

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

Injury No.: 09-017967

Employee: Ronald McKinley
Employer: Atlas Glass & Door, Inc. (Settled)
Insurer: Commerce & Industry 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. 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 Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated August 8, 2012. The award and decision of Administrative Law Judge Kenneth J. Cain, issued August 8, 2012, 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 28th day of July 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD
As to the Second Injury Fund Only

Employee: Ronald McKinley Injury No. 09-017967
Dependents: N/A
Employer: Atlas Glass & Door, Inc.
Insurer: Commerce & Industry Insurance Company
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Hearing Date: June 5, 2012; Briefs filed July 3, 2012 Checked by: KJC/pd

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: March 4, 2009
5. State location where accident occurred or occupational disease was contracted: Leavenworth, Kansas with contract of hire in Missouri.
6. Was above Employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee, while in the course and scope of his employment as a glazer for

Atlas Glass company was required to perform strenuous activities with hand and wrists. Employee developed bilateral DeQuervain's syndrome and trigger fingers.

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 hands and wrists
14. Nature and extent of any permanent disability: 27 percent to body as a whole per stipulation with employer.
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? N/A
18. Employee's average weekly wages: By agreement
19. Weekly compensation rate: \$772.53/\$404.66
20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable: N/A
22. Second Injury Liability: Yes
19.5 weeks @ \$404.66 per week equals \$7,890.87

TOTAL: \$7,890.87

23. Future requirements awarded: None

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

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

FINAL AWARD
As to the Second Injury Fund Only

Employee: Ronald McKinley Injury No. 09-017967
Dependents: N/A
Employer: Atlas Glass & Door, Inc.
Insurer: Commerce & Industry Insurance Company
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Hearing Date: June 5, 2012; Briefs filed July 3, 2012 Checked by: KJC/pd

Mr. Ronald McKinley (hereinafter referred to as Claimant) filed two claims for compensation on October 18, 2010. Injury Number 09-014630 was pled as an occupational disease with a date of March 3, 2009 for the occupational disease. Claimant alleged in the claim that he injured his left shoulder and body as a whole due to performing repetitive activities at work.

Injury Number 09-017697 was also pled as an occupational disease with a date of March 15, 2009 and all days worked prior thereto as the date for the occupational disease. Claimant alleged in that claim injuries to both of his upper extremities as a result of performing repetitive activities at work.

Claimant settled both of his cases against his employer on November 3, 2011. He settled Injury Number 09-014630 based on a permanent partial disability of 37.5 percent to his body as a whole. Neither the claim nor the stipulation for settlement specified any specific parts of the body injured other than his left shoulder. The stipulation for settlement did not show whether the 37.5 percent to the body as a whole settlement was based entirely on his shoulder injury or due to disability from his shoulder and some other part of the body.

Claimant settled Injury Number 09-017697 based on a permanent partial disability of 27 percent to his body as a whole. Again, the settlement was not specific as to the bases for the settlement other than for a bilateral hand impairment. Also, Claimant testified that he last worked at Atlas Glass & Door, Inc. on March 4, 2009. There was no explanation as to why the claim was filed as an occupational disease for March 15, 2009 and all the days worked prior thereto.

The remaining party in both cases was the State Treasurer as Custodian of the Second Injury Fund. Prior to the hearings, the employee and the Second Injury Fund entered into

various admissions and stipulations. The remaining issues in Injury Number 09-014630 were as follows:

1. Whether the employee sustained an occupational disease;
2. Liability of the Second Injury Fund for compensation; and
3. Whether Second Injury Fund liability may be premised on an occupational disease.

At the hearing, Claimant testified that he was born on October 20, 1969. He stated that he graduated from high school in 1987. He stated that he was incarcerated from 1988 to 1993 for armed robbery. He indicated that he was heavily addicted to street drugs in 1988.

Claimant testified that he had not used drugs since 1988. He stated that his conviction was later expunged from his record. He stated that he had maintained good behavior for 20 years.

Claimant testified that after his release from prison he enrolled in college and obtained an AA degree in addiction counseling.¹ He also stated that he had worked on a number of jobs since his release from prison. He stated that prior to 1999 he worked as a CNA and psych technician. He stated that in 1999 he became a glazer. He described the glazer job as strenuous. He stated that he had to lift in excess of 100 pounds and to climb ladders and scaffolds. He stated that he had to use large powerful industrial tools. He stated that he had to do a lot of bending and stooping. He stated that his hands hurt constantly while doing the work.

