

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

Injury No.: 04-085399

Employee: Terry M. McCoy
Employer: Metaltek International (Settled)
Insurer: Wausau Business Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ Having reviewed the evidence, read the briefs, and considered the whole record, the Commission finds that the award of the administrative law judge (ALJ) is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the ALJ dated November 22, 2011, as supplemented herein.

Preliminaries

On August 13, 2004, employee injured his left shoulder when he was moving file boxes at work. Employee settled his claim against employer, but proceeded to final hearing of his claim against the Second Injury Fund.

The ALJ denied employee's claim for benefits against the Second Injury Fund. Employee appealed to the Commission alleging that the ALJ erred in becoming an advocate for the Second Injury Fund and that there was not sufficient, competent evidence in the record to warrant the making of the award under § 287.495 RSMo.

Findings of Fact

The findings of fact and stipulations of the parties were accurately recounted in the award of the ALJ and, to the extent they are not inconsistent with the findings listed below, they are adopted and incorporated by the Commission herein.

Discussion

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there has been previous disability." In order to trigger liability of the Second Injury Fund, employee must show the presence of an actual and measurable disability at the time the work injury is sustained and be of such seriousness as to constitute a hindrance or obstacle to employment or re-employment should the employee become unemployed. *E. W. v. Kansas City, Missouri, School District*, 89 S.W.3d 527, 537 (Mo. App. W.D. 2002), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

¹ Statutory references are to the Revised Statutes of Missouri 2003 unless otherwise indicated.

Employee: Terry M. McCoy

- 2 -

We find, as did the ALJ, that employee failed to prove he suffered from an actual and measureable disability of such seriousness as to constitute a hindrance or obstacle to his employment at the time the work injury was sustained. Therefore, we find that Second Injury Fund liability is not triggered and no further analysis is needed.

We also find that the ALJ did not become an advocate for the Second Injury Fund and his award and decision is fully supported by competent and substantial evidence.

Award

We affirm the award of the ALJ as supplemented herein. Employee's claim against the Second Injury Fund is denied.

The award and decision of Administrative Law Judge Gary L. Robbins, issued November 22, 2011, is attached hereto and incorporated herein to the extent it is not inconsistent with this decision and award.

Given at Jefferson City, State of Missouri, this 25th day of April 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Terry M. McCoy

Injury No. 04-085399 &
08-122038

Dependents: N/A

Employer: Metaltek International

Additional Party: Second Injury Fund

Insurer: Wausau Business Insurance Company

Hearing Date: August 15, 2011

Checked by: GLR/rf

SUMMARY OF FINDINGS

1. Are any benefits awarded herein? Only in 08-122038.
2. Was the injury or occupational disease compensable under Chapter 287? Yes, the parties stipulated to accident and/or occupational disease and medical causation in both cases.
3. Was there an accident or incident of occupational disease under the Law? Yes, the parties stipulated to accident and/or occupational disease in both cases.
4. Date of accident or onset of occupational disease? August 13, 2004 in 04-085399. The employee claimed the period of February 2003 to May 2008 in 08-122038.
5. State location where accident occurred or occupational disease contracted: Jefferson County, Missouri in each case.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes, in both cases.
7. Did employer receive proper notice? Yes, in both cases.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes, the parties stipulated to accident or occupational disease in both cases.
9. Was claim for compensation filed within time required by law? Yes, in both cases.

10. Was employer insured by above insurer? Yes, in both cases.
11. Describe work employee was doing and how accident happened or occupational disease contracted: In 04-085399, the employee injured his left shoulder as he was moving file boxes. In 08-122038, the employee claims that he developed carpal tunnel syndrome in the period from February 2003 to May 2008.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Left shoulder in 04-085399. In 08-122038, the employee settled his case for 20% permanent partial disability of the left hand, 7½ % permanent partial disability of the right hand and 8% multiplicity for \$15,000.00.
14. Nature and extent of any permanent disability: In 04-085399, on April 13, 2010, the employee settled his case with the employer-insurer for 35% permanent partial disability of the left shoulder. In 08-122038, on June 10, 2010, the employee settled his case with the employer-insurer for 20 % permanent partial disability of the left hand, 7½% permanent partial disability of the right hand and 8% multiplicity for \$15, 000.00. All issues including accident were in dispute.
15. Compensation paid to date for temporary total disability: \$175.98 in 04-085399. \$0 in 08-122038.
16. Value necessary medical aid paid to date by employer-insurer: \$14, 948.81 in 04-085399. \$0 in 08-122038.
17. Value necessary medical aid not furnished by employer-insurer: \$0 in each case.
18. Employee's average weekly wage: \$369.54 in 04-085399. \$414.78 in 08-122038.
19. Weekly compensation rate: In 04-085399 the parties stipulated to a rate of \$246.37 for all purposes even though the Stipulation for Compromises Settlement reflects a rate of \$346.37. \$276.52 for all purposes in 08-122038.
20. Method wages computation: By agreement.
21. Amount of compensation payable: See Award.
22. Second Injury Fund liability: See Award.
23. Future requirements awarded: None.

Employee: Terry M. McCoy

Injury Number 04-085399
08-122038

The Compensation awarded to the employee shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the employee: Ray A. Gerritzen.

FINDINGS OF FACT AND RULINGS OF LAW

On August 15, 2011, the employee, Terry M. McCoy, appeared in person and with his attorney, Roy A. Gerritzen, for a hearing for a final award in two cases that were combined for trial. The employer-insurer was not present at trial as they had already settled with the employee. Assistant Attorney General Eileen R. Krispin represented the Second Injury Fund. The Court took judicial notice of all records contained within the files of the Division of Workers' Compensation. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the statement of the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS IN 04-085399

1. The employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by Wausau Business Insurance Company.
2. On or about the date of the alleged accident or occupational disease the employee was an employee of Metaltek Incorporated and was working under the Workers' Compensation Act.
3. On or about August 13, 2004 the employee sustained an accident or occupational disease that arose out of and in the course of his employment.
4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage is \$369.54. The parties agreed that his compensation rate for all issues is \$246.37 per week.
7. The employee's injury was medically causally related to his accident or occupational disease.
8. The parties agreed that the employer-insurer paid \$14,948.81 in medical aid.
9. The parties agreed that the employer-insurer paid \$175.98 in temporary disability benefits.
10. The employee has no claim for previously incurred medical bills.
11. The employee has no claim for mileage or future medical care.
12. The employee has no claim for additional temporary disability benefits.
13. The employee has no claim for either permanent partial or permanent total disability as to the employer-insurer.

UNDISPUTED FACTS IN 08-122038

1. The employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by Wausau Business Insurance Company.
2. On or about the date of the alleged accident or occupational disease the employee was an employee of Metaltek Incorporated and was working under the Workers' Compensation Act.
3. On or about February 2003 to May 2008 the employee sustained an accident or occupational disease that arose out of and in the course of his employment.

4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage is \$414.78. The parties agree that his compensation rate for issues is \$276.52.
7. The employee's injury was medically causally related to his accident or occupational disease.
8. The parties agreed that the employer-insurer paid \$0 in medical aid.
9. The parties agreed that the employer-insurer paid \$0 in temporary disability benefits.
10. The employee has no claim for previously incurred medical bills.
11. The employee has no claim for mileage or future medical care.
12. The employee has no claim for additional temporary disability benefits.
13. The employee has no claim for either permanent partial or permanent total disability as to the employer-insurer.

ISSUES IN 04-085399

1. Liability of the Second Injury Fund for permanent partial disability.

ISSUES IN 08-122038

1. Liability of the Second Injury Fund for permanent partial or permanent total disability.
2. Whether occupational disease is compensable against the Second Injury Fund under Chapter 287.

EXHIBITS AS TO BOTH CASES

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A1. April 28, 2008 deposition of Robert P. Poetz, D.O.
- A2. December 16, 2010 deposition of Robert P. Poetz, D.O.
- B. Deposition of James M. England, Jr.
- C. Building Blocks for Success.
- D. Medical records of Patricia Allen, FNP.
- E. Medical records of John P. Hess, M.D.
- F. Medical records from Jefferson County Rehab
- G1. Medical records from Farmington Sports and Rehab Center.
- G2. Account history from Farmington Sports and Rehab Center.
- H. Medical records from Vista Imaging of Jefferson County.
- I. Medical record of Robert I. Markenson, M.D.
- J. Medical records of Laurence Lum, D.O.
- K. Stipulation for Compromise Settlement in Case 04-085399.
- L. Stipulation for Compromise Settlement in Case 08-122038.
- M. Deposition of Matt Gardiner.

- N. Deposition of Al Blume.
- O. Medical records from Metropolitan Occupational Medicine, P.C.
- P. Medical records of Seth Paskon, M.D.
- Q. Medical records of Daniel Phillips, M.D.
- R. List of medications.

Second Injury Fund Exhibits

- I. Deposition of Richard E. Hulsey, M.D.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:

STATEMENT OF THE FINDINGS OF FACT-

Terry M. McCoy, the employee, Theresa Gorse and Christine Luntzer-McCoy were the only witnesses to personally testify at trial. All other evidence was presented in the form of written records, medical records or deposition testimony.

The employee was born on December 12, 1952. He quit high school during his freshman year. He is not presently married. Over 25 years of his work history was in the auto industry working on transmissions. He and his then wife owned and operated a resort in Piedmont, Missouri for about five years. Most of his prior employment involved some aspect of physical labor.

In February of 2003, the employee began his employment with Metaltek. His job duties were generally as a janitor where he swept, mopped and moved furniture.

The employee hurt his left shoulder on August 13, 2004 when he was moving file boxes. He filed his claim in that case on September 8, 2005. Dr. Markenson performed rotator cuff surgery on October 25, 2004. The employee settled this claim with the employer-insurer for 35% permanent partial disability of the left shoulder on April 10, 2010. The employee returned to his same job at Metaltek after his surgery but testified that he had problems doing overhead work.

The employee claims that he developed carpal tunnel syndrome while working for Metaltek for the period of February 2003 to May 2008. This coincides with the employee's entire employment history with Metaltek. He filed his claim in that case on June 22, 2009. Dr. Maynard performed left carpal tunnel surgery on May 19, 2009. The employee settled this claim with the employer-insurer for 20% permanent partial disability of the left hand, 7½% permanent partial disability of the right hand and 8% multiplicity on June 10, 2010.

The employee claimed and testified about his pre-existing injuries/disabilities:

- 1970's laceration to his right index finger;
- 1981-1982 diabetes;
- 1990 high blood pressure; and
- Coronary artery disease pre-existing 2008.

The employee testified that he has had lots of problems with diabetes beginning in 1982. He said that he had neuropathy in his feet and lower legs but it was affecting his whole body. He also testified that he has had high blood pressure since 1990. He reported that prior to August 13, 2004 he would get dizzy if he stood up too fast and he would get light-headed and dizzy at work.

The employee testified that prior to 2004 when he hurt his shoulder he could do anything he wanted.

The employee has also had major health problems since he last worked for Metaltek:

- May 2008-the employee started having seizures;
- August 2008-Dr. Hess performed a 5 way heart bypass surgery;
- October 31, 2008-after blacking out, the employee fell and injured his left hand and wrist; and
- April 2011-amputation of toes due to diabetic condition.

The records reveal that the employee's general health has deteriorated since he left employment with Metaltek. This decline in health has been mainly due to his diabetic and coronary artery disease.

The employee presented medical records pertaining to his prior medical history.

Dr. Byler saw the employee in 2004 and referred him to Dr. Markenson for his left shoulder matters.

Jefferson County Rehab treated the employee after his left shoulder surgery. These 2005 records contained a functional capacity report that was good. There was no mention of carpal tunnel symptoms.

Farmington Sports and Rehab Center also saw the employee after his shoulder surgery. The last record was dated January 21, 2005. He was released to home exercise program. No reports were made regarding hand/carpal tunnel problems during all of the exercising he did for three months.

Dr. Lum treated the employee from 2007 to 2010. His records show that the employee was seen on:

- May 27, 2007: The employee was there as follow up from ER where he had elevated blood sugar. This may be the first time he was seen at this office.
- June 2, 2008: Employee there due to decreased vision and continued dizziness. Does not feel able to work. In no acute distress. Heart regular. There is no mention of carpal tunnel symptoms.
- June 13, 2008: Employee there for work note. Seeing while spots.
- June 27, 2008: Employee there regarding dizziness. Has seen Dr. Hess and has occlusion of two coronary arteries. Dr. Hess took him off for one month.
- July 25, 2008: Employee there to discuss possibility of getting disability. Difficulty with feeling in feet and cardiac issues. Getting depressed. There is no mention of carpal tunnel symptoms.

- September 16, 2008: Difficulty with stream of urine. There is no mention of carpal tunnel symptoms
- October 13, 2008: There due to diarrhea, nausea. There is no mention of carpal tunnel symptoms.
- **October 31, 2008: There after c/o of right eye and left hand wrist pain after blacking out and being found face down on the floor.**
- February 3, 3009: There complaining of left wrist pain. Cast removed a month earlier.
- April 14, 2009: There for syncopal episodes. Admits to drinking beer and hard liquor and not taking meds. Note says Dr. Maynard advised surgery for left carpal tunnel surgery. There are no records presented from Dr. Maynard.
- August 27, 2010: There as toe split open. Has stopped all medications.

Patricia Allen, FNP treated the employee from 2006 to 2008. In an office note dated November 27, 2006 she reported this was the employee's first visit with problems with diabetes; medical history: Diabetes mellitus type 2. She also reported that the employee smokes two packs a day, "He is a six to eight pack a day alcohol drinker". No problems falling or staying asleep. Extremities: He does have decreased sensation to the bilateral upper extremities to the digits more than the hand itself. Testing of all other functions seems normal. This record made no mention of carpal tunnel. Diagnoses: Diabetes Mellitus Type 2; Peripheral Neuropathy; and General Anxiety Disorder.

In an office note dated February 16, 2007, Ms. Allen reported that the employee was there for follow-up. Blood pressure is running high. Extremities: Patient moves all extremities well with full range of motion. There was no mention of carpal tunnel problems.

Ms. Allen also saw the employee on March 3, 2008. She reports that he was there for regular check-up. Has numbness in hands and feet. He is a maintenance man mopping, sweeping and lifting chairs frequently. Employee has positive Tinel's and Phalen's. All other testing is normal. Diagnoses: Peripheral neuropathy; diabetic neuropathy; diabetes type 2, poorly controlled; hypertension; and GAD. Plan: Contact work and work up carpal tunnel; refilled prescriptions; employee not compliant.

This is the first medical record where carpal tunnel syndrome was specifically mentioned. It was not diagnosed.

Dr. Hess saw the employee regarding a June 20, 2008 angiogram. He reported total chronic occlusion of a large dominant right coronary artery and mild to moderate disease of the left anterior descending and circumflex arteries.

Dr. Phillips evaluated the employee on March 20, 2008 and performed a nerve conduction test. He reported that:

- The employee is right handed;
- Has been a type II diabetic for 20 years;
- Has an 8-10 year progression of numbness in both feet that now reaches the ankles;

- He has developed numbness in the fingers of both hands that started in a constant fashion but is worse at night; and
- "In summary, the findings are consistent with an underlying significant diabetic-type peripheral neuropathy. The observations vis-à-vis the medical nerves are not impressively different than the general level of neuropathy and only a minority of diabetic patients with this pattern will obtain significant sustained benefit from carpal tunnel decompressions. The same can be said with regards to the ulnar nerves. ...".

Dr. Crandall saw the employee and on March 26, 2008 and opined that the testing showed that severe diabetic neuropathy of both upper and lower extremities. His opinion was that work was a minor contributor to carpal tunnel and surgery might not help.

In addition to medical treatment records that were presented, evaluation records were presented from Dr. Poetz, Dr. Hulsey and James M. England. Dr. Poetz and Mr. England were retained by employee's counsel. Dr. Hulsey was retained by employer-insurer's counsel.

Dr. Hulsey saw the employee on three occasions, May 14, 2008, June 18, 2008 and again on January 21, 2009, and prepared three reports of the same date, and testified by deposition on July 13, 2009.

After his first evaluation Dr. Hulsey reported that his exam was consistent with someone who had rotator cuff surgery. After reviewing x-ray and MRI films he indicated that there was thinning of the employee's remaining tendon, discussed but did not recommend surgery. He testified that the employee could continue his regular position but should avoid any overhead activities. There was no report made of carpal tunnel symptoms.

After his January 21, 2009 exam, Dr. Hulsey reported that:

- The employee was not taking pain medications;
- Surgery was not recommended unless the pain got a lot worse;
- The employee was at maximum medical improvement with permanent restrictions of avoid overhead lifting, no lifting of more than 10-15 pounds occasionally on the left and avoid repetitive movement above the shoulder on the left;
- The employee could continue to work in the open labor market with the restrictions he gave; and
- The employee has a 20% permanent partial restriction of his left shoulder.

During cross-examination, Dr. Hulsey reported that he had no records of the employee having any left shoulder problems prior to August 13, 2004. He also indicated that he did not know what Dr. Poetz said in his reports.

Dr. Hulsey made no mention of any carpal tunnel symptoms in any of his reports. He reported that the employee could return to work and made no assessments that he was permanently and totally disabled as of January 2009.

Dr. Poetz saw the employee on four occasions January 5, 2006, June 22, 2007, July 7, 2009, February 1, 2010 and prepared four reports dated March 15, 2006, July 23, 2007, October 7, 2009, May 20, 2010 and testified by deposition on April 28, 2008 and December 16, 2010.

Dr. Poetz testified in his April 28, 2008 deposition after he had seen the employee two times. At that time, the employee had already had his April 13, 2004 accident and subsequent surgery. As of April 28, 2009 the employee had not filed his claim for carpal tunnel as it was filed on June 22, 2009.

In his March 15, 2006 report Dr. Poetz indicated that:

- The employee's chief complaint was that he was unable to do anything overhead with his left arm or reach behind his back. He also complained that he still gets occasional pain in his shoulder and upper arm.
- An FCE of April 19, 2005 noted that the employee functioned well with his left arm from the chest level down.
- The employee's medical history is significant for hypertension and hyperlipidemia.
- The employee was diagnosed with diabetes in approximately 1981.
- The employee lacerated his right index finger in the 1970s and underwent a tendon repair. The employee reported pain and stiffness in that finger.
- The employee denies any other significant previous injuries, surgeries or hospitalizations.
- The employee smokes 1½ packs of cigarettes a day and has a few beers a day.
- He performed a physical exam and gave diagnoses.
- The employee's injury of April 13, 2004 is the substantial prevailing factor for his disabilities.

Dr. Poetz's opinions and ratings regarding the employee's disabilities are:

- 40% permanent partial disability to the left upper extremity from the August 13, 2004 work injury.
- 25% permanent partial disability to the body as a whole due to diabetes, pre-existing.
- 20% permanent partial disability to the body as a whole as measured at the cardiovascular system, pre-existing.
- 20% permanent partial disability to the right upper extremity as measured at the right hand, 1971.
- The combination of the present and prior disabilities results in a total which exceeds the simple sum by 20%.

As of March 15, 2006, Dr. Poetz did not make any findings about the employee's carpal tunnel problems and did not note any physical symptoms relating to either hand or wrist during his physical examination. He also did not address the issue of permanent total disability and did not indicate that the injuries he discussed combined with pre-existing injuries to make the employee permanently and totally disabled. According to the employee's claim he had carpal tunnel symptoms as of February 2003.

In his July 23, 2007 report, Dr. Poetz indicated that:

- The employee had continued complaints with his left shoulder.

- He was still working in housekeeping and maintenance.
- The employee saw Dr. Markenson who had another MRI done.
- The employee's past medical and social history was the same.
- During the physical exam the employee rated his worst pain as 7/10.
- Prognosis was guarded due to length of time that has passed since the injuries and continuance of pain.
- The employee has not reached maximum medical improvement and requires additional treatment.

Dr. Poetz again provided his rating and did not change them from the May 15, 2006 report. Once again he did not make any findings about the employee's carpal tunnel problems and did not note any physical symptoms relating to either hand or wrist during his physical examination. He also did not address the issue of permanent total disability and did not indicate that the injuries he discussed combined with preexisting injuries to make the employee permanently and totally disabled.

Dr. Poetz's next report is dated October 7, 2009. The employee had filed his carpal tunnel complaint alleging carpal tunnel syndrome from February 2003 to May 2008 as of June 22, 2009. The employee had his left carpal tunnel surgery on May 19, 2009. In this report Dr. Poetz indicated that:

- The employee's chief complaints pertained to his left shoulder.
- The employee had been returned to see Dr. Hulsey. Dr. Hulsey did not recommend further surgery due to significant risks unless the pain became intolerable.
- The employee has been receiving social security since May 2008 due to his multiple health conditions.
- Dr's Poetz's Past Medical History changed indicating that the employee has five-vessel coronary artery bypass grafting on August 26, 2008, and that the employee had a left carpal tunnel release two months previously for which he reported overall improvement with residual tightness in his fingers.
- Social History was that the employee smokes 1½ packs of cigarettes a day and "occasionally consumes alcohol".
- "There is significant atrophy at the bilateral thenar eminence which is typical of carpal tunnel syndrome".
- Dr. Poetz did not diagnosis carpal tunnel syndrome.

Dr. Poetz's conclusion was: "... this patient has not reached maximum medical improvement. However, if no further treatment were obtained, then my previous ratings would apply and it is my belief that Mr. McCoy would be permanently and totally disabled as a direct result of his August 13, 2004 work related injury and his pre-existing conditions. He would therefore be unable to maintain gainful employment on the open labor market". Dr. Poetz did not specifically indicate whether any of the carpal tunnel problems alleged to have begun in 2003, and by this time existing for several years, had any bearing on his opinions regarding permanent total disability.

Dr. Poetz's next report is dated May 20, 2010. In this report Dr. Poetz indicated that:

- When he saw the employee on July 9, 2009 he was under the impression that he was evaluating the employee's left shoulder. At that time the employee mentioned that he had undergone a left carpal tunnel release. He was not aware at that time that the employee's counsel had filed a claim until he reviewed the medical records regarding the employee's claim for bilateral carpal tunnel syndrome. He had in the past questioned the employee regarding history for occupational disease and his repetitive job duties. An examination of the upper extremities was done. He is preparing this report as a supplemental report to provide an opinion regarding his ability to work based on his discussion with the employee on February 1, 2010.
- He reviewed additional medical records.
- The employee was seen on November 11, 2008 by Dr. Paul Maynard. It was reported that the employee had blacked out on October 31, 2008 and received a left wrist fracture. It was noted that the employee was being evaluated for syncope episodes. As of February 19, 2009 the employee returned to Dr. Maynard for continued problems and it was noted that the employee had been seen in the past for numbness and tingling problems that was attributed to neuropathy as a result of his diabetes. An EMG/NCV was recommended. Dr. McGarry did the testing on March 9, 2009 which indicated that the EMG findings are commonly seen in diabetes and are evidence of an underlying neuropathy; and that the NCV showed abnormal findings. As of March 31, 2009 surgical options were considered due to persistent complaints in the left hand though possible relief was uncertain. Dr. Maynard continued seeing the employee after his carpal tunnel release.
- The employee reported no additional treatment for his injuries.
- Past Medical History: The employee has suffered from hypertension and coronary artery disease for at least 15 years. He has a history of diabetes since the early 1980s and diabetic neuropathy for the past 12 years which primarily affected the lower extremities and within the past several years the upper extremities as well. The employee began blacking out in May 2008, seizure related. He underwent coronary by-pass surgery in August 2008.

Dr. Poetz also gave the same general diagnoses in the past but added:

- Left carpal syndrome, 2/03-5/08.
- Status post left carpal tunnel release, 2/03-5/08.
- Right carpal tunnel syndrome, 2/03-5/08.

In this report Dr. Poetz changed his disability ratings and assessment of permanent total disability. He reported:

- 35% permanent partial disability to the upper left extremity as measured at the left hand and wrist directly resultant from the February 2003 through May 2008 work related injury.
- 25% permanent partial disability to the upper right extremity as measured at the right hand and wrist directly resultant from the February 2003 through May 2008 work related injury.
- 40% permanent partial disability to the upper left extremity as measured at the left shoulder, 8/13/04.

- 25% permanent partial disability to the body as a whole due to diabetes, pre-existing.
- 25% permanent partial disability to the body as a whole as measured at the cardiovascular system, pre-existing.
- 20% permanent partial disability to the right upper extremity as measured at the right hand, 1971.
- The combination of the present and prior disabilities results in a total which exceed the simple sum by 20%.

Dr. Poetz also opined that the employee is permanently and totally disabled as the result of the combination of the February 2003 through May 2008 work related injuries and his pre-existing conditions. He is and will be permanently and totally unemployable in the open labor market.

Dr. Poetz was challenged during his April 28, 2008 deposition testimony. He indicated that:

- The August 13, 2004 injury combines with the prior problems in that diabetes make an injury less capable of the healing process and that a person is less active and does not perform healthy cardiovascular activity.
- Diabetes also causes renal failure.
- The employee's diabetes is not in control.
- Before the shoulder injury the employee did not report that he was unable to perform his work-related duties with his right hand.
- The employee builds old cars in his spare time; he had no problems before August 2004 but has problems now due to shoulder pain.
- He had no records to review regarding diabetes, hypertension or hyperlipidemia.
- The employee is not taking insulin at this time and his diabetes is out of control.

Dr. Poetz was also challenged during his December 16, 2010 deposition testimony. He indicated that:

- He is asked how the synergy takes place between the carpal tunnel syndrome case, the rotator cuff tear in 2004 and the diabetes and hypertension and the laceration of the little finger. He stated: "Carpal tunnel syndrome has a higher risk in patients that are diabetic. Pre-existing diabetes is one of the risk factors that would have led to carpal tunnel syndrome. The carpal tunnel syndrome and the rotator cuff synergistically combine because they are both in the upper extremities and both impair use of the upper extremities. If the left rotator cuff is not allowing much activity then the right shoulder has to overwork. This also puts additional stress on the rest of his diagnoses. His diabetic neuropathy, hypertension, hyperlipidemia and coronary artery disease are all pre-existing and all pose additional risk factors for the patient."
- He is asked how the employee's job duties caused carpal tunnel syndrome. He responded that carpal tunnel syndrome is at a higher risk for people with diabetes but they don't develop diabetes just from being diabetic. He says it requires excessive and repetitive use of the upper extremities, the hands and the wrists in order for the diabetic to develop carpal tunnel syndrome.
- That as of the 2009 exam he had not made a finding regarding carpal tunnel syndrome and also agreed that his finding of permanent total disability was made whether or not the employee has carpal tunnel syndrome.

- The employee had bypass surgery in 2008. Diabetes, blood pressure and cholesterol problems cause coronary artery problems to develop slowly over a long time.
- Prior to 2008 the employee was being treated for these other conditions. Coronary artery disease is not found until there are symptoms. Many times there are no symptoms and patients just suddenly die due to the underlying cause. The condition worsens over time.
- The doctor is asked about seizures. He says the employee is being treated for a seizure disorder and the mechanisms that cause coronary narrowing. It is likely that the seizure is secondary to small, narrow, plaque-forming blood vessels in his brain as well.
- Carpal tunnel syndrome is a risk factor of diabetic neuropathy.
- Carpal tunnel syndrome is due to pressure on the medial nerve at the wrist. The polyneuropathy that develops with diabetes is a matter of chemical change on the nerve sheath that causes carpal tunnel syndrome.

Dr. Poetz did not ever expound on his statements regarding carpal tunnel affecting the medical nerve due to pressure or as a matter of chemical change. Certainly he did not expound on this difference with respects to the “repetitive” aspects of the employee’s job.

Mr. England saw the employee on March 11, 2011, prepared a report dated June 9, 2010 and testified by deposition on April 4, 2011. He testified that:

- “...I felt with the combination of the medical problems that he had combined with his age and the lack really of any usable skills that I thought he would not be able to compete in the open labor market and that he would be totally disabled from a vocational point”.
- He reported that his opinion is due to several different things; he’s had problems with his upper extremities, he’s had problems with his shoulder, he’s had problems with his hands, medical problems with diabetes, high blood pressure-neuropathy in his legs that makes it difficult for him to be on his feet for very long, it is primarily a combination of the lower extremity problems from the neuropathy and then the upper extremity would be both the shoulder and hand problem, the employee has an 8th grade level in reading and 5th grade in math.

During cross-examination, Mr. England agreed that the employee had high blood pressure issues, cardiovascular issues and he underwent a five-level by pass in 2008, and that he indicated that the employee had seizures but was taking Keppra and he was not having them anymore. The employee did not report any restrictions with respect to his cardiovascular disease. Even lacking the neuropathy, the employee was unemployable as that would limit him to a sit down job and then the hands become more important. If the employee couldn’t use his upper extremities repetitively, and the fact that he is 57 and doesn’t really have skills, it is difficult to think of anything he could do and he is unemployable. The upper extremity problems are the hands and the shoulder, he has trouble using his arm out away from his body and he has trouble using his hands.

Mr. England prepared a report dated June 9, 2010 and reported “Considering the combination of his impairments and the restrictions described by Dr. Poetz, I do not believe that he would be capable of performing any of his past work nor would he appear to be capable of performing alternative entry-level types of work in the open labor market. Considering the combined effects

of his impairments he is likely to remain totally disabled from a vocational standpoint and would not be a good candidate for rehabilitation services”.

Dr. Poetz and Mr. England were not asked to consider how or whether the employee’s subsequent health problems affected the employee. They did not comment on how the subsequent health problems affected their opinions about permanent total disability.

Matt Gardiner and Al Blume are friends of the employee who testified by deposition and indicated that they would not hire the employee given his physical problems. They indicated they had little knowledge about the medical problems other than what the employee told them.

Ms. Gorse has been the employee’s girlfriend since 2003. She testified that before August 2004 the employee could do what he wanted. She indicated there was some dizziness before 2004 and some numbness in his feet. On cross-examination she testified that she never saw him have dizzy spells.

RULINGS OF LAW IN 04-085399

The only issue before the Court in this case is whether the Second Injury Fund has any liability for permanent partial disability. Not in issue is whether the employee was permanently and totally disabled as a result of his August 13, 2004 accident in combination with his preexisting injuries. The general standard for permanent partial disability against the Second Injury Fund is whether the employee’s preexisting injuries are so disabling that they are a hindrance or obstacle to employment or re-employment, meet what is called “threshold” and synergistically combine with the employee’s disabilities from the 2004 accident to create a greater overall disability.

The Court makes the following findings:

- The employee settled Injury Number 04-085399 with the employer-insurer by Stipulation for Compromise Settlement for 35% permanent partial disability of the left shoulder.
- The Court concurs with the settlement and specifically finds that the employee does in fact have a 35% permanent partial disability of his left shoulder.
- The employee filed his claim on September 8, 2005 and claimed preexisting injuries regarding a 1970 injury to the right index finger that was believed to have settled for 10% of the finger, diabetes since 1981 or 1982 affecting his entire body but primarily his feet and high blood pressure since 1990 that affects his entire body.
- The employee presented evidence regarding his preexisting medical problems and disabilities.
- The employee presented the testimony of Dr. Poetz who rated the employee’s prior disabilities.
- Dr. Poetz rated the employee’s disability to his right index finger as equating to 20% permanent partial disability of the left hand. The Court finds that Dr. Poetz’s rating as to the left index finger lacks credibility and is not supported by the medical or any other evidence in this case. Any disability to the finger does not meet threshold. The evidence supporting the 1970 injury to the index finger does trigger second injury fund liability for permanent partial disability.

- Dr. Poetz provided a 25% pre-existing permanent partial disability to the employee's body as a whole due to his diabetes. The Court finds that Dr. Poetz's rating as to the employee's preexisting diabetes lacks credibility and is not supported by the medical or any other evidence in this case. The preexisting medical records regarding diabetes are sketchy at best. While the employee may have been diagnosed with diabetes in 1981 or 1982, by the employee's own admission he indicated that he could do whatever he wanted to up to August 13, 2004. Diabetes is an insidious disease that develops over a lengthy period of time. The records indicate that the employee was noncompliant. The Court does not believe that as of August 13, 2004 the employee's diabetic problems were a hindrance or obstacle to employment or reemployment. His major problems with diabetes manifested themselves after August 13, 2004. The employee's diabetic condition does not trigger second injury fund liability for permanent partial disability. Any disability for diabetes does not meet threshold.
- Dr. Poetz provided a 30% preexisting permanent partial disability to the employee's body as a whole due to his hypertension/cardiovascular problems. The Court finds that Dr. Poetz's rating as to these preexisting problems lacks credibility and is not supported by the medical or any other evidence in this case. While the employee may have been diagnosed and had hypertension/coronary problems since 1990, by the employee's own admission he indicated that he could do whatever he wanted to up to August 13, 2004. Hypertension/coronary artery disease is also an insidious disease that develops over a lengthy period of time. The employee had by-pass surgery in August 2008. The Court does not believe that as of August 13, 2004 or 2008 the employee's preexisting problems were a hindrance or obstacle to employment or re-employment. The greater problems manifested themselves after August 13, 2004 or 2008. The employee's hypertension/coronary problems do not trigger second injury fund liability for permanent partial disability. Any disability for hypertension/coronary artery disease does not meet threshold.

In summary, the employee has not met his burden of proof in this case. The Second Injury Fund is not ordered to provide any benefits in this case for permanent partial disability. The Court finds that the testimony, findings and opinions of Dr. Poetz are not credible.

RULINGS OF LAW IN 08-122038

Permanent Total Disability

The employee is claiming that he is permanently and totally disabled as a result of the combination of the last injury regarding carpal tunnel syndrome and his preexisting disabilities. The employee has the burden of proof that he is unable to compete in the open labor market as a result of the combination of the last injury and his preexisting conditions.

A review as to some of the chronology of events shows that:

- Medical records show that on March 3, 2008, Patricia Allen mentioned decreased sensation to the digits but did not diagnose carpal tunnel. The plan was to contact work and work up carpal tunnel.

- On March 26, 2008, Dr. Phillips performed nerve conduction testing and reported that the employee has long standing significant underlying diabetic type peripheral neuropathy.
- On March 26, 2008, Dr. Crandall saw the employee and opined that the testing showed that severe diabetic neuropathy of both upper and lower extremities. His opinion was that work was a minor contributor to carpal tunnel and surgery might not help.
- On October 31, 2008 Dr. Lum treated the employee. The records show that he was there for care to his right eye and left hand and wrist after blacking out and being found face down on the floor.
- On February 3, 2009, Dr. Lum's records show that the employee was there complaining of left wrist pain.
- The employee did not work at Metaktek as of the summer of 2008.
- The employee had surgery for left carpal tunnel syndrome on May 19, 2009.
- The employee filed the claim where he claimed carpal tunnel syndrome from February 2003 to May 2008 on June 22, 2009.
- The medical records in general do not reflect complaints, problem or diagnosis of carpal tunnel syndrome any time prior to 2008 and the 2008 problems seem to have started due to a traumatic event.
- While Dr. Poetz conducted physicals on the employee several times, it is only in his last report that he discussed and addressed carpal tunnel.

On May 10, 2010 it was Dr. Poetz's final opinion that the employee was permanently and totally disabled as a result of the combination of the February 2003 through May 2008 work related injuries and his preexisting injuries. This is the only report where he addressed carpal tunnel syndrome. He prepared reports dated March 15, 2006, July 23, 2007 and October 7, 2009. He saw the employee on four occasions and gained information in order to develop opinions. He performed multiple physicals on the employee prior to the last report. It is not until his last report that Dr. Poetz indicated that the employee had carpal tunnel problems and indicated that the employee's status of permanent total disability included his carpal tunnel problems. If the employee had carpal tunnel that developed from 2003 to 2008 that was caused by repetitive duties as a janitor, you would believe that such problems would have surfaced in all of the records of treatment in 2003, 2004, 2005, 2006, 2007 and early 2008. Such records do not exist. In addition, the records do show that the employee had a traumatic injury to his left hand on October 31, 2008. In addition, when actual testing is done, the expert opinion is that there is diabetic neuropathy of all extremities and the employee's work was a minor factor.

The records also show that the employee had major health problems that were developing over the years that contributed to his overall deteriorating health. He was a heavy smoker and drinker. Medical reports indicate that he was a noncompliant patient when it came to taking his medications. The employee developed major health concerns long after he was employed by Metaktek. In and since 2008 he has had diabetic amputations, undergone a heart surgery due to coronary artery disease and seizures among other health problems.

In addition to the progression of the employee's medical problems, the timing of the filing of his carpal tunnel claim and the progression and development of Dr. Poetz's opinions regarding disability is at a minimum "convenient".

For all of these reasons and after comparing and scrutinizing all of the medical records, the Court finds the findings, opinions and medical testimony of Dr. Poetz is severely lacking in credibility. The Court further finds that Dr. Poetz's opinions are not supported by treatment records. The opinions of Mr. England also lack credibility as they are based on the findings of Dr. Poetz.

In summary, it is the Court's opinion that the employee is not permanently and totally disabled due to Injury Number 04-085399 or Injury Number 08-122038 either standing alone or in combination with each other. It is also the Court's opinion that the employee is not permanently and totally disabled due to a combination of either Injury Number 04-085399 or Injury Number 08-122038 in combination with each other or in combination with any of the employee's preexisting disabilities that he had prior to 2004. The Court further finds that the employee has not presented credible evidence that he is permanently and totally disabled due to his work related injuries standing alone or in combination with each other or in combination with his preexisting injuries. The Court specifically finds that the employee has not presented credible evidence that triggers permanent total disability liability against the Second Injury Fund under Section 287.220 RSMo.

The Court specifically finds that the opinions of Dr. Poetz as to whether or not the employee is permanently and totally disabled and what caused that disability is totally lacking in credibility. Dr. Poetz prepared reports dated March 15, 2006, July 23, 2007, October 7, 2009 and May 20, 2010. The progression of reports went from permanent partial disability to permanent total disability with the underlying cause of the disability changing from one injury to another.

The employee has presented evidence regarding his permanent and total disability but if in fact he is permanently and totally disabled, the Court finds that it is due to the deterioration of his medical problems that he had subsequent to his repetitive or traumatic work accidents involving mainly his heart and diabetic conditions.

The Court therefore finds that the Second Injury Fund has no liability for permanent total disability.

Permanent Partial Disability

The parties stipulated to accident and medical causation in both cases. The employer-insurer settled Injury Number 04-085399 for 35% permanent partial disability. Whether appropriate or not, the employer-insurer settled Injury Number 08-122038 for 20% permanent partial disability of the employee's left hand. The parties stipulated that the employee's rate for permanent partial disability in the 2008 case is \$276.52.

The Court is compelled to find Second Injury Fund liability for permanent partial disability under these circumstances. The employee has met threshold, he has presented expert opinion on the issues of hindrance and synergy. The Court finds a 10% load in this case. Given these factors, the Second Injury Fund is ordered to pay to the employee \$3,213.16 for permanent partial disability.

Second Injury Fund liability for occupational disease

The other legal issue involved in this case is clearly stated by the Second Injury Fund in its proposed finding, i.e. whether, under the concept of strict construction, the employee has a claim against the Second Injury Fund when the employee has repetitive motion injuries. The Court is also aware that this specific issue is already in the system and is pending before tribunals that will review this decision.

The primary specific statutes that apply in a consideration of this issue are Sections 287.020, 287.067, 287.220 and 287.800 RSMo.:

- Section 287.020(2) defines accident.
- Section 287.020(3) defines injury.
- Section 287.067(3) states “An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter”.
- Section 287.220 sets out Second Injury Fund liability.
- Section 287.800 is about strict construction.

It is clear that when you consider the definitions of accident and injury and the fact that Section 287.067 specifically states that injuries due to repetitive motion are compensable under Chapter 287; there is no inconsistency in Section 287.220 because the term repetitive or occupational disease is not used in conjunction with injury. This Court does not believe that the terms strict construction means that you ignore the language in one section of Chapter 287 in favor of another. Repetitive motion/occupational diseases are clearly compensable as to employers and in this Court’s opinion as to the Second Injury Fund.

ATTORNEY’S FEE

Roy A. Gerritzen, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney’s fee shall constitute a lien on the compensation awarded herein.

INTEREST

Interest on all sums awarded hereunder shall be paid as provided by law.

Made by:

Gary L. Robbins
Administrative Law Judge
Division of Workers' Compensation

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

Injury No.: 08-122038

Employee: Terry M. McCoy
Employer: Metaltek International (Settled)
Insurer: Wausau Business Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ We have reviewed the evidence and briefs and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the award and decision of the administrative law judge (ALJ). We adopt the findings, conclusions, decision, and award of the ALJ to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Preliminaries

Employee developed bilateral carpal tunnel syndrome while working for employer for the period of February 2003 to May 2008. Employee settled his claim against employer, but proceeded to final hearing of his claim against the Second Injury Fund.

The ALJ found that employee's 20% permanent partial disability of his left hand attributable to his carpal tunnel syndrome combined with his preexisting disabilities to create an enhanced permanent partial disability of 10%. The ALJ found the Second Injury Fund liable for this 10% load factor. Employee appealed to the Commission alleging that the ALJ erred in failing to award him permanent total disability benefits against the Second Injury Fund.

Findings of Fact

The findings of fact and stipulations of the parties were accurately recounted in the award of the ALJ and, to the extent they are not inconsistent with the findings listed below, they are adopted and incorporated by the Commission herein.

Employee's settlement of his claim against employer was based upon approximate permanent partial disabilities of 20% of the left hand, 7.5% of the right hand, and an 8% multiplicity factor. Based upon our review of the record as a whole, we find that these ratings are fully supported by the evidence and adopt them as our findings of permanent partial disability attributable to the primary injury.

Employee also settled a prior claim against employer with regard to Injury No. 04-085399 for 35% permanent partial disability of the left shoulder. Based upon our review of the evidence we find that the 35% permanent partial disability rating is fully supported by the evidence and adopt it as our finding of employee's preexisting permanent partial disability.

