

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

Injury No.: 03-021397

Employee: Charlie McDuffie

Employer: Winco Manufacturing Company (Settled)

Insurer: St. Paul Travelers Insurance Company (Settled)

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Date of Accident: February 24, 2003

Place and County of Accident: St. Louis City, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence, heard oral argument, read the briefs, and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 6, 2007, as supplemented herein.

Preliminaries

The administrative law judge made the following findings and conclusions concerning liability of the Second Injury Fund: the primary injury occurring February 24, 2003 resulted in 75% permanent partial disability of the right wrist; at the time of the primary injury employee had a pre-existing permanent partial disability of 16% of the body as a whole referable to the lumbar spine which constituted an obstacle or hindrance to employment; and the combination of the two disabilities resulted in a synergistic effect equal to a permanent partial disability enhancement of 19.5 weeks based on a 10% load factor.

Employee filed a timely Application for Review with the Commission alleging that the administrative law judge's decision is against the weight of the evidence in that all of the evidence supported the proposition that the employee was totally disabled as a result of the current injury in synergy with his prior multiple disabilities.

The Second Injury Fund filed a timely Application for Review, as well, alleging that the administrative law judge erred in finding that employee met his burden of proof in showing that he had an alleged pre-existing disability to the body as a whole (low back) that met the requisite threshold or that it was an obstacle or hindrance to employment at the time of the primary injury. We disagree and affirm the benefits awarded by the administrative law judge.

Discussion

In order to trigger Second Injury Fund liability, employee must have a pre-existing permanent partial disability of such seriousness as to constitute a hindrance or obstacle to employment or re-employment and the preexisting disability must exist at the time the work-related injury was sustained. *E.W. v. Kan. City Sch. Dist.*, 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)). The pre-existing disability must combine with the work-related injury to result in a greater overall disability than that which would have resulted from the new injury alone; or the pre-existing disability must combine with the work-related injury to create permanent total disability. *Karoutzos v. Treasurer of State*, 55 S.W.3d 493, 498 (Mo.App. W.D. 2001) (overruled on other grounds, *Hampton*, 121 S.W.3d 220).

There is competent and substantial evidence in the record to conclude that employee had a pre-existing permanent partial disability of the low back that was an obstacle or hindrance to employment. Employee testified that he sustained an injury to his low back in 1986. The medical records show that employee was treated conservatively by Dr. Sedgwick and underwent a lumbar CT and x-rays. The x-rays indicated arthritis with spurs at L3, L4 and L5 and the lumbar CT indicated a moderate disc bulge at L5-S1, with slight bulging at L3-4 and L4-5. Employee settled his low back claim with employer for 16% permanent partial disability of the body as a whole. Employee testified that due to his 1986 back injury that he lost six months of work. Employee testified as to the ongoing difficulties he had as a result of his back condition which included low back pain and left leg numbness. Employee further testified that after his injury that he occasionally wore a back brace. Employee reported to Mr. England, vocational expert, that his back was never the same following his 1986 injury and that his back bothered him if he tried to do too much lifting.

Dr. Musich evaluated employee on August 25, 2005. Dr. Musich testified that employee suffered acute low back pain in 1986 which resulted in chronic lumbar strain and symptomatic central disc bulge at L5-S1. Dr. Musich opined that the stipulation of permanent partial disability of 16% to the body as a whole referable to the lumbosacral spine was reasonable. Dr. Musich further testified that the combination of employee's past and present disabilities was significantly greater than their simple sum and would continue to produce a chronic hindrance in his routine activities of daily living.

Employee has established Second Injury Fund liability as he has shown that the pre-existing disability to his low back was an obstacle or hindrance to his employment and that it combined with the work-related wrist injury to result in a greater overall disability than that which would have resulted from the work injury alone.

However, there is not sufficient competent and substantial evidence in the record to support a finding of permanent total disability against the Second Injury Fund. Employee failed to meet his burden of proof showing that the work-related injury combined with any pre-existing disability that existed at the time of the work-related injury to result in permanent total disability.

