

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

Injury No.: 10-011786

Employee: Donald Moss
Employer: Boeing Company (Settled)
Insurer: Indemnity Insurance Company of North America (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 February 27, 2012. The award and decision of Administrative Law Judge Suzette Carlisle, issued February 27, 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 22nd day of June 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Donald Moss Injury No.: 10-011786
Dependents: N/A Before the
Employer: Boeing Company (Settled) **Division of Workers'**
Additional Party: Second Injury Fund **Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Insurer: Indemnity Insurance Company of North America (Settled)
Hearing Date: November 21, 2011 Checked by: SC

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: February 28, 2010
5. State location where accident occurred or occupational disease was contracted: St. Louis County
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:
Claimant developed left wrist carpal tunnel syndrome from repetitive use of tools during his 32 year career with Employer.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Left wrist
14. Nature and extent of any permanent disability: 23.6% permanent partial disability of the left wrist (Settled)
15. Compensation paid to-date for temporary disability: \$0
16. Value necessary medical aid paid to date by employer/insurer? \$10, 133.83

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Donald Moss	Injury No.: 10-011786
Dependents:	N/A	Before the
Employer:	Boeing Company (Settled)	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
		Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
Insurer:	Indemnity Insurance Company of North America (Settled)	
		Checked by: SC

STATEMENT OF THE CASE

The parties appeared before the undersigned administrative law judge on November 21, 2011 for a final hearing to determine the liability of the Second Injury Fund in the matter of Donald Moss (Claimant). Attorney James M. Hoffmann represented Claimant. Assistant Attorney General Todd Metheny represented the Second Injury Fund (SIF). The Employer, Boeing, and its Insurer, Indemnity Insurance Company of North America, previously settled with Claimant for 23.6% permanent partial disability (PPD) of the left wrist. The Employer did not participate in the hearing.¹

The parties stipulated to that on or about February 28, 2010:

1. Claimant was employed by Employer and sustained an occupational disease injury which arose out of and in the course and scope of employment in St. Louis County, and venue is proper;
2. Claimant and Employer operated under the Missouri Workers' Compensation Law;²
3. Employer's liability was fully insured;
4. Employer had notice;
5. A Claim for Compensation was timely filed;
6. Claimant's average weekly wage was sufficient for a temporary total disability (TTD) rate of \$807.48 and a rate of \$422.97 for PPD benefits;
7. Employer was fully insured;
8. Employer paid no TTD benefits;
9. Employer paid \$10, 133.83 in medical benefits;
10. Claimant sustained 23.6% PPD of the left wrist for the primary injury;
11. Claimant sustained the following preexisting disabilities:
 - a. 32.5% of the body for the low back;
 - b. 25% of the right knee;

¹ Any references in this award to the Employer also refer to the Insurer.

² All statutory references are to the Revised Statutes of Missouri (2005), unless otherwise stated.

- c. 30% of the left shoulder
- d. 20% of the body (heart)
- e. 20% of the right elbow
- f. 20% of the left knee

12. The preexisting disabilities were a hindrance or obstacle to Claimant’s employment or reemployment.

13. The primary and preexisting disabilities combine to create a synergistic effect and a 15% loading factor should apply;

The issues to be determined are:

- 1. Is an occupational disease primary injury sufficient to trigger SIF liability?
- 2. If so, what is the nature and extent of SIF liability for PPD benefits?

SUMMARY OF THE EVIDENCE

All evidence was reviewed but only evidence which supports this award will be summarized below. Any objections not expressly ruled on during the hearing or in this award are now overruled. To the extent there are marks or highlights contained in the exhibits, marks were made prior to becoming a part of this record, and were not placed there by the undersigned administrative law judge.

Exhibits

Claimant’s Exhibits A through D were offered and received into evidence without objection. The SIF did not offer any additional exhibits.

Live Testimony

- 1. Claimant testified live and his testimony was credible. Claimant has worked for Employer for 32 years as a maintenance mechanic. Claimant takes care of the buildings and equipment. He performs construction and maintenance work. Maintenance work includes carpentry and mechanical projects. He operates and maintains pumps, air handling units, garage doors, and he works with concrete, and drywall. The job is physically demanding.
- 2. On February 28, 2010, Claimant developed left wrist carpal tunnel syndrome, an occupational disease injury, which arose out of and in the course of his employment.