Discussion

Employee contends that he is permanently and totally disabled as a result of his bilateral carpal tunnel syndrome combining with his preexisting disabilities.

¹ Statutory references are to the Revised Statutes of Missouri 2007 unless otherwise indicated.

Employee: Terry M. McCoy

- 2 -

In determining whether employee is permanently and totally disabled, we turn to § 287.020.6 RSMo, which defines “total disability” as the “inability to return to any employment...” The Court in *Gordon v. Tri-State Motor Transit Company*, 908 S.W.2d 849 (Mo.App. 1995) provided a test for determining permanent total disability:

The test for permanent total disability is whether, given the employee’s situation and condition he or she is competent to compete in the open labor market. The pivotal question is whether any employer would reasonably be expected to employ the employee in that person’s present condition, reasonably expecting the employee to perform the work for which he or she is hired.

Id. at 853 (citations omitted).

With regard to permanent total disability, we agree with the ALJ’s credibility findings, analysis, and conclusion that if employee is permanently and totally disabled, it is due to the deterioration of his medical problems he had subsequent to his primary injury, primarily involving his heart and diabetic conditions. Therefore, we deny employee’s claim for permanent total disability benefits.

While we find that employee is not permanently and totally disabled due to the combination of his primary injury and preexisting disability, we must address whether employee is entitled to any enhanced permanent partial disability.

In evaluating cases involving preexisting disabilities, the employer’s liability must first be considered in isolation before determining Second Injury Fund liability. *Kizior v. Trans World Airlines*, 5 S.W.3d 195 (Mo. App. W.D. 1999), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). In *Kizior*, the Court set out a step-by-step test for determining Second Injury Fund liability:

Section 287.220.1 contains four distinct steps in calculating the compensation due an employee, and from what source, in cases involving permanent disability: (1) the employer’s liability is considered in isolation – ‘the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability’; (2) Next, the degree or percentage of the employee’s disability attributable to all injuries existing at the time of the accident is considered; (3) The degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the combined disability; and (4) The balance becomes the responsibility of the Second Injury Fund.

Kizior, 5 S.W.3d at 200.

We have previously found that as a result of the primary injury employee sustained 20% permanent partial disability of the left hand, 7.5% permanent partial disability of the right hand, and an 8% multiplicity factor; and that he had 35% preexisting permanent partial disability of the left shoulder. We further find, based upon the record as a whole, that these disabilities combine to produce greater overall disability than the simple arithmetic sum of the separate disabilities.

The ALJ found that only employee’s 20% permanent partial disability of the left hand combined with his 35% permanent partial disability of the left shoulder to produce a load factor of 10%. While we agree with the ALJ’s finding of a 10% load factor, we disagree with the ALJ’s exclusion of employee’s 7.5% permanent partial disability of the right hand and 8% multiplicity from the

Employee: Terry M. McCoy

calculation of the Second Injury Fund's liability. Therefore, we find that the ALJ's finding of Second Injury Fund liability should be modified.

Award

We modify the award of the ALJ to accurately reflect all of employee's permanent partial disability resulting from the primary injury.

We find that employee's primary injury² combined with his preexisting disability³ to result in a permanent partial disability enhancement of 10% above the simple arithmetic sums of the separate disabilities, or 13.3175 weeks of benefits.⁴

The Second Injury Fund is liable for employee's 13.3175 weeks of enhanced permanent partial disability benefits, or \$3,682.56.⁵

The award and decision of Administrative Law Judge Gary L. Robbins, issued November 22, 2011, is attached hereto and incorporated herein to the extent it is not inconsistent with this decision and award.

The Commission further approves and affirms the ALJ'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 25th day of April 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

² 51.975 weeks = 20% PPD of the left hand (35 weeks) + 7.5% PPD of the right hand (13.125 weeks) + 8% multiplicity factor (3.85 weeks).

³ 81.2 weeks = 35% PPD of the left shoulder.

⁴ = .10 * (51.975 + 81.2).

⁵ = 13.3175 x \$276.52.

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Terry M. McCoy

Injury No. 04-085399 &
08-122038

Dependents: N/A

Employer: Metaltek International

Additional Party: Second Injury Fund

Insurer: Wausau Business Insurance Company

Hearing Date: August 15, 2011

Checked by: GLR/rf

SUMMARY OF FINDINGS

1. Are any benefits awarded herein? Only in 08-122038.
2. Was the injury or occupational disease compensable under Chapter 287? Yes, the parties stipulated to accident and/or occupational disease and medical causation in both cases.
3. Was there an accident or incident of occupational disease under the Law? Yes, the parties stipulated to accident and/or occupational disease in both cases.
4. Date of accident or onset of occupational disease? August 13, 2004 in 04-085399. The employee claimed the period of February 2003 to May 2008 in 08-122038.
5. State location where accident occurred or occupational disease contracted: Jefferson County, Missouri in each case.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes, in both cases.
7. Did employer receive proper notice? Yes, in both cases.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes, the parties stipulated to accident or occupational disease in both cases.
9. Was claim for compensation filed within time required by law? Yes, in both cases.

10. Was employer insured by above insurer? Yes, in both cases.
11. Describe work employee was doing and how accident happened or occupational disease contracted: In 04-085399, the employee injured his left shoulder as he was moving file boxes. In 08-122038, the employee claims that he developed carpal tunnel syndrome in the period from February 2003 to May 2008.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Left shoulder in 04-085399. In 08-122038, the employee settled his case for 20% permanent partial disability of the left hand, 7½ % permanent partial disability of the right hand and 8% multiplicity for \$15,000.00.
14. Nature and extent of any permanent disability: In 04-085399, on April 13, 2010, the employee settled his case with the employer-insurer for 35% permanent partial disability of the left shoulder. In 08-122038, on June 10, 2010, the employee settled his case with the employer-insurer for 20 % permanent partial disability of the left hand, 7½% permanent partial disability of the right hand and 8% multiplicity for \$15, 000.00. All issues including accident were in dispute.
15. Compensation paid to date for temporary total disability: \$175.98 in 04-085399. \$0 in 08-122038.
16. Value necessary medical aid paid to date by employer-insurer: \$14, 948.81 in 04-085399. \$0 in 08-122038.
17. Value necessary medical aid not furnished by employer-insurer: \$0 in each case.
18. Employee's average weekly wage: \$369.54 in 04-085399. \$414.78 in 08-122038.
19. Weekly compensation rate: In 04-085399 the parties stipulated to a rate of \$246.37 for all purposes even though the Stipulation for Compromises Settlement reflects a rate of \$346.37. \$276.52 for all purposes in 08-122038.
20. Method wages computation: By agreement.
21. Amount of compensation payable: See Award.
22. Second Injury Fund liability: See Award.
23. Future requirements awarded: None.

Employee: Terry M. McCoy

Injury Number 04-085399
08-122038

The Compensation awarded to the employee shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the employee: Ray A. Gerritzen.

FINDINGS OF FACT AND RULINGS OF LAW

On August 15, 2011, the employee, Terry M. McCoy, appeared in person and with his attorney, Roy A. Gerritzen, for a hearing for a final award in two cases that were combined for trial. The employer-insurer was not present at trial as they had already settled with the employee. Assistant Attorney General Eileen R. Krispin represented the Second Injury Fund. The Court took judicial notice of all records contained within the files of the Division of Workers' Compensation. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the statement of the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS IN 04-085399

1. The employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by Wausau Business Insurance Company.
2. On or about the date of the alleged accident or occupational disease the employee was an employee of Metaltek Incorporated and was working under the Workers' Compensation Act.
3. On or about August 13, 2004 the employee sustained an accident or occupational disease that arose out of and in the course of his employment.
4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage is \$369.54. The parties agreed that his compensation rate for all issues is \$246.37 per week.
7. The employee's injury was medically causally related to his accident or occupational disease.
8. The parties agreed that the employer-insurer paid \$14,948.81 in medical aid.
9. The parties agreed that the employer-insurer paid \$175.98 in temporary disability benefits.
10. The employee has no claim for previously incurred medical bills.
11. The employee has no claim for mileage or future medical care.
12. The employee has no claim for additional temporary disability benefits.
13. The employee has no claim for either permanent partial or permanent total disability as to the employer-insurer.

UNDISPUTED FACTS IN 08-122038

1. The employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by Wausau Business Insurance Company.
2. On or about the date of the alleged accident or occupational disease the employee was an employee of Metaltek Incorporated and was working under the Workers' Compensation Act.
3. On or about February 2003 to May 2008 the employee sustained an accident or occupational disease that arose out of and in the course of his employment.

4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage is \$414.78. The parties agree that his compensation rate for issues is \$276.52.
7. The employee's injury was medically causally related to his accident or occupational disease.
8. The parties agreed that the employer-insurer paid \$0 in medical aid.
9. The parties agreed that the employer-insurer paid \$0 in temporary disability benefits.
10. The employee has no claim for previously incurred medical bills.
11. The employee has no claim for mileage or future medical care.
12. The employee has no claim for additional temporary disability benefits.
13. The employee has no claim for either permanent partial or permanent total disability as to the employer-insurer.

ISSUES IN 04-085399

1. Liability of the Second Injury Fund for permanent partial disability.

ISSUES IN 08-122038

1. Liability of the Second Injury Fund for permanent partial or permanent total disability.
2. Whether occupational disease is compensable against the Second Injury Fund under Chapter 287.

EXHIBITS AS TO BOTH CASES

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A1. April 28, 2008 deposition of Robert P. Poetz, D.O.
- A2. December 16, 2010 deposition of Robert P. Poetz, D.O.
- B. Deposition of James M. England, Jr.
- C. Building Blocks for Success.
- D. Medical records of Patricia Allen, FNP.
- E. Medical records of John P. Hess, M.D.
- F. Medical records from Jefferson County Rehab
- G1. Medical records from Farmington Sports and Rehab Center.
- G2. Account history from Farmington Sports and Rehab Center.
- H. Medical records from Vista Imaging of Jefferson County.
- I. Medical record of Robert I. Markenson, M.D.
- J. Medical records of Laurence Lum, D.O.
- K. Stipulation for Compromise Settlement in Case 04-085399.
- L. Stipulation for Compromise Settlement in Case 08-122038.
- M. Deposition of Matt Gardiner.

- N. Deposition of Al Blume.
- O. Medical records from Metropolitan Occupational Medicine, P.C.
- P. Medical records of Seth Paskon, M.D.
- Q. Medical records of Daniel Phillips, M.D.
- R. List of medications.

Second Injury Fund Exhibits

- I. Deposition of Richard E. Hulsey, M.D.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:

STATEMENT OF THE FINDINGS OF FACT-

Terry M. McCoy, the employee, Theresa Gorse and Christine Luntzer-McCoy were the only witnesses to personally testify at trial. All other evidence was presented in the form of written records, medical records or deposition testimony.