Claimant testified that prior to March 2009 he had sustained several injuries. He stated that in 1993 he sustained a closed head injury in a motor vehicle accident. He stated that afterwards he noticed a slight personality change and indicated that he became more irritable.

He testified that he had two hernia operations. He stated that due to his hernias he could no longer lift free weights, do some of his hobbies, work on cars or play golf.

Claimant testified that in 2001 he fell down 30 to 40 stairs at work and "crushed" a nerve in his left elbow. He stated that he had surgery on his left elbow. He stated that his left arm was permanently crooked. He also stated that he was diagnosed with bilateral carpal tunnel syndrome at that time. He stated that he had surgery on his left hand. He stated that his doctor had recommended surgery on each hand, but that he was "afraid" to have surgery on both hands.

Claimant complained of continuing problems due to his 2001 injuries. He stated that his grip strength was about ½ of what it was prior to his injury. He stated that his left hand was his

¹ There were references in the medical records where Claimant had allegedly indicated that he had obtained his bachelor's degree from St. Mary's College and other references alleging that he was a few hours short of obtaining his degree.

dominant hand. He stated that after the accident he began using his right hand to do his job and to write.

Claimant testified that the surgery initially improved the numbness and tingling in his hands. He stated that his employer later increased his work load and that his hands went "downhill." He stated that the pain returned. He stated that his fingers began locking up at night. He stated that Dr. Ketchum recommended surgery for bilateral DeQuervain's syndrome.²

Claimant testified that he eventually had surgery on his left wrist and left index and middle fingers. He stated that he had surgery on his right wrist and middle and ring fingers. He complained of constant pain in his hands. He stated that he could no longer grip. He stated that Dr. Ketchum gave him a restriction of no repetitive gripping.

Claimant testified that his alleged March 3, 2009 "occupational disease" involved an injury to his left shoulder. There was no explanation as to why he pled the case as an occupational disease. Claimant testified that he injured his left shoulder on March 3, 2009 when he and several co-workers were carrying some large 600 to 800 pounds aluminum and steel frames. He stated that when one co-worker let go of the frames the weight shifted to him and his shoulder popped. He stated that he felt "extreme" pain in his shoulder.

Claimant testified that he went to work the next day despite his alleged pain. He stated that an MRI a few days later showed a rotator cuff tear. He stated that he had rotator cuff surgery. He stated that his doctor advised him that he was barely able to repair his shoulder.

Claimant testified that following his surgery he was given several lifting restrictions and placed on permanent light duty. He stated that he still had problems with his shoulder. He stated that he could not lift his shoulder. He stated that he had very limited motion in his shoulder. He stated that his shoulder was extremely painful. He stated that due to shoulder pain he could only get 2 to 3 hours of sleep per night. He stated that due to his shoulder problems his wife had to help him dress and with his personal hygiene.

Claimant complained of trouble walking which he attributed to his lack of sleep. He stated that he had become severely depressed and suicidal due to his pain. He stated that he was no longer able to engage in recreational activities. He stated that he had applied for 500 to 600 jobs and that he had been unable to obtain work. He stated that he had enrolled in vocational rehabilitation.

On cross-examination by the Second Injury Fund, Claimant admitted that he had not done any work since March 4, 2009. He admitted that in the 1990s he was a power weight lifter. He admitted that he had played computer games for about 15 years. He admitted that he still used a mouse to play the computer games. He admitted that he played on the

² The surgery was to treat Claimant's alleged injuries from the alleged "March 15, 2009" occupational disease.

computer for 30 to 40 minutes every other day. He admitted that he was diagnosed with diabetes after his March 3, 2009 shoulder injury.

Claimant admitted that he had continued to do the strenuous duties of his glazer job after his prior elbow injury. He alleged, however, that he worked in pain every day prior to 2009. He stated that he was reprimanded at work prior to 2009 for not doing his work on a timely basis and for not doing it correctly.

Claimant's wife, Ms. Rebecca McKinley, testified at the hearing on Claimant's behalf and provided corroborating testimony. She primarily testified as to changes in Claimant's behavior.

Medical Evidence

The Second Injury Fund offered no medical evidence. Claimant offered the deposition testimony of P. Brent Koprivica, M.D. and Steven Hill, D.O., and numerous reports and records. Dr. Koprivica testified that he was board certified in emergency and in occupational medicine. He stated that since 1992 he had just done "independent" medical examinations.

Dr. Koprivica noted that he was familiar with the job duties of a glazer. He noted that he had evaluated Claimant in 2004 for Claimant's 2001 claim involving injuries to both of his upper extremities. He noted that as a result of the 2001 injury that Claimant had a left carpal tunnel release and an anterior transposition of the ulnar nerve in his left elbow.

Dr. Koprivica concluded that Claimant's 2001 upper extremity impairments were not "industrially disabling." He explained that by using the phrase industrially disabling he meant that the conditions would not impair or hinder or limit Claimant in his work and that they would not be an obstacle to him in getting another job.

Dr. Koprivica noted Claimant's two alleged March 2009 occupational diseases. He noted that Claimant had left rotator cuff surgery on April 27, 2009 due to the March 3, 2009 incident when Claimant's left shoulder popped as he was helping to lift 600 pounds. He stated that an MRI showed that Claimant's rotator cuff tear had retracted, meaning that the tendon was completely torn in two.

Dr. Koprivica indicated that Claimant's alleged "March 15, 2009" occupational disease claim resulted in DeQuervain's releases on the right and left side and surgery on Claimant's left thumb, left ring and left middle fingers as well as his right index and right ring fingers.

Dr. Koprivica concluded that Claimant's work activities as a glazer were the prevailing factor in causing Claimant's injuries and impairments as set out above. He concluded that both the rotator cuff tear and the right and left hand impairments were caused by repetitive activities. He concluded that Claimant had sustained a permanent partial disability of 35 percent of the left upper extremity at the 232 week level due to the rotator cuff tear. He stated that he found no evidence that Claimant had right carpal tunnel syndrome. He concluded that

Claimant had sustained a permanent partial disability of 30 percent to his body as a whole due to the injuries or impairments to both of his hands and wrists. He stated that Claimant's permanent partial disability to his right hand at the 175 week level was 35 percent while that to his left hand at the 175 week level was 30 percent.

Dr. Koprivica placed a number of restrictions on Claimant and concluded that Claimant was totally disabled from working as a glazer. He stated that he believed that there were jobs that Claimant could potentially perform from a physical perspective. He stated, however, that he would defer to a vocational expert to determine whether Claimant had the ability to be retrained and placed in the open labor market with his restrictions.

On examination by Claimant's employer, Dr. Koprivica acknowledged that he had not treated a patient for pay since 1992. He admitted that 98 to 99 percent of his "independent" medical examinations were done at the request of plaintiffs or claimants.

On cross-examination by the Second Injury Fund, Dr. Koprivica reiterated that in his opinion none of Claimant's injuries or impairments, which predated the March 2009 work-related injuries or impairments, was a hindrance or obstacle to Claimant's employment or reemployment. He admitted that he did not believe that the restrictions placed on Claimant for Claimant's physical injuries would remove Claimant from the open labor market.

On redirect examination, Dr. Koprivica testified that he believed that Claimant's left shoulder injury in 2009 was due to an acute injury and that he believed that Second Injury Fund liability was based on Claimant's acute injury to his left shoulder on March 3, 2009 and Claimant's subsequent bilateral extremities injury or claim dated March 15, 2009.

Todd Hill, D.O., testified that he was a board certified psychiatrist. He stated that he examined Claimant on July 18, 2011. He noted that Claimant had initially sought treatment for his alleged psychiatric problems in December 2010.³

Dr. Hill noted that Claimant provided a history of developing depression in October and November 2010. He stated that Claimant attributed his depression primarily to an inability to work in his trade due to his impairments to his hands. He noted that Claimant began psychological treatment with Amy Lauterbach in December 2010.

Dr. Hill testified that Ms. Lauterbach had assigned Claimant a Global Assessment of Functioning (GAF) score of 55 meaning that there was a moderate impairment. He stated that Dr. Cole, a psychiatrist, later found that Claimant had a major depression exacerbated by pain, hypertension and possibly low testosterone. He stated that in June 2011 Dr. Pronko administered an MMPI-2 test to Claimant and concluded that the results were "weakened" due to Claimant's unwillingness or inability to disclose personal information. He stated that Dr.

³ Claimant filed his claims for compensation in late October 2010.

Pronko did indicate that the test results showed that Claimant was claiming to be "unrealistically virtuous."

Dr. Hill's diagnosis of Claimant was major depressive disorder. He concluded that the direct, proximate and prevailing factor in causing Claimant's depression was the March 3, 2009 injury and the subsequent pain caused by repetitive activities as represented by Claimant's "March 15, 2009" claim. He concluded that Claimant had sustained a permanent partial disability of 55 percent to his body as a whole due to the major depression.

In a subsequent report, Dr. Hill indicated that Claimant's March 3, 2009 injury had caused a permanent partial disability of 25 percent to the body as a whole due to depression and that the alleged March 15, 2009 occupational disease had caused a 30 percent permanent partial disability to the body as a whole for a combined permanent partial disability of 55 percent to the body as a whole.

Finally, Dr. Hill concluded that Claimant should avoid activities requiring a significant amount of concentration, focus and stamina and that Claimant needed a "fairly" structured environment.

On cross-examination by the Second Injury Fund, Dr. Hill admitted that that he did not believe that Claimant had any pre-existing psychiatric conditions. He admitted that he had never worked on a case for an insurance company. He admitted that he had worked on cases in the past for Claimant's attorneys. He stated that he was not aware the diabetes could cause carpal tunnel syndrome.

Medical and other Records

The medical records were essentially cumulative of the other evidence. Dr. Koprivica's 2004 report, however, showed that Claimant provided a history of having a Bachelor of Science degree from St. Mary's College in applied psychology.

The records showed that John B. Moore, IV, M.D. , of Premier Plastic Surgery in 2004 had rated Claimant's impairment as a 10 percent permanent partial disability and noted that his rating was generous. He noted that Claimant had a normal grip strength and normal sensation in his hands at that time.

The stipulation for compromise lump sum settlement with the Second Injury Fund of Injury No. 01-169269 showed that the Fund made a payment of \$2,594.18 due to Claimant's disability to his right wrist combining with his preexisting disability to his left elbow.

On June 23, 2011, Dr. Pronko, M.D., a psychiatrist, concluded in his report that Claimant's accident at work "seems highly unlikely to be a causative factor for his depression." He concluded that there was "no emotional, psychological sequelae to the injuries he sustained in the course of his work".

Vocational Evidence

Claimant offered the deposition testimony and reports of Michael J. Dreiling. Mr. Dreiling testified that he wrote three reports on Claimant. He noted Claimant's educational and work background. He noted that Claimant had not done any sedentary work and indicated that he did not believe that Claimant had any transferable job skills.

Mr. Dreiling admitted, however, that he believed that Claimant could work in the open labor based on the medical restrictions and the findings in the functional capacities evaluations. He stated that he concluded that Claimant could not work when he considered Claimant's subjective complaints of pain and Claimant's alleged problems with his shoulder and hands.

Mr. Dreiling testified that in his second report he addressed the psychiatric evidence. He stated that based on the psychiatric reports he had further concerns about Claimant's ability to work. He stated that based on Claimant's physical and psychological restrictions he did not believe that any employer in the ordinary course of business would hire Claimant.

On cross-examination by Claimant's employer, Mr. Dreiling admitted that he believed that Claimant's inability to work was based on a combination of Claimant's medial disabilities to his left shoulder and bilateral wrists and hands. He stated that Claimant's left shoulder and bilateral hands and wrists injuries were a hindrance or obstacle to Claimant obtaining employment or reemployment. He admitted that Claimant was still in a vocational rehabilitation program to determine if Claimant could be retrained to work at the time he evaluated Claimant.

On cross-examination by the Second Injury Fund, Mr. Dreiling admitted that he only relied on Dr. Hill's psychiatric findings and that he gave no credence to Dr. Pronko's findings because he could not understand Dr. Pronko's report or findings.