3. A left carpal tunnel release was performed as described in Exhibit D-4. Employer and Claimant settled the workers' compensation claim for 23.6% of the low back. Current complaints include hand tingling and decreased grip strength.
4. Prior to February 28, 2010, Claimant had the following disabling injuries or conditions:
 - a. On February 9, 2007, Claimant sustained an accidental injury to his **low back** when he bent to pick up a section of fence. Disc replacement surgery was performed at L5-S1. The replacement failed and Claimant underwent a fusion at L5-S1. Claimant and Employer settled the workers' compensation claim for 32.5% of the body as a whole for the low back. Current back complaints include the inability to sit or stand for long periods due to pain. He takes medicine to sleep. After the injury, Claimant stopped climbing ladders. His partner lifts for him. The injury was disabling and constituted a hindrance and obstacle to employment.
 - b. Claimant had two **left knee** arthroscopic surgeries. The medical records are not in evidence. The left knee goes out when he kneels to hammers anchors to the floor. The knee affected his ability to climb ladders. He took unscheduled breaks to stretch. The injury was disabling and constituted a hindrance and obstacle to employment.
 - c. Claimant sustained an injury to his **right elbow**. The elbow was surgically repaired twice. After surgery, it was difficult to over extend the elbow. He took unscheduled breaks. It was difficult to lift and he requested help as needed. The injury was disabling and constituted a hindrance and obstacle to employment.
 - d. Claimant had a **five vessel coronary artery bypass** and six **stents** inserted. The condition decreased Claimant's endurance, and he can no longer climb. He received work accommodations. The injury was disabling and constituted a hindrance and obstacle to employment.
 - e. Claimant was electrocuted and sustained a **left shoulder** fracture and dislocation, which required surgery. The injury affected his ability to lift and carry. Claimant requested assistance as needed. Claimant transferred to the second shift because the work load was less strenuous. The condition was disabling and constituted a hindrance and obstacle to employment.
 - f. Claimant sustained a **right knee** injury that resulted in surgery. Leading up to 2007, Claimant had ongoing knee pain with kneeling and climbing. After the 2007 back injury, a second right knee surgery was performed.

Opinion Evidence

5. **Dr. David Volarich** examined Claimant, took a history, and issued two reports dated April 9, 2009 and October 5, 2010. Dr. Volarich found Claimant developed left wrist carpal tunnel syndrome and a neuroma which arose out of and in the course of employment. Dr. Volarich provided the following ratings of permanent partial disability: With respect to the primary injury: 35% of the left wrist.

6. With respect to the preexisting disabilities, which constituted a hindrance and obstacle to employment:
 - i. 45% of the low back
 - ii. 25% of the right elbow.
 - iii. 35% of the body (heart).
 - iv. 25% of the right knee.
 - v. 20% of the left knee
 - vi. 35% of the left shoulder.

Dr. Volarich opined the disabilities created more disability than their simple sum and a loading factor should apply.

FINDINGS OF FACT & RULINGS OF LAW

Claimant's occupational disease injury is sufficient to trigger SIF liability

At the hearing, the parties stipulated Claimant's primary injury is an occupational disease. The issue is whether SIF has liability, after the 2005 amendments, when the primary injury is an occupational disease. Claimant asserts he sustained a compensable occupational disease injury in the form of carpal tunnel syndrome.

SIF contends the 2005 statutory changes bar Claimant's recovery because the primary injury, an occupational disease, is not mentioned in to Section 287.220 RSMo, which provides SIF liability when a worker with preexisting disability "receives a *subsequent compensable injury*." (Emphasis added) Section 287.020.3(5) defines "injury," and states in "no case except as specifically provided in this chapter be construed to include occupational disease in any form." Therefore, the SIF concluded the failure to include occupational disease in this section must be strictly construed to exclude it.

Section 287.800 requires strict construction of the provisions in this chapter. Strict construction means that a statute can be given no broader application than is warranted by its plain and unambiguous terms. The operation of the statute must be confined to matters affirmatively pointed out by its terms, and to cases which fall fairly within its letter. A strict

construction of a statute presumes nothing that is not expressed. *Robinson v. Hooker*, 323 S.W.3d 418, 423 (Mo.App. 2010).

SIF's reliance on *State ex rel. KCP & L Greater Missouri Operations Co. v. Cook*, 353 S.W.3d 14, 20 (Mo.App. 2011) is not persuasive. The court applied strict construction to the exclusivity provisions and refused to apply Section 287.120.1 and .2 to occupational disease cases because the provision clearly referred to accident cases only. Moreover, the 2005 amendments made significant changes to the definition of "accident" and eliminated the qualifier that the statutory definition of "accident" applied "unless a different meaning is clearly indicated by the context." However, the 2005 amendments retained similar language in the definition of an "injury" and an "occupational disease." Section 287.020.3(5) provides:

[‘Injury’ or ‘personal injuries’] shall in no case *except as specifically provided in this chapter* be construed to include occupational disease in any form.” (emphasis added)); § 287.067.1 (“the term ‘**occupational disease**’ is hereby defined to mean, *unless a different meaning is clearly indicated by the context*, an identifiable disease arising with or without human fault out of and in the course of employment” (italics added)).

