation