

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

Injury No.: 03-141615

Employee: Ronald Michael
Employer: United Parcel Service (Settled)
Insurer: Liberty Mutual Fire 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 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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 24, 2009. The award and decision of Administrative Law Judge Victorine R. Mahon, issued July 24, 2009, 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 14th day of January 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Ronald Michael

Injury No. 03-141615

Dependents: N/A

Employer: (settled)

Additional Party: Treasurer, State of Missouri as
Custodian of the Second Injury Fund

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and
Industrial Relations of Missouri
Jefferson City, Missouri

Insurer: (settled)

Hearing Date: June 1, 2009

Checked by: VRM/db

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: Onset of symptoms was in February 2003; Diagnosis was August 11, 2003.
5. State location where accident occurred or occupational disease was contracted: Springfield, Greene County, Missouri.
6. Was above employee in employ of above employer at the 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: Repetitive trauma to wrists as a result of duties as UPS driver.
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: Bilateral wrists.
14. Nature and extent of any permanent disability: Settled as to Employer/Insurer; Liability for enhanced disability from Second Injury Fund.
15. Compensation paid to-date for temporary disability: \$11,882.00.
16. Value necessary medical aid paid to date by employer/insurer? \$13,613.58.
17. Value necessary medical aid not furnished by employer/insurer? Not applicable.
18. Employee's average weekly wages: Sufficient to yield maximum rate of compensation.
19. Weekly compensation rate: \$ 662.55 PTD/\$347.05 PPD.
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: Employer previously settled its risk of liability.
22. Second Injury Fund liability: For Permanent Partial Disability the sum of **\$ 9,617.62.**

Preexisting disability =	50 weeks
+ Primary disability =	<u>134.75 weeks</u>
Total:	184.75 weeks
	<u> x 15% load</u>
	27.7125 weeks x \$347.05 = <u>\$ 9,617.62</u>

23. Future requirements awarded: None.

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

FIINDINGS OF FACT and RULINGS OF LAW:

Employee: Ronald Michael

Injury No. 03-141615

Dependents: N/A

Employer: United Parcel Service (Settled)

Additional Party: Treasurer of the State of Missouri
as custodian of The Second Injury Fund

Insurer: Liberty Mutual Group (Settled)

Hearing Date: June 1, 2009

Reviewed by: VRM/mb

Before the
**DIVISION OF
WORKERS'
COMPENSATION**
Department of Labor and
Industrial Relations of
Missouri
Jefferson City, Missouri

Introduction

The undersigned Administrative Law Judge conducted a final hearing between Ronald Michael (hereafter Claimant) and the Second Injury Fund on June 1, 2009. This case was tried simultaneously with Injury Number 02-148781, which pertains to a work injury sustained on December 17, 2002. The instant case pertains to a diagnosis of bilateral carpal tunnel syndrome made August 11, 2003, from work-related repetitive trauma. The claims against the Employer and its Insurer in both cases have settled.

Stipulations

Claimant was an employee within the meaning of the Workers' Compensation Law. Employer was fully insured and subject to the Law. There is no issue with respect to accident, occupational disease, course and scope of employment, notice, jurisdiction, venue, or statute of limitations. Claimant's Permanent Partial Disability rate is \$347.05. His Permanent Total Disability rate is \$662.55. The sole issue is the nature and extent of any liability by the Second Injury Fund. Claimant seeks Permanent Total Disability.

Exhibits

The following exhibits were admitted without objection:

- Exhibit A Deposition of Dr. David T. Volarich, with exhibits
- Exhibit B Deposition of Mr. Wilbur Swearingin, with exhibits
- Exhibit C Stipulation in Injury No. 02-148781
- Exhibit D Stipulation in Injury No. 03-141615

Findings of Fact

Claimant is a 54 year old man who has been married 32 years. He is a high school graduate. His work career has been in manufacturing and labor. He became a driver for United Postal Service in February 1986, and continued to work for that company until April 28, 2003. Claimant said he had no on-the-job injuries prior to his work for UPS. He described no non-work-related preexisting disabilities or conditions.

Pre-existing Injuries

Claimant sustained his first injury with UPS in the early 1990s. After delivering some rolls of material, Claimant stepped up into the truck and suffered a pull in his lower back. He was treated conservatively and returned to full duty. There is no evidence of a residual disability from this incident.