The employee was born on December 12, 1952. He quit high school during his freshman year. He is not presently married. Over 25 years of his work history was in the auto industry working on transmissions. He and his then wife owned and operated a resort in Piedmont, Missouri for about five years. Most of his prior employment involved some aspect of physical labor.

In February of 2003, the employee began his employment with Metaltek. His job duties were generally as a janitor where he swept, mopped and moved furniture.

The employee hurt his left shoulder on August 13, 2004 when he was moving file boxes. He filed his claim in that case on September 8, 2005. Dr. Markenson performed rotator cuff surgery on October 25, 2004. The employee settled this claim with the employer-insurer for 35% permanent partial disability of the left shoulder on April 10, 2010. The employee returned to his same job at Metaltek after his surgery but testified that he had problems doing overhead work.

The employee claims that he developed carpal tunnel syndrome while working for Metaltek for the period of February 2003 to May 2008. This coincides with the employee's entire employment history with Metaltek. He filed his claim in that case on June 22, 2009. Dr. Maynard performed left carpal tunnel surgery on May 19, 2009. The employee settled this claim with the employer-insurer for 20% permanent partial disability of the left hand, 7½% permanent partial disability of the right hand and 8% multiplicity on June 10, 2010.

The employee claimed and testified about his pre-existing injuries/disabilities:

- 1970's laceration to his right index finger;
- 1981-1982 diabetes;
- 1990 high blood pressure; and
- Coronary artery disease pre-existing 2008.

The employee testified that he has had lots of problems with diabetes beginning in 1982. He said that he had neuropathy in his feet and lower legs but it was affecting his whole body. He also testified that he has had high blood pressure since 1990. He reported that prior to August 13, 2004 he would get dizzy if he stood up too fast and he would get light-headed and dizzy at work.

The employee testified that prior to 2004 when he hurt his shoulder he could do anything he wanted.

The employee has also had major health problems since he last worked for Metaltek:

- May 2008-the employee started having seizures;
- August 2008-Dr. Hess performed a 5 way heart bypass surgery;
- October 31, 2008-after blacking out, the employee fell and injured his left hand and wrist; and
- April 2011-amputation of toes due to diabetic condition.

The records reveal that the employee's general health has deteriorated since he left employment with Metaltek. This decline in health has been mainly due to his diabetic and coronary artery disease.

The employee presented medical records pertaining to his prior medical history.

Dr. Byler saw the employee in 2004 and referred him to Dr. Markenson for his left shoulder matters.

Jefferson County Rehab treated the employee after his left shoulder surgery. These 2005 records contained a functional capacity report that was good. There was no mention of carpal tunnel symptoms.

Farmington Sports and Rehab Center also saw the employee after his shoulder surgery. The last record was dated January 21, 2005. He was released to home exercise program. No reports were made regarding hand/carpal tunnel problems during all of the exercising he did for three months.

Dr. Lum treated the employee from 2007 to 2010. His records show that the employee was seen on:

- May 27, 2007: The employee was there as follow up from ER where he had elevated blood sugar. This may be the first time he was seen at this office.
- June 2, 2008: Employee there due to decreased vision and continued dizziness. Does not feel able to work. In no acute distress. Heart regular. There is no mention of carpal tunnel symptoms.
- June 13, 2008: Employee there for work note. Seeing while spots.
- June 27, 2008: Employee there regarding dizziness. Has seen Dr. Hess and has occlusion of two coronary arteries. Dr. Hess took him off for one month.
- July 25, 2008: Employee there to discuss possibility of getting disability. Difficulty with feeling in feet and cardiac issues. Getting depressed. There is no mention of carpal tunnel symptoms.

- September 16, 2008: Difficulty with stream of urine. There is no mention of carpal tunnel symptoms
- October 13, 2008: There due to diarrhea, nausea. There is no mention of carpal tunnel symptoms.
- **October 31, 2008: There after c/o of right eye and left hand wrist pain after blacking out and being found face down on the floor.**
- February 3, 3009: There complaining of left wrist pain. Cast removed a month earlier.
- April 14, 2009: There for syncopal episodes. Admits to drinking beer and hard liquor and not taking meds. Note says Dr. Maynard advised surgery for left carpal tunnel surgery. There are no records presented from Dr. Maynard.
- August 27, 2010: There as toe split open. Has stopped all medications.

Patricia Allen, FNP treated the employee from 2006 to 2008. In an office note dated November 27, 2006 she reported this was the employee's first visit with problems with diabetes; medical history: Diabetes mellitus type 2. She also reported that the employee smokes two packs a day, "He is a six to eight pack a day alcohol drinker". No problems falling or staying asleep. Extremities: He does have decreased sensation to the bilateral upper extremities to the digits more than the hand itself. Testing of all other functions seems normal. This record made no mention of carpal tunnel. Diagnoses: Diabetes Mellitus Type 2; Peripheral Neuropathy; and General Anxiety Disorder.

In an office note dated February 16, 2007, Ms. Allen reported that the employee was there for follow-up. Blood pressure is running high. Extremities: Patient moves all extremities well with full range of motion. There was no mention of carpal tunnel problems.

Ms. Allen also saw the employee on March 3, 2008. She reports that he was there for regular check-up. Has numbness in hands and feet. He is a maintenance man mopping, sweeping and lifting chairs frequently. Employee has positive Tinel's and Phalen's. All other testing is normal. Diagnoses: Peripheral neuropathy; diabetic neuropathy; diabetes type 2, poorly controlled; hypertension; and GAD. Plan: Contact work and work up carpal tunnel; refilled prescriptions; employee not compliant.

This is the first medical record where carpal tunnel syndrome was specifically mentioned. It was not diagnosed.

Dr. Hess saw the employee regarding a June 20, 2008 angiogram. He reported total chronic occlusion of a large dominant right coronary artery and mild to moderate disease of the left anterior descending and circumflex arteries.

Dr. Phillips evaluated the employee on March 20, 2008 and performed a nerve conduction test. He reported that:

- The employee is right handed;
- Has been a type II diabetic for 20 years;
- Has an 8-10 year progression of numbness in both feet that now reaches the ankles;

- He has developed numbness in the fingers of both hands that started in a constant fashion but is worse at night; and
- "In summary, the findings are consistent with an underlying significant diabetic-type peripheral neuropathy. The observations vis-à-vis the medical nerves are not impressively different than the general level of neuropathy and only a minority of diabetic patients with this pattern will obtain significant sustained benefit from carpal tunnel decompressions. The same can be said with regards to the ulnar nerves. ...".

Dr. Crandall saw the employee and on March 26, 2008 and opined that the testing showed that severe diabetic neuropathy of both upper and lower extremities. His opinion was that work was a minor contributor to carpal tunnel and surgery might not help.

In addition to medical treatment records that were presented, evaluation records were presented from Dr. Poetz, Dr. Hulsey and James M. England. Dr. Poetz and Mr. England were retained by employee's counsel. Dr. Hulsey was retained by employer-insurer's counsel.

Dr. Hulsey saw the employee on three occasions, May 14, 2008, June 18, 2008 and again on January 21, 2009, and prepared three reports of the same date, and testified by deposition on July 13, 2009.

After his first evaluation Dr. Hulsey reported that his exam was consistent with someone who had rotator cuff surgery. After reviewing x-ray and MRI films he indicated that there was thinning of the employee's remaining tendon, discussed but did not recommend surgery. He testified that the employee could continue his regular position but should avoid any overhead activities. There was no report made of carpal tunnel symptoms.

After his January 21, 2009 exam, Dr. Hulsey reported that:

- The employee was not taking pain medications;
- Surgery was not recommended unless the pain got a lot worse;
- The employee was at maximum medical improvement with permanent restrictions of avoid overhead lifting, no lifting of more than 10-15 pounds occasionally on the left and avoid repetitive movement above the shoulder on the left;
- The employee could continue to work in the open labor market with the restrictions he gave; and
- The employee has a 20% permanent partial restriction of his left shoulder.

During cross-examination, Dr. Hulsey reported that he had no records of the employee having any left shoulder problems prior to August 13, 2004. He also indicated that he did not know what Dr. Poetz said in his reports.

Dr. Hulsey made no mention of any carpal tunnel symptoms in any of his reports. He reported that the employee could return to work and made no assessments that he was permanently and totally disabled as of January 2009.

Dr. Poetz saw the employee on four occasions January 5, 2006, June 22, 2007, July 7, 2009, February 1, 2010 and prepared four reports dated March 15, 2006, July 23, 2007, October 7, 2009, May 20, 2010 and testified by deposition on April 28, 2008 and December 16, 2010.

Dr. Poetz testified in his April 28, 2008 deposition after he had seen the employee two times. At that time, the employee had already had his April 13, 2004 accident and subsequent surgery. As of April 28, 2009 the employee had not filed his claim for carpal tunnel as it was filed on June 22, 2009.

In his March 15, 2006 report Dr. Poetz indicated that:

- The employee's chief complaint was that he was unable to do anything overhead with his left arm or reach behind his back. He also complained that he still gets occasional pain in his shoulder and upper arm.
- An FCE of April 19, 2005 noted that the employee functioned well with his left arm from the chest level down.
- The employee's medical history is significant for hypertension and hyperlipidemia.
- The employee was diagnosed with diabetes in approximately 1981.
- The employee lacerated his right index finger in the 1970s and underwent a tendon repair. The employee reported pain and stiffness in that finger.
- The employee denies any other significant previous injuries, surgeries or hospitalizations.
- The employee smokes 1½ packs of cigarettes a day and has a few beers a day.
- He performed a physical exam and gave diagnoses.
- The employee's injury of April 13, 2004 is the substantial prevailing factor for his disabilities.

Dr. Poetz's opinions and ratings regarding the employee's disabilities are:

- 40% permanent partial disability to the left upper extremity from the August 13, 2004 work injury.
- 25% permanent partial disability to the body as a whole due to diabetes, pre-existing.
- 20% permanent partial disability to the body as a whole as measured at the cardiovascular system, pre-existing.
- 20% permanent partial disability to the right upper extremity as measured at the right hand, 1971.
- The combination of the present and prior disabilities results in a total which exceeds the simple sum by 20%.

As of March 15, 2006, Dr. Poetz did not make any findings about the employee's carpal tunnel problems and did not note any physical symptoms relating to either hand or wrist during his physical examination. He also did not address the issue of permanent total disability and did not indicate that the injuries he discussed combined with pre-existing injuries to make the employee permanently and totally disabled. According to the employee's claim he had carpal tunnel symptoms as of February 2003.