Section 287.067.1 defines “**occupational disease**”, *unless a different meaning is clearly indicated by the context*, an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence. (Emphasis added)

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. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

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. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

The Court in *KCP & L* concluded the 2005 amendment to Section 287.067.2 contains a “stand-alone” compensability standard for occupational disease claims, independent of Sections 287.020.2 and .3, which diminishes the justification to make occupational disease claims fit within the definitions of “accident” and “injury” contained in other provisions of the Act. *Id.* at 25. Combined with the revisions to the definition of “accident,” the Court found the intent of the 2005 amendments to § 287.067.2 was to divorce the compensability of occupational disease claims from §§ 287.020.2 and .3- which define “accident” and “injury.” *Id.*

This is confirmed not only by the elimination of the specific cross-reference to §§ 287.020.2 and .3 which formerly appeared in § 287.067.2, RSMo 2000, but also by the addition of language to § 287.067.2 excluding claims for “[o]rdinary, gradual deterioration, or progressive

degeneration of the body caused by aging”-language that formerly appeared in the “injury” definition in § 287.020.3(1), RSMo 2000. The separation of the standards for compensability of injuries by accident and injuries by occupational disease is further confirmed by the 2005 amendments to § 287.020.3(2) (a). *Id.* While that provision formerly provided that an injury would be deemed to have arisen out of and in the course of employment if it was shown that “*the employment* was a substantial factor in causing the injury,” the post-2005 provision requires proof that “*the accident* is the prevailing factor in causing the injury.”

Similarly, SIF’s argument is not persuasive that the failure to mention occupational diseases in Section 287.220 should bar recovery when the primary injury is an occupational disease. The legislature clearly intended to “divorce” the compensability standards of occupational disease cases and accidents in the 2005 amendments. However, occupational diseases were not removed from the statute. To the contrary, the 2005 amendments established a comprehensive description of compensability for occupational disease injuries. It is interesting to note that “accidents” are not specifically mentioned in Section 287.220.

An injury by occupational disease that rises to a compensable level as against the employer, as was established here by stipulation, is a “compensable injury for purposes of the SIF.

Claimant has established a right to recover from the Second Injury Fund. A claimant in a worker's compensation proceeding has the burden of proving all elements of his claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 911 (Mo.App. 2008). In order for a claimant to recover against the SIF, he must prove that he sustained a compensable injury, referred to as “the last injury,” which resulted in permanent partial disability. **Section 287.220.1 RSMo.** A claimant must also prove that he had a pre-existing permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment should he become unemployed; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15% for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo.App. 2008)(Citations omitted). In order for a claimant to be entitled to recover permanent partial disability benefits from the SIF, he must prove that the last injury, combined with his pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. *Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 138 S.W.3d 714, 717-18 (Mo. banc 2004). Claimant has met the burden imposed by law.

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

1. Claimant sustained a compensable last injury which resulted in permanent partial disability equivalent to 23.6% of the left wrist (41.3 weeks).

2. At the time the last injury was sustained, Claimant had the following preexisting permanent partial disabilities, which meet the statutory thresholds and were of such seriousness as to constitute a hindrance or obstacle to employment or reemployment:
 - a. 32.5% of the body (low back) (130 weeks).
 - b. 25% of the right knee (40 weeks).
 - c. 30% of the left shoulder (69.6 weeks).
 - d. 20% of the body (heart) (80 weeks).
 - e. 20% of the right elbow (42 weeks).
 - f. 20% of the left knee (32 weeks).

Total weeks for preexisting disabilities: 393.6 weeks

3. The credible evidence establishes that the last injury, combined with the pre-existing permanent partial disabilities, causes 15% greater overall disability than the independent sum of the disabilities. The Second Injury Fund liability is calculated as follows: 41.3 weeks for last injury + 393.6 weeks for preexisting injuries = 434.9 weeks x 15% = 65.235 weeks of overall greater disability.

CONCLUSION

The Second Injury Fund is liable to Claimant for permanent partial disability benefits. Attorney for Claimant shall be entitled to an attorney fee of 25% of this award.

Made by: _____

Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation