

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

Injury No.: 99-041543

Employee: Robert McDonough  
Employer: Rock Hill Mechanical (Settled)  
Insurer: Missouri Employers Mutual Insurance Company (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: February 2, 1999  
Place and County of Accident: St. Louis City

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated October 19, 2005. The award and decision of Administrative Law Judge Joseph E. Denigan, issued October 19, 2005, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 3<sup>rd</sup> day of May 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

**AWARD**

Employee: Robert McDonough

Injury No.: 99-041543

Dependents: N/A  
Employer: Rock Hill Mechanical Corp. (Settled)  
Additional Party: Second Injury Fund  
Insurer: Missouri Employers Mutual Insurance Co. (Settled)  
Hearing Date: July 25, 2005

Before the  
**Division of Workers'  
Compensation**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Checked by: JED:tr

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: February 2, 1999
5. State location where accident occurred or occupational disease was contracted: St. Louis City
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
Employee fell down steps.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Left shoulder and neck
14. Nature and extent of any permanent disability: 32.5% permanent partial disability of body referable to cervical spine
15. Compensation paid to-date for temporary disability: \$10,321.66
16. Value necessary medical aid paid to date by employer/insurer? \$8,279.28

Employee: Robert McDonough Injury No.: 99-041543

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: Unknown
19. Weekly compensation rate: \$562.67/\$294.73
20. Method wages computation: Stipulation

### COMPENSATION PAYABLE

21. Amount of compensation payable:

32.5 weeks of permanent partial disability from Employer (Settled)

22. Second Injury Fund liability: Yes

12 weeks of permanent partial disability from Second Injury Fund \$3,536.76

TOTAL: \$3,536.76

23. Future requirements awarded: None

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

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

Timothy O'Mara

## FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Robert McDonough	Injury No.: 99-041543
Dependents:	N/A	Before the <b>Division of Workers'</b> <b>Compensation</b>
Employer:	Rock Hill Mechanical Corp. (Settled)	Department of Labor and Industrial
Additional Party:	Second Injury Fund	Relations of Missouri Jefferson City, Missouri
Insurer:	Missouri Employers Mutual Insurance Co.	Checked by: JED

This matter involves three separate Claims for Compensation identified as follows:

99-041543	02-09-99	cervical fusion (primary settled at 32.5% PPD BAW)
01-160544	07-25-01	multiple repetitive traumas (upper extremities)
02-157640	11-30-02	tinnitus (primary settled at 5% PPD BAW)

These cases may be referred to hereinafter as the first, second, and third cases, chronologically. Employer and its insurer stipulate that Claimant was employed on said date and that any liability is fully insured. The SIF neither disputes the interim benefits paid nor the relevance of any body part mentioned in the evidence which is important since no party introduced the Claims and Claimant introduced thirty years of medical evidence encompassing multiple body parts. The first and third cases concern SIF liability only. Claimant seeks permanent total disability benefits under an assertion of unemployability. All parties are represented by counsel.

Issues for Trial

## Second Case

1. Nature and extent of permanent partial disability;

### *All Cases*

2. Liability of the SIF.

## FINDINGS OF FACT

1. Claimant, age 61, received sheet metal training while in high school and joined the Pipefitters Union after graduation.
2. Claimant worked as a welder throughout his employment history. He also worked maintenance and installation of refrigeration equipment for a number of years. He also worked alone in the service industry for a number of years.
3. Claimant testified the work required climbing, lifting, bending and kneeling. He climbed ladders while carrying equipment and toolboxes to the rooftop of buildings to work on refrigeration systems.

### *First Case*

4. Claimant fell down a flight of steps on February 9, 1999 and injured his left knee and left shoulder and neck. Claimant subsequently had surgical fusion at the C5-C6 level. Claimant received a settlement for 32.5% PPD of the body referable to the neck in Injury No. 99-041543.

## Second Case

5. Claimant testified he began experiencing numbness and tingling in his hands. The symptoms progressed to the point he would awake at night with pain in his hands.
6. Claimant was referred to Dr. Ollinger who performed a right carpal tunnel release on November 8, 2002 and both left carpal tunnel release and left elbow ulnar nerve transposition on November 22, 2002. Dr. Ollinger released Claimant from treatment without restrictions on May 19, 2003.
7. Claimant admitted the symptoms in his hands improved after the surgery. He also admitted he did not attempt to return to work following his discharge by Dr. Ollinger.

### *Third Case*

8. Claimant filed an occupational disease claim for chronic tinnitus with a reported onset date of November 30, 2002. Claimant settled this claim for 5% PPD of the body referable to tinnitus. Chronic tinnitus was diagnosed by Dr. John McKinney.

## Pre-existing Conditions

9. Claimant testified he sustained an injury to his right elbow and right hand in 1974 when he fell at the Rush Island powerhouse. As a result of the injury, Claimant cannot fully supinate his right arm experiences difficulty lifting heavy objects.
10. Claimant testified he sustained an injury requiring surgery to his right knee in 1984. He gave unimpeached

testimony that he received periodic injections into the right knee due to ongoing symptoms.

11. In 1997, Claimant sustained an injury to his right thumb when it became caught in a machine. Dr. Stromberg performed multiple surgeries on the hand and thumb. He indicated the injury affects his grip.
12. Claimant received treatment from Dr. Glogovac for ongoing problems involving the hand. He indicated Dr. Glogovac diagnosed arthritis in the thumb and hand. He also indicated Dr. Glogovac injected the right thumb joint due to ongoing problems.
13. Claimant sustained an injury to his neck and back when he fell in 1999. He underwent a cervical fusion in May 1999. Claimant experiences radiculopathy and curtailed range of motion in the neck.
14. Claimant was diagnosed with having sleep apnea. He was prescribed a CPAP machine which he uses every night.
15. Claimant testified he was diagnosed with asbestosis approximately six years ago. He admitted to a long history of smoking. He experiences shortness of breath with exertion.
16. Claimant experienced chest pains and palpitations a number of years ago. He underwent a stress test and takes an aspirin each day. Claimant testified he occasionally experiences tightness and pain in his chest.
17. Claimant admitted to having problems performing his job leading up to the time he was diagnosed with carpal tunnel. He stated he avoided climbing ladders, bending, and had difficulty getting up and down off the floor. He had helpers who performed some of the heavier tasks during the years from 1994 through 1999 when he worked at the Savvis Center.

#### Opinion Evidence

18. Dr. Ollinger rated Claimant as having a 2% disability of the right wrist and a 5% disability of the left elbow as a result of the July 25, 2001 incident. He did not recommend any additional medical treatment for Claimant. (Exhibit 1).
19. Claimant was examined by Dr. Musich at the request of his attorney on April 29, 2004. Dr. Musich rated Claimant as having a 25% disability of the right wrist and a 30% disability of the left elbow due to the July 25, 2001 injury. Dr. Musich did not recommend any additional medical treatment for Claimant. (Exhibit B/2).
20. Claimant was examined by Dr. Musich at the request of his attorney on September 4, 2001 for problem associated with *pre-existing conditions*. Dr. Musich rated Claimant as having a 40% disability of the person as a whole referable to the neck. Dr. Musich rated Claimant as having a 50% disability of the right elbow and 30% disability of the right wrist due to the previous injury. He also rated Claimant as having a 50% disability of the right thumb. (Exhibit B2).
21. Dr. Musich subsequently reported in 2004 that Claimant was permanently and totally disabled due to a combination of his current upper extremity disability and his physical limitations, advanced age, work history and training. (Exhibit B2).
22. Dr. Berstein, a psychologist and licensed counselor, reviewed the medical record and testified Claimant was unemployable in the open labor market.
23. Mr. England, a licensed counselor, found Claimant employable at sedentary to light range of exertion. Claimant had trade expertise that permitted him to supervise building maintenance, sell plumbing supplies or handle an answer desk for a builder.

#### Other Settlements

24. Claimant received a settlement for 55% of the left thumb in Injury No. 85-159633.
25. Claimant received a settlement for 15% of the right knee in Injury No. 84-118379.

## RULINGS OF LAW

### Expert Testimony

#### *Medical Opinion Evidence*

Dr. Musich identified elements from which a finding of permanent total disability may be drawn. Severe injury to opposite upper extremities together with the cervical disc fusion with radiculopathy, independent upper extremity pathologies, and chronic pain combine to prevent any reasonable means by which Claimant might compensate for individual losses in order to endeavor regular, sustained work hours.

More importantly, he had opportunity to evaluate Claimant over several years' gap. It is noted, however, that Dr. Musich did not rate the right knee surgery or the left heel surgery each of which are relevant to an assessment of Claimant's ability to ambulate. The right knee was settled at fifteen percent PPD which was a reasonable assessment in 1984. However, Claimant's gait at trial, his unrebutted complaints at trial, together with the recognition of progressive degenerative joint disease during the years 1984 to 2001, render the knee more likely in the forty percent range of PPD. The lay evidence contemplates future arthroplasty. Again, Claimant worked heavy labor in installation and maintenance. Finally, Claimant gave unrebutted testimony that he had a helper during his last years on the job and largely gave instructions with minimal exertion on his behalf.

Dr. Musich opined that claimant sustained a greater overall disability as a result of the combination of the prior injuries to the right upper extremity (50% PPD of elbow, 30% PPD of wrist and 50% PPD of thumb) with the current cervical fusion (Exhibit B; *Depo. Ex. 3, dated September 4, 2001*). He identified no other pre-existing conditions that combined with the cervical fusion. Yet, Dr. Musich testified he had patient history that included right elbow surgery, right knee surgery and left heel surgery.

Dr. Musich's opinion evidence is difficult to follow. First, little foundation was laid as to what medical records were reviewed. A listing of provider names for an individual who has treated repeatedly with the same providers is not necessarily sufficient evidence when coupled with the variations of live testimony. Second, Dr. Musich's omissions in testimony about the actual review of records of serious prior injuries and conditions (eg. surgical records) raises additional doubt when the expert identifies *patient history* (eg. "he told me...") rather than records as the basis for his belief in the existence of a prior disability. Third, Dr. Musich inexplicably omits very serious prior injuries from his SIF analysis which, again, brings into doubt his awareness level and the persuasive value of his disability opinions (see report dated September 4, 2001). After omitting major injuries from the SIF analysis in 2001 it is difficult to re-incorporate them into analysis thereafter without undercutting one's credibility. Credibility of experts usually affects the probative value, or weight, of the opinion rather than admissibility. Fourth, these omissions are made even more serious by the fact that the disability necessarily increases after twenty and thirty years degenerative process that can occur in a sixty year old Claimant who sustained such injuries in the seventies and eighties. Finally, two of the omitted prior injuries concern ambulation (i.e. degenerative right knee and operated left heel spur). Ambulation deficits are hallmarks of permanent total disability. No greater single obstacle to employment exists beside the inability to walk about home and work.

Nevertheless, poor expert preparation and performance (and costs thereof) cannot be the basis to ignore substantial evidence of disability found elsewhere in the record. This is especially true in the absence of party objection. Claimant's right knee disability, for example, is not any less real after twenty years passage of time for degenerative change compounded by daily wear and tear in trade work requiring crawling, kneeling climbing and constant toting of heavy loads in various positions. It does appear, however, that Claimant's limp at trial was worse than at his deposition. The addition of a limp merely proves the presence of serious degenerative process decades underway at the time of Claimant's latest series of upper extremity surgeries in 2002 with Dr. Ollinger. Incremental value may be given to Dr. Musich's clinical findings and general conclusion that Claimant is permanently and totally disabled.

#### Vocational Evidence

Claimant's vocational expert's election not to mention Claimant's retirement in his analysis of unemployability is more difficult to excuse. Dr. Bernstein made no mention of Claimant's retirement in his seven-page report. This is true

despite subsections entitled “General Background” and “Education and Employment History.” He repeated phrases such as “from an employment perspective” and “advanced age.” At deposition, an atypically succinct response from him that he *knew* Claimant was retired was unconventional. The manner in which Dr. Bernstein dismissed two opportunities to discuss Claimant’s retirement is significant for two reasons. First, the omission in the report is simply disingenuous and the brevity of his response to this on cross-examination is specious as if retirement was irrelevant to the question of employability. This damages his expert credibility.

Consistent with this analysis is a recent holding in by the Court of Appeals in Ransburg v. Great Plains Drilling, 22 S.W.3d 726 (Mo.App. 2000). In that case, a 60 year old construction worker fell and required both neck and shoulder surgery. The record included evidence that the employee was capable of sedentary work and received both social security benefits and pension benefits. The employee admitted not having sought alternative employment. The court held employee's testimony itself was sufficient to find he had no motivation to return to work. Social security and pension benefits are irrelevant for the purpose of determining overall disability but are relevant to determine the ability or motivation to return to work. *Id.* Here, Claimant is now sixty-one and admitted never attempting a return to work after his surgeries. He retired.

Second, he failed to *explain* why this employee was, nevertheless, unemployable. He made not the slightest attempt to explain why retirement was this employee’s only alternative. And, yet, noted such details as “feelings of worthlessness” and “guilt.” Dr. Bernstein mentioned age but not retirement.

Finally, it is notable that Dr. Bernstein, in his expert report, uses the commonplace, “he has a good work record.” This remark is self-serving praise and completely unfounded in either his own report or the balance of the evidentiary record. Chapter 287 does not contemplate goodness.

Mr. England gave considered opinions but also seemed to under value Claimant’s ambulation deficits. He believed Claimant was employable in the sedentary to light categories of work. Beyond a review of the medical records, he was denied the opportunity to see Claimant ambulate. Also, he is not an orthopedist and may not be expected to make a sufficient inference of degenerative disability over the many arduous years Claimant worked after the 1984 right knee surgery. In fairness to Mr. England, he would not have learned enough of Claimant’s ambulation deficits by a reading of Dr. Musich’s reports.