Law

After considering all the evidence, including the medical depositions and reports and records, the vocational deposition and reports, the other evidence and after observing Claimant's appearance and demeanor, I find and believe that Claimant did not prove the Second Injury Fund's liability for permanent total disability benefits. He did prove that the Second Injury Fund's liability for \$7,890.87 in compensation. The Second Injury Fund is ordered to pay that amount to Claimant.

Claimant had the burden of proving all material elements of his claim. Fischer v. Arch Diocese of St. Louis – Cardinal Richter Inst., 703 SW 2nd 196 (Mo. App. E.D. 1990); overruled on other grounds by Hampton vs. Big Boy Steel Erections, 121 SW 3rd 220 (Mo. Banc 2003); Griggs v. A.B. Chance Company, 503 S.W. 2d 697 (Mo. App. W.D. 1973); Hall v. Country Kitchen Restaurant, 935 S.W. 2d 917 (Mo. App. S.D. 1997); overruled on other grounds by Hampton. Claimant proved his entitlement to benefits as set out below.

Occupational Disease

Claimant testified that his job as a glazer required the strenuous use of his hands and wrists. Claimant was credible in his testimony on that issue. Dr. Koprivica concluded that Claimant's work as a glazer was the prevailing factor in causing Claimant's bilateral DeQuervain's syndrome and trigger fingers. Dr. Koprivica was credible in his opinion. The evidence supported his opinion. The Second Injury Fund offered no medical opinions. The Second Injury Fund offered no evidence, other than Claimant's deposition. Claimant proved that he sustained an occupational disease as defined by Missouri law.

Whether Second Injury Fund Liability may be Premised on an Occupational Disease

The Second Injury Fund argued that its liability could not be premised on an occupational disease. That argument was without merit. Section 287.220 RSMo (2005) pertaining to Second Injury Fund liability does refer to a compensable injury. It does not use the phrase occupational disease. The occupational disease statute, however, provides in pertinent parts as follows:

2. An injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. . .

3. An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. An occupational disease due to repetitive motion is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. . .

8. With regard to occupational disease due to repetitive motion, if the exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than three months and the evidence demonstrates that the exposure to the repetitive motion with the immediate prior employer was the prevailing factor in causing the injury, the prior employer shall be liable for such occupational disease.

§ 287.067 RSMo. 2005

Claimant's alleged injury or occupational disease was allegedly due to repetitive motion. The legislature clearly defined an occupational disease and an injury by repetitive motion to be an injury for purposes of the Workers' Compensation Act. *Id.* The Act must be strictly construed. See § 287.800 RSMo. 2005. Second Injury Fund liability may clearly be premised on an occupational disease.

Preexisting Disability

Dr. Koprivica, Claimant's rating physician, concluded that Claimant had not sustained any preexisting disability which was a hindrance or obstacle to his employment or reemployment prior to Claimant's alleged March 3, 2009 occupational disease.⁴ He then concluded that Claimant did sustain permanent partial disability as a result of the alleged "March 3, 2009 occupational disease" and that the permanent partial disability from the alleged March 3, 2009 occupational disease pre-existed Claimant's alleged "March 15, 2009" occupational disease, and that the combination of the two resulted in Second Injury Fund liability.

First, Dr. Koprivica's conclusions were incorrect. There was no "March 15, 2009" occupational disease. Claimant admitted that he last worked for his employer on March 4, 2009. He admitted that he had not worked for any other employer since March 4, 2009. He had not received any treatment nor missed any time from work for the alleged occupational disease prior to March 4, 2009. Therefore, March 4, 2009 was the date of his last exposure to the conditions which allegedly caused the occupational disease and not March 15, 2009 as alleged by Claimant in his claim for compensation and as relied on by Dr. Koprivica in reaching his conclusions.

The March 4, 2009 date was important. Dr. Koprivica, as noted above, concluded that Claimant had not sustained any permanent partial disability which was a hindrance or obstacle to his employment or reemployment prior to March 3, 2009. Thus, based on Dr. Koprivica's opinion, the Second Injury Fund could only be liable for benefits if the disability from the alleged March 3, 2009 occupational disease had already become permanent as of March 4, 2009 and if it was a hindrance or obstacle to his employment or reemployment. See § 287.220 RSMo. 2005. In Claimant's case, there was no credible evidence showing that the disability from his rotator cuff tear on March 3, 2009 had resulted in permanent disability prior to March 4, 2009.