Mr. James England evaluated employee on December 20, 2005. He opined taking into consideration only the restrictions imposed by the functional capacity evaluation, that there would be some types of alternative work employee could perform. However, when taking into consideration the limitations of Dr. Musich along with employee's apparent day-to-day functioning, combined with his back problems, limited education and functional capacity, Mr. England did not believe employee would be able to successfully compete for employment. Mr. England opined employee seemed to be best suited for sedentary to light employment which usually would involve rapid, repetitive use of the upper extremities and/or a lot of contact with the public. Mr. England noted that the employee was more machine oriented and did not particularly like dealing with the public. Mr. England noted that employee reported that he was depressed and could not handle verbal activity. Mr. England opined that someone with employee's combination of problems was not likely to be able to find any type of work activity that he could sustain on a consistent basis and was

permanently and totally disabled from a vocational standpoint.

We find Mr. England's opinion that employee is permanently and totally disabled from a vocational standpoint is not credible. Mr. England based his opinion in part on employee's subjective complaints along with the fact that employee did not like dealing with the public. The record does not support a finding that employee is permanently and totally disabled based on the combination of his work-related injury and any pre-existing disability.

Conclusion

The Commission agrees with the ultimate conclusion reached by the administrative law judge, that the Second Injury Fund is liable to employee for a permanent partial disability enhancement of 19.5 weeks.

The award and decision of Administrative Law Judge Cornelius T. Lane, issued December 6, 2007, 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 1st day of July 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee:	Charlie McDuffie	Injury No.:	03-021397
Dependents:	N/A	Before the	
Employer:	Winco Manufacturing Company (settled)	Division of Workers'	
Additional Party:	Second Injury Fund	Compensation	
Insurer:	St. Paul Travelers Insurance Company	Department of Labor and Industrial	
Hearing Date:	October 2, 2007	Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	CTL: ms

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
 - 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
 - Date of accident or onset of occupational disease: February 24, 2003
 - 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
 - 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: The employee dropped a long piece of aluminum on his right wrist causing injury.
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: Right wrist
 - Nature and extent of any permanent disability: 75%PPD of the right wrist
15. Compensation paid to-date for temporary disability: n/a – settled with Employer
16. Value necessary medical aid paid to date by employer/insurer? n/a – settled with Employer
17. Value necessary medical aid not furnished by employer/insurer? none
 - Employee's average weekly wages: \$465.19
19. Weekly compensation rate: \$310.13/\$310.13
20. Method wages computation: by consent

COMPENSATION PAYABLE

21. Amount of compensation payable by Employer: n/a

22. Second Injury Fund liability: Yes

75% of the right wrist, 16% of the low back, for a total of 195.25 weeks, 10% load factor, 19.5 weeks at \$310.13 PPD for a total of:

Total: \$6,047.53

23. Future requirements awarded: n/a

Said payments to begin 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:

Frank W. Kriegel, Jr., , KRIEGEL & ITUARTE P.C., 6100 South Grand Blvd., St. Louis, Missouri 63111.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Charlie McDuffie	Injury No.:	03-021397
Dependents:	N/A	Before the	Division of Workers'
Employer:	Winco Manufacturing Company (settled)	Compensation	
Additional Party:	Second Injury Fund	Department of Labor and Industrial	Relations of Missouri
		Jefferson City, Missouri	
Insurer:	St. Paul Travelers Insurance Company	Checked by:	CTL: ms

PRELIMINARIES

A hearing in the above mentioned matter was heard on October 2, 2007, in St. Louis, Missouri. The Claimant, Charlie McDuffie, was represented by attorney Frank W. Kriegel, Jr., Attorney at law, and the Second Injury Fund was represented by Attorney Tracy E. Cordia, Assistant Attorney General.

STIPULATIONS

Claimant had a wage rate of \$310.13 for PPD and PTD.

ISSUE

Second Injury Fund Liability.