Another important factor is the effect of maintenance analgesics on the idea of full-time employment. Claimant is on a host of drugs for various ailments many of which are due to the natural aging process. Independent of these, however, is his prescription for hydrocodone, a scheduled narcotic. Age is relevant here regarding Claimant’s ability to work regular hours, or daily, and sustained hours meaning unbroken shifts and without unscheduled rest breaks.

Thus, the properly founded expert evidence herein is of limited use. Probative value is gleaned from the experts’ general familiarity with Claimant and instances of detail concerning certain injuries.

### Permanent Disability and Liability of the SIF

#### First Case

Claimant’s cervical fusion PPD was settled at thirty-two and one-half percent PPD (130 weeks) which amount is appropriate with post-surgical left-sided radiculopathy. Claimant’s prior right wrist fracture and operated right elbow, and repeatedly operated right thumb cumulate, with chronic degeneration, to thirty percent PPD of the right upper extremity at the 210 week level (63 weeks). His operated right knee together with his chronic degeneration and heavy labor activity through 1999 equates to forty percent PPD (64 weeks). The left heel spur surgery equates to twenty percent PPD of the foot (31 weeks). Surprisingly, Claimant continued to work full-time after 1999.

Synergy is the concept in which the *current* PPD and the *pre-existing* PPD are found, in combination, to create a “substantially greater” disability, or an increased overall disability, and for which the employer should not be held liable. The significance is predicated by the statutory thresholds for injuries to the extremities and injuries to the body as a whole. Section 287.220.1 RSMo (2000). Here, Claimant's condition was quite serious and warranted serious guarding and precautionary measures. The medical evidence suggests Claimant’s combined PPD equates to three-quarters of a body, or 300 weeks. Thus, after deducting the pre-existing PPD plus the PPD from the current injury, the synergistic affect results in an additional 12 weeks of PPD from the SIF.

Insufficient evidence was presented that the other SIF allegations manifest as hindrances or obstacles to employment and, in addition, synergize with the current PPD. Section 287.220.1 RSMo (2000).

#### Second Case

PRIMARY

Claimant's primary injury herein is determined by attribution of PPD between Claimant's current upper extremity PPD and his pre-existing upper extremity PPD. Claimant's overall *right* upper extremity disability equates to fifty percent PPD at the 210 week level. Claimant's *pre-existing* right upper extremity PPD is thirty percent PPD at the elbow, or 63 weeks. His *current* right wrist equates to twenty percent PPD (35 weeks). Claimant's *left* upper extremity injury equates to a thirty-three percent PPD at *left* elbow for the wrist and elbow surgeries (69.3 weeks). Claimant's total current upper extremity disability is 104.3 weeks PPD. In addition, five weeks disfigurement was noted.

SIF

From the record herein, it must be concluded that Claimant is permanently and totally disabled as a result of the combination of his primary injuries with his pre-existing disabilities. It is not reasonable to suggest an employer would hire Claimant on the open labor market despite his skill set. The SIF failed to rebut the record of serious pre-existing disabilities, age, current complaints, use of narcotic pain relievers and the fact that Claimant never returned to work.

*Third Case*

The tinnitus case fails with regard to PPD liability of the SIF and is moot with regard to PTD liability of the SIF.

Conclusion

Accordingly, with regard to the first Claim, and on the basis of the substantial competent evidence contained within the whole record, Claimant is found to have sustained an additional 12 weeks PPD from the SIF as a result of the combination between the primary injury and the pre-existing extremity PPD. Section 287.220.1 RSMo (2000).

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

Joseph E. Denigan  
Administrative Law Judge  
Division of Workers' Compensation

A true copy: Attest:

\_\_\_\_\_  
Patricia "Pat" Secret  
Director  
Division of Workers' Compensation

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION \_\_\_\_\_

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

Injury No.: 01-160544

Employee: Robert McDonough

Employer: Rock Hill Mechanical Corporation

Insurer: TIG Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: July 25, 2001  
Place and County of Accident: St. Louis

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated October 19, 2005. The award and decision of Administrative Law Judge Joseph E. Denigan, issued October 19, 2005, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 3<sup>rd</sup> day of May 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING  
\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
John J. Hickey, Member

Attest:  
  
\_\_\_\_\_  
Secretary

**AWARD**

Employee:	Robert McDonough	Injury No.: 01-160544
Dependents:	N/A	Before the
Employer:	Rock Hill Mechanical Corp.	<b>Division of Workers'</b>
Additional Party:	Second Injury Fund	<b>Compensation</b>
Insurer:	TIG Insurance Company	Department of Labor and Industrial
Hearing Date:	July 25, 2005	Relations of Missouri
		Jefferson City, Missouri
		Checked by: JED:tr