A few weeks later, Claimant sustained his second work injury, this time to the upper portion of his back. He again was treated conservatively with medications and therapy. The injury resolved and he returned to work full time, averaging more than nine hours a day five days a week.

Injury Number 02-148781

On December 17, 2002, Claimant backed his UPS truck to a loading dock. He placed a heavy package on the edge of the dock. As he reached down to push the box forward, he

experienced a pull in his neck and left shoulder girdle. Although this accident occurred in December during a busy work time for Claimant, he continued to work full time. He declined Employer's initial offer of medical treatment, and did not go to a physician until sometime in March 2003; that was *after* Claimant started having symptoms of carpal tunnel syndrome. Claimant said he was prompted to obtain medical help because "my hands were hurting so bad I couldn't get a cup of coffee to drink it." Claimant's last day of work was April 28, 2003.

As Claimant's examining physician Dr. David Volarich relates in his report, Claimant's job as a UPS driver required that he lift packages weighing up to 70 pounds without assistance and 150 pounds with assistance. Dr. Volarich further notes that Claimant operated an electric hand-held computer and used his thumbs to input information thousands of times per day.

Claimant eventually came under the care of Dr. Cole in Joplin, Missouri. An MRI revealed multi-level degenerative disc disease in the cervical spine and a disc protrusion at C6-7 on the left. Claimant was provided heat applications and steroid injections. No physician has recommended surgical intervention.

Injury No. 03-141615

Claimant related that his hands started going numb in February or March 2003. The numbness woke him at night. When asked whether he ever had problems with his hands prior to that time, Claimant emphatically answered, "No." Prior to the numbness appearing in his hands, Claimant had worked his normal duties, full time. It was only after Claimant's hands started going numb and he needed to alternate his hands on the steering wheel that he sought medical attention from a physician. This occurred in March 2003. Claimant continued to work until April 28, 2003. Employer provided treatment, and the diagnosis of bilateral carpal tunnel syndrome was made on or about August 11, 2003. When conservative care did not provide

favorable results, Claimant underwent bilateral carpal tunnel release. The surgery relieved some of the symptoms such as nighttime numbness, but not all of the symptoms.

Current Complaints

Claimant still suffers tingling and aching in his hands and fingers. He said his left hand is much worse than his right (dominant) hand. Claimant now has difficulty grasping, gripping, writing, typing, holding a paper cup, turning pages, or wringing out a wash cloth. He needs assistance in opening jars or pulling things apart. He is unable to load and unload groceries because he is unable to lift items such as soft drinks, water, or dog food. While he can mow his lawn over a period of days, the bouncing "up and down" hurts his neck *and his hands*. He can no longer hunt by himself because he needs assistance in pulling a deer out of the woods. He can still fish, but bouncing in rough water bothers him. He no longer accompanies his wife when she goes shopping because he is unable to stand for long periods of time. Claimant states that he only obtains about two hours of solid sleep per night because he wakes up multiple times. With respect to his neck and left shoulder, Claimant testified that he has constant pain sufficient to wake him up "many times" at night. He stated that if he drives, he is unable to look back over his left shoulder. Claimant's wife testified credibly that Claimant "constantly" rubs his neck and hands trying to get comfortable.

Subsequent Employment

After leaving his employment with UPS, Claimant worked two weeks in the summer of 2005 for a Ford automobile dealership. He washed and vacuumed cars. After working a total of 26 hours over a period of two weeks, Claimant found the job duties too physically demanding. He qualified for Social Security Disability in 2005.

Claimant is not on any prescription medications for his hands or neck.

Settlements

Claimant settled each of his cases with Employer prior to this hearing against the Second Injury Fund. In Injury Number 02-148781, Claimant settled his claim for 12.5 percent of the body as a whole. With respect to Injury Number 03-141615, even though Claimant testified that the left hand was much worse than the right, the settlement with Employer does not reflect such contention. Claimant settled his claim in Injury Number 03-141615 for 15 percent of the right arm at the 175 week level and five percent of the left arm at the same level. In addition to these lump sum amounts, Employer paid \$3,580.41 in Medicare Set-Aside funds, which Claimant is to self-administer for the purpose of providing future medical care if it is needed.