Claimant's MRI of his left shoulder was on March 13, 2009. That was nine days after his alleged March 4, 2009 occupational disease. His rotator cuff surgery was on April 27, 2009. He received temporary total disability benefits until December 8, 2009. Clearly, his March 3, 2009 left shoulder injury had not resulted in permanent partial disability prior to March 4, 2009 as concluded by Dr. Koprivica when the disability was still temporary in December 2009.

In addition, the workers' compensation statutes must be strictly construed. See §287.800 RSMo. 2005. Section 287.220 pertaining to Second Injury Fund liability also provides in pertinent parts as follows:

⁴ Claimant did not sustain an occupational disease on March 3, 2009. He allegedly injured his left shoulder on March 3, 2009 when he was lifting and carrying 600 to 800 pound pieces of aluminum and steel with some co-workers and one let go causing the weight to shift to him and his shoulder to pop. He alleged that he experienced immediate pain when his shoulder popped.

All cases of permanent disability where there has been previous disability shall be compensated as herein provided. . . . If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, 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. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for. If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury or a major extremity injury shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the "Second Injury Fund" . . .

§287.220 RSMo. 2005

Thus, pursuant to the statute, Claimant had to prove that he sustained a subsequent compensable injury which resulted in permanent partial disability and that prior thereto he had

sustained preexisting permanent partial disability which was a hindrance or obstacle to his employment or reemployment.⁵ Strict construction meant that Claimant had to show actual preexisting permanent partial disability; not that he had a preexisting injury or occupational disease or temporary disability.

Therefore, if Dr. Koprivica were correct in his opinion that Claimant had not sustained any permanent disability which was a hindrance or obstacle to his employment or reemployment prior to March 3, 2009; Claimant would not be entitled to any benefits from the Second Injury Fund, because as noted above the alleged March 3, 2009 occupational disease had not resulted in any permanent disability prior to the subsequent compensable injury on March 4, 2009.

Permanent Total Disability

Claimant alleged that the Second Injury Fund was liable for permanent total disability benefits. Based on Dr. Koprivica's opinion, as set out above, he would not be entitled to any benefits. Based on other evidence, however, he did prove the Second Injury Fund's liability for benefits. He did not prove the Second Injury Fund's liability for permanent total disability benefits.

The evidence showed that the Second Injury Fund made a previous payment to Claimant in Injury Number 01-169269 based on a preexisting left elbow injury combining with a subsequent compensable injury to his right wrist in 2001.

The Second Injury Fund is bound by that stipulation. Based on the stipulation, Claimant proved that his left elbow injury prior to March 2009 met the requirements for establishing Second Injury Fund liability. See Conley v. Treasurer of Missouri, 999 S.W.2d 269 (Mo. App. E.D. 1999) where the Court ruled that parties to a stipulation for settlement could not re-litigate the issues covered by the settlement in a later proceeding. The Court ruled that to do so would defeat the finality of the settlement. See also Gassen v. Livengood, 134 S.W. 3^d 75 (Mo. App. W.D. 2004); and, Totten v. Treasurer of State of Missouri, 116 S.W.3d 624 (Mo. App. 2003).

Claimant, however, as noted above, did not prove that he was permanently and totally disabled. He did not prove that a prior left elbow injury combined with a left shoulder injury on March 3, 2009 to render him permanently and totally disabled or that a prior left elbow injury combined with his March 4, 2009 bilateral DeQuervain's syndrome and trigger fingers to render him so disabled.

Claimant is a young man. He was only 39 years old in March 2009. He is educated. He has at least two years of college. He did not demonstrate any problems in communicating at the hearing. He has no problems which would impair his ability to stand, walk or sit. He has

⁵ In permanent partial disability cases the permanent partial disability for both the subsequent injury and the preexisting disability must meet certain threshold disability amounts to qualify for Second Injury Fund benefits. Id.

computer skills. He admitted that he still regularly played computer games. He admitted that he used a computer mouse to play the games. That was despite his alleged debilitating impairments to his hands.