EXHIBITS

Claimant offered the following exhibits which were admitted into evidence:

- Exhibit A. Deposition of Dr. Musich.
- Exhibit B. Deposition of Mr. England
- Exhibit C. Stipulation for Compromise Lump Sum Settlement for Injury Number 03-021397.
- Exhibit D. Stipulation for Compromise Lump Sum Settlement for Injury Number 04-144486.
- Exhibit E. Stipulation for Compromise Lump Sum Settlement for Injury Number 86-047476.
- Exhibit F. Concentra Records regarding March 12, 2003 to April 21, 2003.
- Exhibit G. Pro Rehab Records.
- Exhibit H. Forest Park Hospital Records.
- Exhibit I. St. Joseph Hospital Records.
- Exhibit J. St. Joseph Hospital Records.
- Exhibit K. Dr. Rotman/The Orthopedic Center Records.
- Exhibit L. Dr. Pruitt/St. Louis Orthopedic Records.
- Exhibit M. Hand Therapy of South County Records.
- Exhibit N. St. Louis/Clayton Orthopedic Group Records.
- Exhibit O. Northland Mid-America Orthopedic Group Records.
- Exhibit P. Healthline records re 1993 right hand.
- Exhibit Q. Centers for Hearing and Speech 1998 to 2004.
- Exhibit R. Report of Injury in 93-012084 re the right hand.
- Exhibit S. Dr. Lehman's March 24, 1993 Record.
- Exhibit T. Healthline Corporate Health re 1993
- Exhibit U. Stipulation for Compromise Lump Sum Settlement for Injury Number 93-012084

The Second Injury Fund offered the following exhibits which were admitted into evidence:

- I. Deposition of Claimant.

FINDINGS OF FACT

- Claimant is sixty years of age and testified that he had worked for Winco Manufacturing Company, the Employer, for approximately 24 years. On February 24, 2003, Claimant injured his right wrist. Subsequently on May 14, 2003, Claimant underwent a right wrist scathoidectomy and four corner fusion, and subsequently on April 21, 2004, Claimant underwent a right wrist arthrodesis with iliac crest bone graph. Claimant underwent a further operation on November 17, 2004 when he underwent a right wrist fusion with iliac crest bone graph and hardware removal.
- From the evidence, the Claimant had a prior injury to his low back in 1986, and he received a 16% body as a whole settlement.

CONCLUSIONS OF LAW

Second Injury Fund liability to the Claimant for his 75% injury of his right wrist, and 16% PPD for his low back, for a total of 195.25 weeks of PPD, with a load factor of 10% for a total of 19.5 weeks at \$310.13 for PPD for a total of compensation payable to the Claimant by the Second Injury Fund in the amount of \$6,047.53.

Date: _____

Made by: _____

Cornelius T. Lane
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey W. Buker
Director
Division of Workers' Compensation

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 04-144486

Employee: Charlie McDuffie
Employer: Winco Manufacturing Company
Insurer: Hartford c/o Gallagher Bassett
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: Alleged November 15, 2004
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 December 6, 2007, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Cornelius T. Lane, issued December 6, 2007, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 1st day of July 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee:	Charlie McDuffie	Injury No.: 04-144486
Dependents:	N/A	Before the
Employer:	Winco Manufacturing Company	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	Hartford c/o Gallagher Bassett	Department of Labor and Industrial
Hearing Date:	October 2, 2007	Relations of Missouri
		Jefferson City, Missouri
		Checked by: CTL: ms

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
 - Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
 - Date of accident or onset of occupational disease: Alleged November 15, 2004
 - 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? No
- 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: The employee allegedly was exposed to loud industrial noise over a long period of time while using machinery to shape and cut metal.
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: Allegedly Claimant's ears.
- Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: n/a
16. Value necessary medical aid paid to date by employer/insurer? n/a
17. Value necessary medical aid not furnished by employer/insurer? none
- Employee's average weekly wages: \$531.07
19. Weekly compensation rate: \$354.05/\$354.05
20. Method wages computation: by consent

COMPENSATION PAYABLE

21. Amount of compensation payable by Employer: n/a
22. Second Injury Fund liability: None

Total: None

23. Future requirements awarded: n/a

Said payments to begin and to be payable and be subject to modification and review as provided by law. n/a