In his July 23, 2007 report, Dr. Poetz indicated that:

- The employee had continued complaints with his left shoulder.

- He was still working in housekeeping and maintenance.
- The employee saw Dr. Markenson who had another MRI done.
- The employee's past medical and social history was the same.
- During the physical exam the employee rated his worst pain as 7/10.
- Prognosis was guarded due to length of time that has passed since the injuries and continuance of pain.
- The employee has not reached maximum medical improvement and requires additional treatment.

Dr. Poetz again provided his rating and did not change them from the May 15, 2006 report. Once again he did not make any findings about the employee's carpal tunnel problems and did not note any physical symptoms relating to either hand or wrist during his physical examination. He also did not address the issue of permanent total disability and did not indicate that the injuries he discussed combined with preexisting injuries to make the employee permanently and totally disabled.

Dr. Poetz's next report is dated October 7, 2009. The employee had filed his carpal tunnel complaint alleging carpal tunnel syndrome from February 2003 to May 2008 as of June 22, 2009. The employee had his left carpal tunnel surgery on May 19, 2009. In this report Dr. Poetz indicated that:

- The employee's chief complaints pertained to his left shoulder.
- The employee had been returned to see Dr. Hulsey. Dr. Hulsey did not recommend further surgery due to significant risks unless the pain became intolerable.
- The employee has been receiving social security since May 2008 due to his multiple health conditions.
- Dr's Poetz's Past Medical History changed indicating that the employee has five-vessel coronary artery bypass grafting on August 26, 2008, and that the employee had a left carpal tunnel release two months previously for which he reported overall improvement with residual tightness in his fingers.
- Social History was that the employee smokes 1½ packs of cigarettes a day and "occasionally consumes alcohol".
- "There is significant atrophy at the bilateral thenar eminence which is typical of carpal tunnel syndrome".
- Dr. Poetz did not diagnosis carpal tunnel syndrome.

Dr. Poetz's conclusion was: "... this patient has not reached maximum medical improvement. However, if no further treatment were obtained, then my previous ratings would apply and it is my belief that Mr. McCoy would be permanently and totally disabled as a direct result of his August 13, 2004 work related injury and his pre-existing conditions. He would therefore be unable to maintain gainful employment on the open labor market". Dr. Poetz did not specifically indicate whether any of the carpal tunnel problems alleged to have begun in 2003, and by this time existing for several years, had any bearing on his opinions regarding permanent total disability.

Dr. Poetz's next report is dated May 20, 2010. In this report Dr. Poetz indicated that:

- When he saw the employee on July 9, 2009 he was under the impression that he was evaluating the employee's left shoulder. At that time the employee mentioned that he had undergone a left carpal tunnel release. He was not aware at that time that the employee's counsel had filed a claim until he reviewed the medical records regarding the employee's claim for bilateral carpal tunnel syndrome. He had in the past questioned the employee regarding history for occupational disease and his repetitive job duties. An examination of the upper extremities was done. He is preparing this report as a supplemental report to provide an opinion regarding his ability to work based on his discussion with the employee on February 1, 2010.
- He reviewed additional medical records.
- The employee was seen on November 11, 2008 by Dr. Paul Maynard. It was reported that the employee had blacked out on October 31, 2008 and received a left wrist fracture. It was noted that the employee was being evaluated for syncope episodes. As of February 19, 2009 the employee returned to Dr. Maynard for continued problems and it was noted that the employee had been seen in the past for numbness and tingling problems that was attributed to neuropathy as a result of his diabetes. An EMG/NCV was recommended. Dr. McGarry did the testing on March 9, 2009 which indicated that the EMG findings are commonly seen in diabetes and are evidence of an underlying neuropathy; and that the NCV showed abnormal findings. As of March 31, 2009 surgical options were considered due to persistent complaints in the left hand though possible relief was uncertain. Dr. Maynard continued seeing the employee after his carpal tunnel release.
- The employee reported no additional treatment for his injuries.
- Past Medical History: The employee has suffered from hypertension and coronary artery disease for at least 15 years. He has a history of diabetes since the early 1980s and diabetic neuropathy for the past 12 years which primarily affected the lower extremities and within the past several years the upper extremities as well. The employee began blacking out in May 2008, seizure related. He underwent coronary by-pass surgery in August 2008.

Dr. Poetz also gave the same general diagnoses in the past but added:

- Left carpal syndrome, 2/03-5/08.
- Status post left carpal tunnel release, 2/03-5/08.
- Right carpal tunnel syndrome, 2/03-5/08.

In this report Dr. Poetz changed his disability ratings and assessment of permanent total disability. He reported:

- 35% permanent partial disability to the upper left extremity as measured at the left hand and wrist directly resultant from the February 2003 through May 2008 work related injury.
- 25% permanent partial disability to the upper right extremity as measured at the right hand and wrist directly resultant from the February 2003 through May 2008 work related injury.
- 40% permanent partial disability to the upper left extremity as measured at the left shoulder, 8/13/04.

- 25% permanent partial disability to the body as a whole due to diabetes, pre-existing.
- 25% permanent partial disability to the body as a whole as measured at the cardiovascular system, pre-existing.
- 20% permanent partial disability to the right upper extremity as measured at the right hand, 1971.
- The combination of the present and prior disabilities results in a total which exceed the simple sum by 20%.

Dr. Poetz also opined that the employee is permanently and totally disabled as the result of the combination of the February 2003 through May 2008 work related injuries and his pre-existing conditions. He is and will be permanently and totally unemployable in the open labor market.

Dr. Poetz was challenged during his April 28, 2008 deposition testimony. He indicated that:

- The August 13, 2004 injury combines with the prior problems in that diabetes make an injury less capable of the healing process and that a person is less active and does not perform healthy cardiovascular activity.
- Diabetes also causes renal failure.
- The employee's diabetes is not in control.
- Before the shoulder injury the employee did not report that he was unable to perform his work-related duties with his right hand.
- The employee builds old cars in his spare time; he had no problems before August 2004 but has problems now due to shoulder pain.
- He had no records to review regarding diabetes, hypertension or hyperlipidemia.
- The employee is not taking insulin at this time and his diabetes is out of control.

Dr. Poetz was also challenged during his December 16, 2010 deposition testimony. He indicated that:

- He is asked how the synergy takes place between the carpal tunnel syndrome case, the rotator cuff tear in 2004 and the diabetes and hypertension and the laceration of the little finger. He stated: "Carpal tunnel syndrome has a higher risk in patients that are diabetic. Pre-existing diabetes is one of the risk factors that would have led to carpal tunnel syndrome. The carpal tunnel syndrome and the rotator cuff synergistically combine because they are both in the upper extremities and both impair use of the upper extremities. If the left rotator cuff is not allowing much activity then the right shoulder has to overwork. This also puts additional stress on the rest of his diagnoses. His diabetic neuropathy, hypertension, hyperlipidemia and coronary artery disease are all pre-existing and all pose additional risk factors for the patient."
- He is asked how the employee's job duties caused carpal tunnel syndrome. He responded that carpal tunnel syndrome is at a higher risk for people with diabetes but they don't develop diabetes just from being diabetic. He says it requires excessive and repetitive use of the upper extremities, the hands and the wrists in order for the diabetic to develop carpal tunnel syndrome.
- That as of the 2009 exam he had not made a finding regarding carpal tunnel syndrome and also agreed that his finding of permanent total disability was made whether or not the employee has carpal tunnel syndrome.

- The employee had bypass surgery in 2008. Diabetes, blood pressure and cholesterol problems cause coronary artery problems to develop slowly over a long time.
- Prior to 2008 the employee was being treated for these other conditions. Coronary artery disease is not found until there are symptoms. Many times there are no symptoms and patients just suddenly die due to the underlying cause. The condition worsens over time.
- The doctor is asked about seizures. He says the employee is being treated for a seizure disorder and the mechanisms that cause coronary narrowing. It is likely that the seizure is secondary to small, narrow, plaque-forming blood vessels in his brain as well.
- Carpal tunnel syndrome is a risk factor of diabetic neuropathy.
- Carpal tunnel syndrome is due to pressure on the medial nerve at the wrist. The polyneuropathy that develops with diabetes is a matter of chemical change on the nerve sheath that causes carpal tunnel syndrome.

Dr. Poetz did not ever expound on his statements regarding carpal tunnel affecting the medical nerve due to pressure or as a matter of chemical change. Certainly he did not expound on this difference with respects to the “repetitive” aspects of the employee’s job.

Mr. England saw the employee on March 11, 2011, prepared a report dated June 9, 2010 and testified by deposition on April 4, 2011. He testified that:

- “...I felt with the combination of the medical problems that he had combined with his age and the lack really of any usable skills that I thought he would not be able to compete in the open labor market and that he would be totally disabled from a vocational point”.
- He reported that his opinion is due to several different things; he’s had problems with his upper extremities, he’s had problems with his shoulder, he’s had problems with his hands, medical problems with diabetes, high blood pressure-neuropathy in his legs that makes it difficult for him to be on his feet for very long, it is primarily a combination of the lower extremity problems from the neuropathy and then the upper extremity would be both the shoulder and hand problem, the employee has an 8th grade level in reading and 5th grade in math.

During cross-examination, Mr. England agreed that the employee had high blood pressure issues, cardiovascular issues and he underwent a five-level by pass in 2008, and that he indicated that the employee had seizures but was taking Keppra and he was not having them anymore. The employee did not report any restrictions with respect to his cardiovascular disease. Even lacking the neuropathy, the employee was unemployable as that would limit him to a sit down job and then the hands become more important. If the employee couldn’t use his upper extremities repetitively, and the fact that he is 57 and doesn’t really have skills, it is difficult to think of anything he could do and he is unemployable. The upper extremity problems are the hands and the shoulder, he has trouble using his arm out away from his body and he has trouble using his hands.

Mr. England prepared a report dated June 9, 2010 and reported “Considering the combination of his impairments and the restrictions described by Dr. Poetz, I do not believe that he would be capable of performing any of his past work nor would he appear to be capable of performing alternative entry-level types of work in the open labor market. Considering the combined effects

of his impairments he is likely to remain totally disabled from a vocational standpoint and would not be a good candidate for rehabilitation services”.

Dr. Poetz and Mr. England were not asked to consider how or whether the employee’s subsequent health problems affected the employee. They did not comment on how the subsequent health problems affected their opinions about permanent total disability.

Matt Gardiner and Al Blume are friends of the employee who testified by deposition and indicated that they would not hire the employee given his physical problems. They indicated they had little knowledge about the medical problems other than what the employee told them.

Ms. Gorse has been the employee’s girlfriend since 2003. She testified that before August 2004 the employee could do what he wanted. She indicated there was some dizziness before 2004 and some numbness in his feet. On cross-examination she testified that she never saw him have dizzy spells.