In addition, both Dr. Koprivica and Mr. Dreiling, Claimant's own experts, admitted that in their opinion, Claimant was not rendered permanently and totally disabled due to the disability and the medical restrictions resulting from his alleged physical impairments.⁶ The evidence clearly supported their opinions on that issue.

Claimant did raise another issue at the hearing. He argued that he was depressed due to his alleged March 2009 injury and occupational disease. He did not allege a psychiatric or psychological injury in either of his claims for compensation.

Claimant too, however, was bound by his stipulations for settlement of his alleged March 3, 2009 injury and of his alleged March 4, 2009 occupational disease. See Conley; Gassen and Totten. Claimant's stipulation for settlement of his alleged March 3, 2009 injury and of his alleged March 4, 2009 occupational disease did not mention that he had sustained any psychiatric or psychological injuries or impairments as a result of either the March 3, 2009 accident or the alleged March 4, 2009 occupational disease. Thus, he cannot re-litigate that issue just as the Second Injury Fund could not re-litigate the issue of whether Claimant's prior left elbow injury met the requirements for establishing Second Injury Fund liability.

Moreover, neither stipulation for settlement stated that Claimant had sustained any permanent partial disability due to a psychological or psychiatric impairment. Claimant cannot re-litigate that issue. If he had intended for the settlements to show that he had sustained a psychiatric or psychological impairment; he should have negotiated that issue with his employer and included such language in the stipulations.

Psychiatric or Psychological Disability

Even if Claimant were not bound by the stipulations for settlement; the most credible evidence still failed to show that his alleged work-related accident or occupational disease were the prevailing factor in causing his alleged psychiatric or psychological disability or that he was rendered permanently and totally disabled by a combination of the disability he sustained in either the alleged March 3, 2009 accident and his preexisting left elbow injury or his alleged March 4, 2009 occupational disease and his preexisting left elbow injury.

Dr. Koprivica concluded on September 27, 2010 that Claimant was not permanently and totally disabled. In October 2010, Claimant filed his claims for compensation and alleged

⁶ Mr. Dreiling stated that after he factored in Claimant's subjective complaints of pain and Claimant's complaints of problems with his shoulder and hands he believed that Claimant could not work, although based on the medical restrictions, Claimant could perform work in the open labor market. Mr. Dreiling is not a physician. His opinions, as a vocational expert, should be based on the medical restrictions and limitations as recognized by medical experts and not on his own medical diagnosis as to the extent of Claimant's alleged pain and restrictions.

permanent total disability. Thus, his own evidence in October 2010 did not support his alleged permanent total disability.

In December 2010, however, Claimant for the first time sought psychological treatment. That was 21 months after the alleged March 2009 accident and occupational disease and only after Dr. Koprivica had concluded that he was not permanently and totally disabled due to his physical impairments.

Dr. Hill noted that Claimant saw Ms. Lauterbach, an LMLP, for psychological treatment in December 2010, and that she had concluded that Claimant had only a moderate psychological impairment based on Claimant's GAF score. Again, there was no credible evidence showing that Claimant was rendered permanently and totally disabled due to a combination of a moderate psychological impairment and his alleged physical impairments. By late March 2011, Ms. Lauterbach indicated that Claimant's level of depression had improved from a subsequent bout of major depression.

In July 2011, Claimant sought an opinion from Dr. Hill, a D.O. and a psychiatrist. Dr. Hill concluded that Claimant's March 3, 2009 accident had resulted in a permanent partial disability of 25 percent to the body as a whole based on Claimant's psychiatric disability and that the March 4, 2009 occupational disease had resulted in a permanent partial disability of 30 percent to the body as a whole based on Claimant's psychiatric disability.

Dr. Hill failed to offer any credible evidence to support his opinions. He failed to explain how he determined how much disability resulted from the alleged March 3, 2009 accident and how much resulted from the alleged occupational disease which occurred a day later when he did not examine Claimant until more than two years after the alleged accident and occupational disease. He gave no bases for his opinions. He failed to address other stressors in Claimant's life. Claimant, as noted earlier, had served time in prison. Claimant's records showed that he believed that he had been denied a job promotion due to his prison record. Claimant admitted that he was a major abuser of "street" drugs in the past. His mother was fighting cancer as noted in Dr. Pronko's June 2011 report. His father had recently lost his job as noted in Dr. Pronko's June 2011 report. Claimant had lost an infant son to sudden infant death syndrome a few years earlier.