Expert Opinions

Dr. David Volarich first evaluated Claimant on April 14, 2004. He found the requisite causal connection between Claimant's job and his neck injury. He assigned a 30 percent Permanent Partial Disability to the body as a whole. The rating accounts for loss in motion, persistent neck pain, and difficulties with multiple activities, as well as weakness in the upper extremities attributable to the neck. He said Claimant should limit his "repetitive bending, twisting, lifting, pushing, pulling, carrying, climbing and similar tasks" to "as needed." He imposed a 20 pound lifting restriction, stating that Claimant should not handle weights overhead, away from the body, over long distances, or on uneven terrain. Dr. Volarich recommended that Claimant change positions frequently, and avoid fixed positions of standing or sitting of more than 30 to 45 minutes at a time.

In a supplemental report issued January 28, 2008, Dr. Volarich found that the work at UPS was the "substantial contributing factors, as well as the prevailing or primary factors causing" the bilateral carpal tunnel syndrome that required surgery. He assigned a 35 percent

Permanent Partial Disability to each wrist due to pain, paresthesias and weakness in the hands.

He also assigned a 15 percent multiplicity factor due to the combination of injuries to both upper extremities. Dr. Volarich found the combination of neck and hand injuries were substantially greater than their simple sum. He deferred to a vocational expert as to whether Claimant was permanently and totally disabled. Interestingly, Dr. Volarich found that Claimant's grip strength at the time of his 2004 examination was better than during his January 2008 evaluation after the carpal tunnel surgery. He made the following findings in his April 14, 2004 report:

	GRIP STRNGTH: (Ft-lbs)					PINCH STRNEGTH (Ft-lbs)
	#1	#2	#3	#4	#5	
Right	40	60	60	70	60	12/13/13
Left:	30	40	60	55	40	15/16/17

Dr. Volarich described the following in his January 28, 2008 report:

	GRIP STRNGTH: (Ft-lbs)					PINCH STRNEGTH (Ft-lbs)
	#1	#2	#3	#4	#5	
Right	35	40	30	20	30	NA*
Left:	10	20	20	15	20	NA*

*Out for repair.

In his second report, Dr. Volarich did not modify the restrictions related to the neck and/or shoulder. He imposed the following restrictions for the hands:

1. Use proper ergonomics.
2. Minimize repetitive gripping, pinching, squeezing, pushing, pulling, twisting, rotary motions, and similar tasks and limit use to as needed.
3. Avoid impact and vibratory trauma to hands and use protective devices, as needed.
4. Limit weight to three to five pounds with either arm alone.
5. Handle weight to tolerance with arm dependent and close to body, but no more than 10 to 15 pounds.
6. Continue strengthening, stretching, and range of motion exercise program for the hands daily to tolerance.

Wilbur Swearingin, a certified rehabilitation counselor, opined that Claimant did not have a reasonable expectation of finding work in the open labor market based on the combination of

the preexisting and primary disabilities, Claimant's age, work history, and education. Mr.

Swearingin reported that Claimant's general health was "good" when he began having trouble gripping and holding onto packages, driving and carrying materials leading up to August 2003.

Mr. Swearingin stated in his report that there are 12,761 jobs in the Dictionary of Occupational Titles which are unskilled labor or lower level semi-skilled. These jobs required light or medium strength level. But given Claimant's "medical conditions," he was not able to perform these common jobs. In making this statement, Mr. Swearingin did not differentiate between those medical conditions related to Claimant's hands or wrists and those related to the cervical spine.

Mr. Swearingin stated that Claimant could not work in production or retail and food service because he is unable to remain in a fixed work station for an hour and 50 minutes and he is unable to repetitively reach, handle, grip, grasp, push, pull or finger continuously for one hour and 50 minutes. He noted that because Claimant is "taking four or five showers a day, hot showers a day, to manage his pain," he would be unable to stay at a machine looking up and down repetitively throughout the day.

Mr. Swearingin admitted that Claimant has an average intelligence with an I.Q. score of 102, and possesses a high school diploma and academic skills adequate for the needs of everyday living, most entry level, semi-skilled, and some skilled occupations. He admitted that there is no record of Claimant having a learning disability. Mr. Swearingin noted that Claimant had a Missouri Class E chauffeur license. He admitted that Claimant was capable of doing at least some handling, fingering and feeling with his hands. And while Mr. Swearingin's opinion of total disability is based on a combination of disabilities, he conceded that the treating physician, Dr. Cole, had released Claimant to return to work in November 2003 with a rating to the neck of

only five percent to the body as a whole. He also conceded that no surgery had ever been recommended for Claimant's neck condition.

The Second Injury Fund offered no additional vocational or medical evidence.

Conclusions of Law

The law in effect at the time of Claimant's last injury provides that the Workers' Compensation Act is to be broadly and liberally interpreted and doubts are to be resolved in favor of the injured employee. *Cherry v. Powdered Coatings*, 897 S.W. 2d 664 (Mo. App. E.D. 1995); *Wolfgeher v. Wagner Cartage Services, Inc.*, 646 S.W.2d 781, 783 (Mo. banc 1983). Applying this standard and the applicable statutes of the State of Missouri, and based on a comprehensive review of the substantial and competent evidence described above, including the credible testimony of Claimant, the medical opinions, the vocational opinion, depositions, and the Stipulations of Compromise Settlement, as well as my personal observations of Claimant at the hearing, I make the following findings and conclusions related to the liability of the Second Injury Fund.

Injury Number 03-141615

Claimant seeks total disability as against the Second Injury Fund. Total disability is defined as the inability to return to employment in the open labor market. § 287.020.7, RSMo 2000. The central question is whether any employer in the usual course of business could reasonably be expected to employ Claimant in his present physical condition. *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173, 178 (Mo. App. E.D. 1995), *overruled on other grounds, Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

To establish Fund liability, Claimant must show "either that (1) a preexisting partial disability combined with a disability from a subsequent injury to create permanent and total

disability or (2) the two disabilities combined to result in a greater disability than that which would have resulted from the last injury by itself.” *Gasson v. Liebengood*, 134 S.W.3d 75, 79 (Mo. App.W.D.2004). Claimant must then show that the combined effect of the last work-related disability and the disability that is attributable to all conditions **existing at the time of the last injury** results in permanent total disability. *Boring v. Treasurer*, 947 S.W.2d 483, 489 (Mo. App. E.D. 1997), *overruled on other grounds*, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

Disability - Last Injury

In determining whether the Second Injury Fund has liability for Permanent Total Disability, the Administrative Law Judge first determines the degree of disability from the last injury. *Feld v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 208 S.W.3d 230, 233 (Mo App. E.D. 2006). The only expert opinion in the record relating to the degree of disability from the bilateral carpal tunnel is that of Dr. Volarich. He stated that Claimant suffered 35 percent to each upper extremity at the level of the wrist with a 15 percent loading factor due to the combination of injuries to both upper extremities. While not binding against the Second Injury Fund, Claimant’s settlement with Employer is relevant in establishing the percentage of disability. *Conley v. Treasurer of Missouri*, 999 S.W.2d 269 (Mo. App. E.D. 1999), *overruled on other grounds*, *Hampton v. Big Boy Steel Erectors*, 121 S.W.3d 220 (Mo. banc 2003). The parties’ settlement certainly does not reflect anything close to permanent total disability from the last accident. And Mr. Swearingin, the vocational expert, while opining that Claimant was totally disabled, did not believe it was from the last accident.

Having reviewed all of the evidence, I conclude that the disability to Claimant’s wrists is severe. The lifting restriction imposed by Dr. Volarich is far more stringent than that imposed

for the back (3 to 5 pounds vs. 20 pounds). The restrictions imposed by Dr. Volarich for the last injury is far more stringent than one normally would expect after a successful carpal tunnel release. As the comparison of the grip strengths reveal, surgery simply did not produce a good result. It is because of the disability to the hands that Claimant is unable to work in a number of professions requiring manual dexterity. Still, I conclude Claimant was not permanently and totally disabled from the last accident only.

While certainly higher than normally given for severe bilateral carpal tunnel, I believe the assessment of disability by Dr. Volarich is not unreasonable given the facts of this case. I disagree with the 15 percent loading factor, however, and apply a 10 percent load due to the bilateral nature of the disability. Therefore, as to the last accident, I conclude Claimant sustained 134.75 weeks of disability ($175 \times 35\% = 61.25$; $61.25 \times 2 = 122.50$; $122.50 \times 10\% = 12.25$; $12.25 + 122.50 = 134.75$ weeks).