**FINDINGS OF FACT AND RULINGS OF LAW**

- 1. Are any benefits awarded herein? Yes
- 3. Was the injury or occupational disease compensable under Chapter 287? Yes
- 3. Was there an accident or incident of occupational disease under the Law? Yes
- 6. Date of accident or onset of occupational disease: July 25, 2001
- 7. State location where accident occurred or occupational disease was contracted: St. Louis
- 6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
- 7. Did employer receive proper notice? Yes
- 8. Did accident or occupational disease arise out of and in the course of the employment? Yes
- 10. Was claim for compensation filed within time required by Law? Yes
- 10. Was employer insured by above insurer? Yes
- 11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
Employee experienced upper extremity pain and numbness while performing pipefitter trade work.
- 12. Did accident or occupational disease cause death? No Date of death? N/A
- 13. Part(s) of body injured by accident or occupational disease: Both upper extremities.
- 15. Nature and extent of any permanent disability: 20% PPD of right wrist, 33% PPD at left elbow, 5 weeks disfigurement; and PTD against SIF.
- 16. Compensation paid to-date for temporary disability: \$21,002.01
- 16. Value necessary medical aid paid to date by employer/insurer? \$9,163.98

Employee: Robert McDonough Injury No.: 01-160544

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 19. Employee's average weekly wages: Unknown
- 19. Weekly compensation rate: \$628.90/\$329.42
- 20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable:
  - 104.3 weeks of permanent partial disability from Employer \$34,358.50
  - 5 weeks disfigurement 1,647.10
- 22. Second Injury Fund liability: Yes
  - Permanent total disability benefits from Second Injury Fund:  
weekly differential (\$299.48) payable by SIF for 104.3 weeks beginning  
May 19, 2003 and, thereafter \$628.90, for Claimant's lifetime Indeterminate

TOTAL:

INDETERMINATE

23. Future requirements awarded: Unknown

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

The compensation awarded to the claimant shall be subject to a lien in the amount requested of 20% (not to exceed \$25,000.00) of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Timothy P. O'Mara

## FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Robert McDonough	Injury No.: 01-160544
Dependents:	N/A	Before the <b>Division of Workers' Compensation</b>
Employer:	Rock Hill Mechanical Corp.	Department of Labor and Industrial Relations of Missouri
Additional Party:	Second Injury Fund	Jefferson City, Missouri
Insurer:	TIG Insurance Company	Checked by: JED:tr

This matter involves three separate Claims for Compensation identified as follows:

99-041543	02-09-99	cervical fusion (primary settled at 32.5% PPD BAW)
01-160544	07-25-01	multiple repetitive traumas (upper extremities)
02-157640	11-30-02	tinnitus (primary settled at 5% PPD BAW)

These cases may be referred to hereinafter as the first, second, and third cases, chronologically. Employer and its insurer stipulate that Claimant was employed on said date and that any liability is fully insured. The SIF neither disputes the interim benefits paid nor the relevance of any body part mentioned in the evidence which is important since no party introduced the Claims and Claimant introduced thirty years of medical evidence encompassing multiple body parts. The first and third cases concern SIF liability only. Claimant seeks permanent total disability benefits under an assertion of unemployability. All parties are represented by counsel.

### Issues for Trial

#### Second Case

2. Nature and extent of permanent partial disability;

#### *All Cases*

2. Liability of the SIF.

## FINDINGS OF FACT

26. Claimant, age 61, received sheet metal training while in high school and joined the Pipefitters Union after graduation.
27. Claimant worked as a welder throughout his employment history. He also worked maintenance and installation of refrigeration equipment for a number of years. He also worked alone in the service industry for a number of years.
28. Claimant testified the work required climbing, lifting, bending and kneeling. He climbed ladders while carrying equipment and toolboxes to the rooftop of buildings to work on refrigeration systems.

### *First Case*

29. Claimant fell down a flight of steps on February 9, 1999 and injured his left knee and left shoulder and neck. Claimant subsequently had surgical fusion at the C5-C6 level. Claimant received a settlement for 32.5% PPD of the body referable to the neck in Injury No. 99-041543.

### Second Case

30. Claimant testified he began experiencing numbness and tingling in his hands. The symptoms progressed to the point he would awake at night with pain in his hands.
31. Claimant was referred to Dr. Ollinger who performed a right carpal tunnel release on November 8, 2002 and both left carpal tunnel release and left elbow ulnar nerve transposition on November 22, 2002. Dr. Ollinger released Claimant from treatment without restrictions on May 19, 2003.
32. Claimant admitted the symptoms in his hands improved after the surgery. He also admitted he did not attempt to return to work following his discharge by Dr. Ollinger.

### *Third Case*

33. Claimant filed an occupational disease claim for chronic tinnitus with a reported onset date of November 30, 2002. Claimant settled this claim for 5% PPD of the body referable to tinnitus. Chronic tinnitus was diagnosed by Dr. John McKinney.

### Pre-existing Conditions

34. Claimant testified he sustained an injury to his right elbow and right hand in 1974 when he fell at the Rush Island powerhouse. As a result of the injury, Claimant cannot fully supinate his right arm experiences difficulty lifting heavy objects.
35. Claimant testified he sustained an injury requiring surgery to his right knee in 1984. He gave unimpeached testimony that he received periodic injections into the right knee due to ongoing symptoms.
36. In 1997, Claimant sustained an injury to his right thumb when it became caught in a machine. Dr. Stromberg performed multiple surgeries on the hand and thumb. He indicated the injury affects his grip.
37. Claimant received treatment from Dr. Glogovac for ongoing problems involving the hand. He indicated Dr. Glogovac diagnosed arthritis in the thumb and hand. He also indicated Dr. Glogovac injected the right thumb joint due to ongoing problems.
38. Claimant sustained an injury to his neck and back when he fell in 1999. He underwent a cervical fusion in May

1999. Claimant experiences radiculopathy and curtailed range of motion in the neck.

39. Claimant was diagnosed with having sleep apnea. He was prescribed a CPAP machine which he uses every night.
40. Claimant testified he was diagnosed with asbestosis approximately six years ago. He admitted to a long history of smoking. He experiences shortness of breath with exertion.
41. Claimant experienced chest pains and palpitations a number of years ago. He underwent a stress test and takes an aspirin each day. Claimant testified he occasionally experiences tightness and pain in his chest.
42. Claimant admitted to having problems performing his job leading up to the time he was diagnosed with carpal tunnel. He stated he avoided climbing ladders, bending, and had difficulty getting up and down off the floor. He had helpers who performed some of the heavier tasks during the years from 1994 through 1999 when he worked at the Savvis Center.

#### Opinion Evidence

43. Dr. Ollinger rated Claimant as having a 2% disability of the right wrist and a 5% disability of the left elbow as a result of the July 25, 2001 incident. He did not recommend any additional medical treatment for Claimant. (Exhibit 1).
44. Claimant was examined by Dr. Musich at the request of his attorney on April 29, 2004. Dr. Musich rated Claimant as having a 25% disability of the right wrist and a 30% disability of the left elbow due to the July 25, 2001 injury. Dr. Musich did not recommend any additional medical treatment for Claimant. (Exhibit B/2).
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46. Dr. Musich subsequently reported in 2004 that Claimant was permanently and totally disabled due to a combination of his current upper extremity disability and his physical limitations, advanced age, work history and training. (Exhibit B2).
47. Dr. Bernstein, a psychologist and licensed counselor, reviewed the medical record and testified Claimant was unemployable in the open labor market.
48. Mr. England, a licensed counselor, found Claimant employable at sedentary to light range of exertion. Claimant had trade expertise that permitted him to supervise building maintenance, sell plumbing supplies or handle an answer desk for a builder.

#### Other Settlements

49. Claimant received a settlement for 55% of the left thumb in Injury No. 85-159633.
50. Claimant received a settlement for 15% of the right knee in Injury No. 84-118379.

### RULINGS OF LAW

#### Expert Testimony

#### *Medical Opinion Evidence*

Dr. Musich identified elements from which a finding of permanent total disability may be drawn. Severe injury to opposite upper extremities together with the cervical disc fusion with radiculopathy, independent upper extremity

pathologies, and chronic pain combine to prevent any reasonable means by which Claimant might compensate for individual losses in order to endeavor regular, sustained work hours.

More importantly, he had opportunity to evaluate Claimant over several years' gap. It is noted, however, that Dr. Musich did not rate the right knee surgery or the left heel surgery each of which are relevant to an assessment of Claimant's ability to ambulate. The right knee was settled at fifteen percent PPD which was a reasonable assessment in 1984. However, Claimant's gait at trial, his un rebutted complaints at trial, together with the recognition of progressive degenerative joint disease during the years 1984 to 2001, render the knee more likely in the forty percent range of PPD. The lay evidence contemplates future arthroplasty. Again, Claimant worked heavy labor in installation and maintenance. Finally, Claimant gave un rebutted testimony that he had a helper during his last years on the job and largely gave instructions with minimal exertion on his behalf.