Claimant had been married three times. Claimant told Dr. Pronko that his second wife had mental issues and that she had divorced him. He told Dr. Pronko that his first wife had divorced him. Claimant had sustained a head injury in a motor vehicle accident. Both Claimant and his wife testified that Claimant's personality had changed after the head injury in the motor vehicle accident. Both testified that Claimant had become more irritable after his motor vehicle accident. His wife testified that Claimant had become more of a loner and that he no longer participated in social activities.

Dr. Hill failed to address those stressors in Claimant's personal life. He failed to explain how he determined that Claimant's work was the prevailing factor in causing Claimant's alleged

depression and how or why he discounted the effects of the numerous and severe stressors in Claimant's personal life. Dr. Hill's opinions were not credible. His opinions were entitled to little weight.

Dr. Pronko's opinions were credible. Dr. Pronko, a medical doctor and a psychiatrist, as opposed to a D.O., examined Claimant on June 23, 2011. Dr. Pronko in a thorough report noted that Claimant did not exhibit signs or symptoms of a major depression. He noted the numerous stressors in Claimant's personal life. He noted that there was nothing in his personal interview with Claimant which correlated with depression and Claimant's alleged work-related injuries. He noted that depression usually occurred within a year after a loss. He noted that Claimant's alleged depression did not occur until nearly two years after the loss. He noted that Claimant's MMPI-2 scores were invalid because Claimant would not answer the questions properly or did not have the ability to do so and that Claimant had attempted to be too virtuous in answering the questions. Dr. Pronko concluded that there was no causal connection between Claimant's current psychological and emotional complaints and Claimant's alleged March 2009 work injuries.

The evidence supported Dr. Pronko's opinions and conclusions. Claimant did not prove that he was suffering from a major depression resulting from his left shoulder injury on March 3, 2009 or his DeQuervain's syndrome and trigger fingers in the March 4, 2009 occupational disease claim. Claimant did not prove that his work was the prevailing factor in causing his alleged depression or that if he were depressed it in combination with his left shoulder and left elbow injury rendered him permanently and totally disabled or that it and his left elbow and Dequervain's syndrome and trigger fingers rendered him permanently and totally disabled.

Permanent Partial Disability

Claimant did prove the Second Injury Fund's liability for permanent partial disability benefits. As noted above, Claimant proved based on his stipulation for settlement with the Second Injury Fund in Injury No. 01-169269 that his preexisting left elbow injury met the requirements for establishing Second Injury Fund liability based on a preexisting condition. Claimant settled his workers' compensation case involving his left elbow injury based on a permanent partial disability of 25 percent of his left upper extremity at the 210 week level, or for 52.5 weeks of compensation. The evidence supported the settlement.

Claimant settled his alleged March 4, 2009 occupational disease under Injury Number 09-017967 based on a permanent partial disability of 27 percent to his body as a whole, or for 108 weeks of compensation. The Second Injury Fund offered no evidence to contradict or challenge the settlement. Based on the evidence offered, Claimant proved that the settlement properly reflected the amount of disability he sustained in the accident. The evidence also showed that Claimant's disability from his March 4, 2009 occupational disease combined with the disability from his preexisting left elbow injury to result in a greater overall permanent partial disability to his body as a whole than that represented by the simple sum of the disability from the impairments considered individually. See § 287.220 RSMo. 2005.

The simple sum of the disability from the impairments considered individually equaled 160.5 weeks of compensation, or a permanent partial disability of 40.125 percent to his body as a whole. (52.5 weeks plus 108 weeks equals 160.5 weeks). Due to the combined effect of the disability from the March 4, 2009 occupational disease and his preexisting permanent partial disability to his left elbow, Claimant proved that he sustained a permanent partial disability of 45 percent to his body as a whole, or 180 weeks of compensation. The Second Injury Fund is therefore liable for 19.5 weeks of compensation, (180 weeks minus 160.5 weeks equals 19.5 weeks) which at a rate of \$404.66 per week equals \$7,890.87. The Second Injury Fund is ordered to pay that amount to Claimant.

Made by: _____

Kenneth J. Cain
Administrative Law Judge
Division of Workers' Compensation