Subsequent Deterioration

While Claimant may very well be permanently and totally disabled due to a combination of factors, I conclude that such degree of disability is due to a subsequent deterioration of the preexisting condition and primary injury.

As Mr. Swearingin reported, Claimant was in good general health until he began having trouble gripping and holding onto packages, driving and carrying materials leading up to August 2003. Mr. Swearingin did not evaluate Claimant until June 2008, more than five years after the work accident involving the neck. Much of his evaluation is based on complaints that Claimant had at that time, and not those present when Claimant was released by Dr. Cole in November 2003 with only a five percent rating.

The preexisting disability necessary to trigger Second Injury Fund liability is permanent partial disability existing at the time the last work-related injury was sustained. Section 287.220.1 RSMo; *Lammert v. Vess Beverages, Inc.*, 968 S.W.2d 720, 725 (Mo. App. E.D.1998) *overruled on other grounds*, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). The Second Injury Fund is not responsible for progression of preexisting conditions or new conditions that develop after and are unrelated to the last work injury. *Id.*

While Claimant's evidence is that he now must constantly rub his neck and avoid activities that jar his neck, and Mr. Swearingin found that while Claimant takes as many as five hot showers per day to relieve neck pain, there is no evidence suggesting that Claimant was in that degree of pain prior to the development of the carpal tunnel syndrome. The fact remains that after December 2002, Claimant continued to work in a physically-demanding job until the development of his carpal tunnel symptoms. He even *declined* medical treatment until *after* the carpal tunnel symptoms appeared.

Dr. Volarich did not evaluate Claimant's neck or hands until April 2004. At that time, Dr. Volarich imposed a lifting restriction of 20 pounds, and limited Claimant to performing certain positions "as needed." But this was nearly six months after the release and rating by Dr. Cole and well after the carpal tunnel syndrome had been diagnosed.

There was no testimony that Claimant had to constantly rub his neck prior to the onset of the carpal tunnel syndrome symptoms. There is no evidence that in the two months following the December 2002 work accident and prior to the onset and diagnosis of carpal tunnel symptoms that Claimant was unable to perform any household chores. There is no evidence that in the two months subsequent to the December 2002 accident and prior to the onset of the carpal tunnel symptoms that Claimant could not travel. In fact, he still was driving a truck. While

Claimant indicated that he continued to experience pain during these two months, there is no evidence that he was relegated to taking five hot showers a day to relieve symptoms. It was the numbness in the hands that prompted him to seek medical care. Thus, if Claimant is permanently and totally disabled, it is due to a combination of the last accident with a subsequent deterioration of the neck disability, which includes *degenerative* disc disease.

Combination of Permanent Partial Disabilities

For something less than Permanent Total Disability, Claimant's preexisting disabilities must meet a statutory threshold of 50 weeks if it is a body as a whole injury or, "if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability...." § 287.220.1 RSMo. The proper focus of the inquiry is "not on the extent to which the condition has caused difficulty in the past; it is on the *potential* that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition." (emphasis in original). *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. E.D.1995).

With respect to the degree of disability for the preexisting condition, I accept as accurate the degree of disability included in Claimant's stipulations for compromise settlement. Thus, I find that Claimant had preexisting disabilities to the body as a whole in the amount of 12.5 percent (50 weeks). I conclude that both the primary and the preexisting disabilities not only meet the statutory threshold, but also are a hindrance or obstacle to employment.

Amount of Award

The simple sum of Claimant's preexisting disabilities and that of the last injury is 184.75 weeks (134.75 primary disability + 50 weeks preexisting disability). I find a 15 percent load is appropriate due to the synergistic effect of combining the disabilities. Thus, the Second Injury is liable for \$9,617.62 in Permanent Partial Disability ($184.75 \times 15\% = 27.7125$; $27.7125 \times \$347.05 = \$9,617.62$).

This award is subject to a lien in favor of Attorney John Newman in the amount of 25 percent of the award as a reasonable fee for necessary legal services rendered.

This Award is subject to appeal and modification as provided by law. Interest shall be paid as provided by law.

Date: July 24, 2009

Made by: /s/ Victorine R. Mahon
Victorine R. Mahon
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Naomi Pearson

Naomi Pearson

Division of Workers' Compensation