RULINGS OF LAW IN 04-085399

The only issue before the Court in this case is whether the Second Injury Fund has any liability for permanent partial disability. Not in issue is whether the employee was permanently and totally disabled as a result of his August 13, 2004 accident in combination with his preexisting injuries. The general standard for permanent partial disability against the Second Injury Fund is whether the employee’s preexisting injuries are so disabling that they are a hindrance or obstacle to employment or re-employment, meet what is called “threshold” and synergistically combine with the employee’s disabilities from the 2004 accident to create a greater overall disability.

The Court makes the following findings:

- The employee settled Injury Number 04-085399 with the employer-insurer by Stipulation for Compromise Settlement for 35% permanent partial disability of the left shoulder.
- The Court concurs with the settlement and specifically finds that the employee does in fact have a 35% permanent partial disability of his left shoulder.
- The employee filed his claim on September 8, 2005 and claimed preexisting injuries regarding a 1970 injury to the right index finger that was believed to have settled for 10% of the finger, diabetes since 1981 or 1982 affecting his entire body but primarily his feet and high blood pressure since 1990 that affects his entire body.
- The employee presented evidence regarding his preexisting medical problems and disabilities.
- The employee presented the testimony of Dr. Poetz who rated the employee’s prior disabilities.
- Dr. Poetz rated the employee’s disability to his right index finger as equating to 20% permanent partial disability of the left hand. The Court finds that Dr. Poetz’s rating as to the left index finger lacks credibility and is not supported by the medical or any other evidence in this case. Any disability to the finger does not meet threshold. The evidence supporting the 1970 injury to the index finger does trigger second injury fund liability for permanent partial disability.

- Dr. Poetz provided a 25% pre-existing permanent partial disability to the employee's body as a whole due to his diabetes. The Court finds that Dr. Poetz's rating as to the employee's preexisting diabetes lacks credibility and is not supported by the medical or any other evidence in this case. The preexisting medical records regarding diabetes are sketchy at best. While the employee may have been diagnosed with diabetes in 1981 or 1982, by the employee's own admission he indicated that he could do whatever he wanted to up to August 13, 2004. Diabetes is an insidious disease that develops over a lengthy period of time. The records indicate that the employee was noncompliant. The Court does not believe that as of August 13, 2004 the employee's diabetic problems were a hindrance or obstacle to employment or reemployment. His major problems with diabetes manifested themselves after August 13, 2004. The employee's diabetic condition does not trigger second injury fund liability for permanent partial disability. Any disability for diabetes does not meet threshold.
- Dr. Poetz provided a 30% preexisting permanent partial disability to the employee's body as a whole due to his hypertension/cardiovascular problems. The Court finds that Dr. Poetz's rating as to these preexisting problems lacks credibility and is not supported by the medical or any other evidence in this case. While the employee may have been diagnosed and had hypertension/coronary problems since 1990, by the employee's own admission he indicated that he could do whatever he wanted to up to August 13, 2004. Hypertension/coronary artery disease is also an insidious disease that develops over a lengthy period of time. The employee had by-pass surgery in August 2008. The Court does not believe that as of August 13, 2004 or 2008 the employee's preexisting problems were a hindrance or obstacle to employment or re-employment. The greater problems manifested themselves after August 13, 2004 or 2008. The employee's hypertension/coronary problems do not trigger second injury fund liability for permanent partial disability. Any disability for hypertension/coronary artery disease does not meet threshold.

In summary, the employee has not met his burden of proof in this case. The Second Injury Fund is not ordered to provide any benefits in this case for permanent partial disability. The Court finds that the testimony, findings and opinions of Dr. Poetz are not credible.

RULINGS OF LAW IN 08-122038

Permanent Total Disability

The employee is claiming that he is permanently and totally disabled as a result of the combination of the last injury regarding carpal tunnel syndrome and his preexisting disabilities. The employee has the burden of proof that he is unable to compete in the open labor market as a result of the combination of the last injury and his preexisting conditions.

A review as to some of the chronology of events shows that:

- Medical records show that on March 3, 2008, Patricia Allen mentioned decreased sensation to the digits but did not diagnose carpal tunnel. The plan was to contact work and work up carpal tunnel.

- On March 26, 2008, Dr. Phillips performed nerve conduction testing and reported that the employee has long standing significant underlying diabetic type peripheral neuropathy.
- On March 26, 2008, Dr. Crandall saw the employee and opined that the testing showed that severe diabetic neuropathy of both upper and lower extremities. His opinion was that work was a minor contributor to carpal tunnel and surgery might not help.
- On October 31, 2008 Dr. Lum treated the employee. The records show that he was there for care to his right eye and left hand and wrist after blacking out and being found face down on the floor.
- On February 3, 2009, Dr. Lum's records show that the employee was there complaining of left wrist pain.
- The employee did not work at Metaktek as of the summer of 2008.
- The employee had surgery for left carpal tunnel syndrome on May 19, 2009.
- The employee filed the claim where he claimed carpal tunnel syndrome from February 2003 to May 2008 on June 22, 2009.
- The medical records in general do not reflect complaints, problem or diagnosis of carpal tunnel syndrome any time prior to 2008 and the 2008 problems seem to have started due to a traumatic event.
- While Dr. Poetz conducted physicals on the employee several times, it is only in his last report that he discussed and addressed carpal tunnel.

On May 10, 2010 it was Dr. Poetz's final opinion that the employee was permanently and totally disabled as a result of the combination of the February 2003 through May 2008 work related injuries and his preexisting injuries. This is the only report where he addressed carpal tunnel syndrome. He prepared reports dated March 15, 2006, July 23, 2007 and October 7, 2009. He saw the employee on four occasions and gained information in order to develop opinions. He performed multiple physicals on the employee prior to the last report. It is not until his last report that Dr. Poetz indicated that the employee had carpal tunnel problems and indicated that the employee's status of permanent total disability included his carpal tunnel problems. If the employee had carpal tunnel that developed from 2003 to 2008 that was caused by repetitive duties as a janitor, you would believe that such problems would have surfaced in all of the records of treatment in 2003, 2004, 2005, 2006, 2007 and early 2008. Such records do not exist. In addition, the records do show that the employee had a traumatic injury to his left hand on October 31, 2008. In addition, when actual testing is done, the expert opinion is that there is diabetic neuropathy of all extremities and the employee's work was a minor factor.

The records also show that the employee had major health problems that were developing over the years that contributed to his overall deteriorating health. He was a heavy smoker and drinker. Medical reports indicate that he was a noncompliant patient when it came to taking his medications. The employee developed major health concerns long after he was employed by Metaktek. In and since 2008 he has had diabetic amputations, undergone a heart surgery due to coronary artery disease and seizures among other health problems.

In addition to the progression of the employee's medical problems, the timing of the filing of his carpal tunnel claim and the progression and development of Dr. Poetz's opinions regarding disability is at a minimum "convenient".

For all of these reasons and after comparing and scrutinizing all of the medical records, the Court finds the findings, opinions and medical testimony of Dr. Poetz is severely lacking in credibility. The Court further finds that Dr. Poetz's opinions are not supported by treatment records. The opinions of Mr. England also lack credibility as they are based on the findings of Dr. Poetz.

In summary, it is the Court's opinion that the employee is not permanently and totally disabled due to Injury Number 04-085399 or Injury Number 08-122038 either standing alone or in combination with each other. It is also the Court's opinion that the employee is not permanently and totally disabled due to a combination of either Injury Number 04-085399 or Injury Number 08-122038 in combination with each other or in combination with any of the employee's preexisting disabilities that he had prior to 2004. The Court further finds that the employee has not presented credible evidence that he is permanently and totally disabled due to his work related injuries standing alone or in combination with each other or in combination with his preexisting injuries. The Court specifically finds that the employee has not presented credible evidence that triggers permanent total disability liability against the Second Injury Fund under Section 287.220 RSMo.

The Court specifically finds that the opinions of Dr. Poetz as to whether or not the employee is permanently and totally disabled and what caused that disability is totally lacking in credibility. Dr. Poetz prepared reports dated March 15, 2006, July 23, 2007, October 7, 2009 and May 20, 2010. The progression of reports went from permanent partial disability to permanent total disability with the underlying cause of the disability changing from one injury to another.

The employee has presented evidence regarding his permanent and total disability but if in fact he is permanently and totally disabled, the Court finds that it is due to the deterioration of his medical problems that he had subsequent to his repetitive or traumatic work accidents involving mainly his heart and diabetic conditions.

The Court therefore finds that the Second Injury Fund has no liability for permanent total disability.

Permanent Partial Disability

The parties stipulated to accident and medical causation in both cases. The employer-insurer settled Injury Number 04-085399 for 35% permanent partial disability. Whether appropriate or not, the employer-insurer settled Injury Number 08-122038 for 20% permanent partial disability of the employee's left hand. The parties stipulated that the employee's rate for permanent partial disability in the 2008 case is \$276.52.

The Court is compelled to find Second Injury Fund liability for permanent partial disability under these circumstances. The employee has met threshold, he has presented expert opinion on the issues of hindrance and synergy. The Court finds a 10% load in this case. Given these factors, the Second Injury Fund is ordered to pay to the employee \$3,213.16 for permanent partial disability.

Second Injury Fund liability for occupational disease

The other legal issue involved in this case is clearly stated by the Second Injury Fund in its proposed finding, i.e. whether, under the concept of strict construction, the employee has a claim against the Second Injury Fund when the employee has repetitive motion injuries. The Court is also aware that this specific issue is already in the system and is pending before tribunals that will review this decision.

The primary specific statutes that apply in a consideration of this issue are Sections 287.020, 287.067, 287.220 and 287.800 RSMo.:

- Section 287.020(2) defines accident.
- Section 287.020(3) defines injury.
- Section 287.067(3) states “An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter”.
- Section 287.220 sets out Second Injury Fund liability.
- Section 287.800 is about strict construction.

It is clear that when you consider the definitions of accident and injury and the fact that Section 287.067 specifically states that injuries due to repetitive motion are compensable under Chapter 287; there is no inconsistency in Section 287.220 because the term repetitive or occupational disease is not used in conjunction with injury. This Court does not believe that the terms strict construction means that you ignore the language in one section of Chapter 287 in favor of another. Repetitive motion/occupational diseases are clearly compensable as to employers and in this Court’s opinion as to the Second Injury Fund.

ATTORNEY’S FEE

Roy A. Gerritzen, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney’s fee shall constitute a lien on the compensation awarded herein.

INTEREST

Interest on all sums awarded hereunder shall be paid as provided by law.

Made by:

Gary L. Robbins
Administrative Law Judge
Division of Workers' Compensation