Dr. Musich opined that claimant sustained a greater overall disability as a result of the combination of the prior injuries to the right upper extremity (50% PPD of elbow, 30% PPD of wrist and 50% PPD of thumb) with the current cervical fusion (Exhibit B; *Depo. Ex. 3, dated September 4, 2001*). He identified no other pre-existing conditions that combined with the cervical fusion. Yet, Dr. Musich testified he had patient history that included right elbow surgery, right knee surgery and left heel surgery.

Dr. Musich's opinion evidence is difficult to follow. First, little foundation was laid as to what medical records were reviewed. A listing of provider names for an individual who has treated repeatedly with the same providers is not necessarily sufficient evidence when coupled with the variations of live testimony. Second, Dr. Musich's omissions in testimony about the actual review of records of serious prior injuries and conditions (eg. surgical records) raises additional doubt when the expert identifies *patient history* (eg. "he told me...") rather than records as the basis for his belief in the existence of a prior disability. Third, Dr. Musich inexplicably omits very serious prior injuries from his SIF analysis which, again, brings into doubt his awareness level and the persuasive value of his disability opinions (*see* report dated September 4, 2001). After omitting major injuries from the SIF analysis in 2001 it is difficult to re-incorporate them into analysis thereafter without undercutting one's credibility. Credibility of experts usually affects the probative value, or weight, of the opinion rather than admissibility. Fourth, these omissions are made even more serious by the fact that the disability necessarily increases after twenty and thirty years degenerative process that can occur in a sixty year old Claimant who sustained such injuries in the 1970's and 1980's. Finally, two of the omitted prior injuries concern ambulation (i.e. degenerative right knee and operated left heel spur). Ambulation deficits are hallmarks of permanent total disability. No greater single obstacle to employment exists than the inability to walk about home and work.

Nevertheless, poor expert preparation and performance (and costs thereof) cannot be the basis to ignore substantial evidence of disability found elsewhere in the record. This is especially true in the absence of party objection. Claimant's right knee disability, for example, is not any less real after twenty years passage of time for degenerative change compounded by daily wear and tear in trade work requiring crawling, kneeling climbing and constant toting of heavy loads in various positions. It does appear, however, that Claimant's limp at trial was worse than that described at his deposition. The addition of a limp merely demonstrates the presence of serious degenerative process decades underway at the time of Claimant's latest series of upper extremity surgeries in 2002 with Dr. Ollinger. Incremental value may be given to Dr. Musich's clinical findings and general conclusion that Claimant is permanently and totally disabled.

#### Vocational Evidence

Claimant's vocational expert's election not to mention Claimant's retirement in his analysis of unemployability is more difficult to excuse. Dr. Bernstein made no mention of Claimant's retirement in his seven-page report. This is true despite subsections entitled "General Background" and "Education and Employment History." He repeated phrases such as "from an employment perspective" and "advanced age." At deposition, an atypically succinct response from him that he *knew* Claimant was retired was unconventional. The manner in which Dr. Bernstein dismissed two opportunities to discuss Claimant's retirement is significant for two reasons. First, the omission in the report is simply disingenuous and the brevity of his response to this on cross-examination is specious as if retirement was irrelevant to the question of employability. This damages his expert credibility.

Consistent with this analysis is a recent holding in by the Court of Appeals in *Ransburg v. Great Plains Drilling*, 22 S.W.3d 726 (Mo.App. 2000). In that case, a 60 year old construction worker fell and required both neck and shoulder surgery. The record included evidence that the employee was capable of sedentary work and received both social security benefits and pension benefits. The employee admitted not having sought alternative employment. The court held employee's testimony itself was sufficient to find he had no motivation to return to work. Social security and pension benefits are irrelevant for the purpose of determining overall disability but are relevant to determine the ability or motivation to return to work. *Id.* Here, Claimant is now sixty-one and admitted never attempting a return to work after his surgeries. He retired.

Second, he failed to *explain* why this employee was, nevertheless, unemployable. He made not the slightest attempt to explain why retirement was this employee's only alternative. And, yet, noted such details as "feelings of worthlessness" and "guilt." Dr. Bernstein mentioned age but not retirement.

Finally, it is notable that Dr. Bernstein, in his expert report, uses the commonplace, "he has a good work record." This remark is self-serving praise and completely unfounded in either his own report or the balance of the evidentiary record. Chapter 287 does not contemplate goodness.

Mr. England gave considered opinions but also seemed to under value Claimant's ambulation deficits. He believed Claimant was employable in the sedentary to light categories of work. Beyond a review of the medical records, he was denied the opportunity to see Claimant ambulate. Also, he is not an orthopedist and may not be expected to make a sufficient inference of degenerative disability over the many arduous years Claimant worked after the 1984 right knee surgery. In fairness to Mr. England, he would not have learned enough of Claimant's ambulation deficits by a reading of Dr. Musich's reports.