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: n/a

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Charlie McDuffie	Injury No.:	04-144486
Dependents:	N/A	Before the	
Employer:	Winco Manufacturing Company	Division of Workers'	
Additional Party:	Second Injury Fund	Compensation	
Insurer:	Hartford c/o Gallagher Bassett	Department of Labor and Industrial	
		Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	CTL: ms

PRELIMINARIES

A hearing was held in the above mentioned matter was heard on October 2, 2007, in the City of St. Louis, Missouri. The Claimant, Charlie McDuffie, was represented by attorney Frank W. Kriegel, Jr., Attorney at law, and the Second Injury Fund was represented by Attorney Tracy E. Cordia, Assistant Attorney General.

STIPULATIONS

Claimant had a wage rate of \$354.05 for PPD and PTD.

ISSUES

-

- Accident
- Occupational Disease
- Second Injury Fund Liability
- Causation

EXHIBITS

Claimant offered the following exhibits which were admitted into evidence:

Exhibit A.	Deposition of Dr. Musich.
Exhibit B.	Deposition of Mr. England
Exhibit C.	Stipulation for Compromise Lump Sum Settlement for Injury Number 03-021397.
Exhibit D.	Stipulation for Compromise Lump Sum Settlement for Injury Number 04-144486.
Exhibit E.	Stipulation for Compromise Lump Sum Settlement for Injury Number 86-047476.
Exhibit F.	Concentra Records regarding March 12, 2003 to April 21, 2003.
Exhibit G.	Pro Rehab Records.
Exhibit H.	Forest Park Hospital Records.
Exhibit I.	St. Joseph Hospital Records.
Exhibit J.	St. Joseph Hospital Records.
Exhibit K.	Dr. Rotman/The Orthopedic Center Records.
Exhibit L.	Dr. Pruitt/St. Louis Orthopedic Records.

Exhibit M.	Hand Therapy of South County Records.
Exhibit N.	St. Louis/Clayton Orthopedic Group Records.
Exhibit O.	Northland Mid-America Orthopedic Group Records.
Exhibit P.	Healthline records re 1993 right hand.
Exhibit Q.	Centers for Hearing and Speech 1998 to 2004.
Exhibit R.	Report of Injury in 93-012084 re the right hand.
Exhibit S.	Dr. Lehman's March 24, 1993 Record.
Exhibit T.	Healthline Corporate Health re 1993
Exhibit U.	Stipulation for Compromise Lump Sum Settlement for Injury Number 93-012084

The Second Injury Fund offered the following exhibits which were admitted into evidence:

I. Deposition of Claimant.

FINDINGS OF FACT

- At the time of the hearing the Claimant was a sixty year old gentleman who worked for Winco Manufacturing Company, the Employer. On November 15, 2004, Claimant allegedly sustained an occupational disease as a result of hearing loss.
- The only testimony concerning Claimant's hearing loss was hearing records from the Employer, which it gave to the Claimant hearing test for a seven year period of time. Those records indicate that Claimant had a 99.9% loss of hearing in the right ear, and 45% loss of hearing in the left ear. The records indicate that the Claimant as a child had hearing problems that being a perforated eardrum as a youngster, and his ear would drain.
- From all the evidence there was really no evidence that the Claimant was permanently and totally disabled as a result of primary injury of hearing loss, in combination with his pre-existing injuries, those being low back as well as right wrist injuries.
- Claimant did not offer any medical expert testimony as to nature and extent of disability due to Claimant's alleged hearing condition.
- Claimant testified that since he was a child he had some hearing problems but he never had any medical treatment for his hearing.

CONCLUSIONS OF LAW

- The Claimant failed to meet his burden of proof that he sustained any PPD as a result of his alleged hearing loss. Further Claimant failed to meet the burden of proof to show that he was permanently and totally disabled as a result of the primary injury of hearing loss and combination of his pre-existing injuries.

- Therefore, the Employer/Insurer and the Second Injury Fund are not liable to pay any benefits to the Claimant.

Date: _____

Made by: _____

Cornelius T. Lane
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey W. Buker
Director
Division of Workers' Compensation