Another important factor is the effect of maintenance analgesics on the idea of full-time employment. Claimant is on a host of drugs for various ailments many of which are due to the natural aging process. Independent of these, however, is his prescription for hydrocodone, a scheduled narcotic. Age is relevant here regarding Claimant's ability to work regular hours, or daily, and sustained hours meaning unbroken shifts and without unscheduled rest breaks.

Thus, the properly founded expert evidence herein is of limited use. Probative value is gleaned from the experts' general familiarity with Claimant and instances of detail concerning certain injuries.

### Permanent Disability and Liability of the SIF

#### First Case

Claimant's cervical fusion PPD was settled at thirty-two and one-half percent PPD (130 weeks) which amount is appropriate with post-surgical left-sided radiculopathy. Claimant's prior right wrist fracture and operated right elbow, and repeatedly operated right thumb cumulate, with chronic degeneration, to thirty percent PPD of the right upper extremity at the 210 week level (63 weeks). His operated right knee together with his chronic degeneration and heavy labor activity through 1999 equates to forty percent PPD (64 weeks). The left heel spur surgery equates to twenty percent PPD of the foot (31 weeks). Surprisingly, Claimant continued to work full-time after 1999.

Synergy is the concept in which the *current* PPD and the *pre-existing* PPD are found, in combination, to create a "substantially greater" disability, or an increased overall disability, and for which the employer should not be held liable. The significance is predicated by the statutory thresholds for injuries to the extremities and injuries to the body as a whole. Section 287.220.1 RSMo (2000). Here, Claimant's condition was quite serious and warranted serious guarding and precautionary measures. The medical evidence suggests Claimant's combined PPD equates to three-quarters of a body, or 300 weeks. Thus, after deducting the pre-existing PPD plus the PPD from the current injury, the synergistic affect results in an additional 12 weeks of PPD from the SIF.

Insufficient evidence was presented that the other SIF allegations manifest as hindrances or obstacles to employment and, in addition, synergize with the current PPD. Section 287.220.1 RSMo (2000).

#### Second Case

### PRIMARY

Claimant's primary injury herein is determined by attribution of PPD between Claimant's current upper extremity PPD and his pre-existing upper extremity PPD. Claimant's overall *right* upper extremity disability equates to fifty percent PPD at the 210 week level. Claimant's *pre-existing* right upper extremity PPD is thirty percent PPD at the elbow, or 63 weeks. His *current* right wrist equates to twenty percent PPD (35 weeks). Claimant's *left* upper extremity injury equates to a thirty-three percent PPD at *left* elbow for the wrist and elbow surgeries (69.3 weeks). Claimant's total current upper extremity disability is 104.3 weeks PPD. In addition, five weeks disfigurement was noted.

SIF

From the record herein, it must be concluded that Claimant is permanently and totally disabled as a result of the combination of his primary injuries with his pre-existing disabilities. It is not reasonable to suggest an employer would hire Claimant on the open labor market despite his skill set. The SIF failed to rebut the record of serious pre-existing disabilities, age, current complaints, use of narcotic pain relievers and the fact that Claimant never returned to work.

*Third Case*

The tinnitus case fails with regard to PPD liability of the SIF and is moot with regard to PTD liability of the SIF.

Conclusion

Accordingly, with regard to the second Claim, and on the basis of the substantial and competent evidence contained within the whole record, Claimant is found to have sustained a twenty percent PPD at the right wrist and a thirty-three percent PPD at the left elbow, plus five weeks disfigurement, as a result of the primary injury.

In addition, Claimant is found to have sustained an increased overall disability that equates to permanent total disability as the result of the combination of the primary injury and the pre-existing disabilities described. Section 287.220.1 RSMo (2000). The SIF is liable for the differential between the PTD rate and the PPD rate for the PPD installment period and, thereafter, for Claimant's lifetime. Section 287.200 RSMo (2000).

The calculation of PTD benefits depends on a commencement date, usually the date of MMI. The date of MMI was not identified by Dr. Musich in his reports or otherwise posed to him at deposition. Dr. Ollinger's rating is dated May 19, 2003. Claimant apparently worked on November 30, 2002 (*third case*).

Given the obvious severity of the primary injury (three surgeries) and the overwhelming medical evidence of pre-existing orthopedic injury, the skills required and the skills used, and preparation of experts, an attorney fee is allowed in the amount requested of twenty percent (not to exceed \$25,000.00). Section 287.260 RSMo (2000). Cervantes v. Ryan, 799 S.W.2d 111, 115 (Mo.App. 1990).

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

Joseph E. Denigan  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Patricia "Pat" Secret  
*Director*  
*Division of Workers' Compensation*