

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

Injury No.: 09-035715

Employee: Michael Onder
Employer: St. Louis County (Settled)
Insurer: Self-Insured (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, heard the parties' arguments, and considered the whole record, we find 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, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

Permanent disability demonstrated and certified by a physician

The Second Injury Fund argues that the award of the administrative law judge must be reversed because employee did not provide an expert medical opinion that he is permanently and totally disabled. The Second Injury Fund relies on § 287.190.6(2) RSMo, which provides, in relevant part, as follows:

Permanent partial disability or permanent total disability shall be demonstrated and certified by a physician.

The subsection does not describe or define "demonstrated" or "certified." Nor does the subsection (or any other provision of Chapter 287) create a sanction for a worker's failure to produce a doctor's opinion demonstrating and certifying permanent disability. The Second Injury Fund asks us to interpret the foregoing language as requiring the denial of every claim for permanent total disability benefits that is not accompanied by testimony from a doctor that the employee is permanently and totally disabled.

Employee provided expert medical testimony from Dr. Thomas Musich. Dr. Musich opined that employee sustained permanent partial disability to each wrist as a result of bilateral carpal tunnel syndrome, the primary injury. Dr. Musich identified work restrictions and provided ratings of permanent partial disability referable to the primary injury, and also provided restrictions and permanent partial disability ratings referable to employee's preexisting conditions of ill-being. When asked whether employee would be able to find a job given his physical restrictions, Dr. Musich indicated he would defer to the opinion of a vocational expert. Dr. Musich explained: "I don't place people in jobs."
Transcript, page 57.

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Employee also provided expert testimony from James Israel, a vocational rehabilitation counselor, who reviewed employee's medical records, administered achievement and skills testing, reviewed employee's employment history, identified transferable skills, and considered whether jobs could be found for employee in the open labor market, given the physical restrictions imposed by Dr. Musich. Mr. Israel ultimately opined that employee is permanently and totally disabled as a result of a combination of the primary injury and his preexisting disabling conditions.

Section 287.020.6 RSMo provides as follows: "The term 'total disability' as used in this chapter shall mean inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident." The Missouri courts have identified the following test for permanent total disability:

The test for permanent total disability is whether the worker is able to compete in the open labor market. The critical question is whether, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition.

Molder v. Mo. State Treasurer, 342 S.W.3d 406, 411 (Mo. App. 2011)(citation omitted).

When the question is the nature and extent of permanent disability, the courts have consistently stated that the "degree of disability is not solely a medical question." *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 52 (Mo. App. 2007).

The Commission may consider all the evidence, including the testimony of the employee, and draw all reasonable inferences in arriving at the percentage of disability. This is a determination within the special province of the Commission. The Commission is also not bound by the percentage estimates of the medical experts and is free to find a disability rating higher or lower than that expressed in medical testimony. This is due to the fact that determination of the degree of disability is not solely a medical question. The nature and permanence of the injury is a medical question, however, the impact of that injury upon the employee's ability to work involves considerations which are not exclusively medical in nature.

Elliott v. Kan. City School Dist., 71 S.W.3d 652, 657 (Mo. App. 2002)(citation omitted).

We note that the legislature, in 2005, did not abrogate the foregoing case law principles setting forth the test for permanent total disability and making clear that the question of employability is not solely a medical question. Nor did the legislature take any steps to narrow or restrict the well-established "special province" of the Commission to determine the nature and extent of permanent disability.

A proper analysis of employability requires not only the expert medical identification of disability and limitations but also consideration of issues such as job requirements, job availability, transferable skills, and prospects for retraining. In many (and perhaps most) cases, physicians do not possess the training, experience, or access to information

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necessary to render competent opinions regarding an injured worker's prospects for returning to any employment. We interpret § 287.190.6(2) to require that expert vocational opinions, and decisions from administrative law judges and this Commission, be fully supported by credible, competent, expert medical testimony.

We do not believe the legislature intended, nor do we believe it would be reasonable to conclude, that expert medical testimony, particularly with regard to the issue of an injured worker's employability, cannot be supplemented (or refuted) by other expert testimony. We believe, and so hold, that the Commission maintains the authority to review evidence in the record in its entirety and to draw reasonable inferences therefrom.

For the foregoing reasons, and because we agree with the administrative law judge that the testimony from Dr. Musich and Mr. Israel in this matter is persuasive, we affirm the award of permanent total disability benefits against the Second Injury Fund.

We note in closing that we have addressed nearly identical arguments before. See, e.g., *Pamela Simpson*, Injury No. 07-095109 (LIRC, May 26, 2011). In the absence of any instructive decisions from the Missouri courts on the topic, the policy of the Commission remains unchanged with respect to application of the 2005 amendments to § 287.190.6(2) RSMo.

Conclusion

We affirm and adopt the award of the administrative law judge, as supplemented herein.

The award and decision of Administrative Law Judge Kathleen M. Hart, issued March 30, 2012, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fees 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 19th day of September 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Michael Onder

Injury No.: 09-035715

Dependents: n/a

Employer: St. Louis County (previously settled)

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

Additional Party: Second Injury Fund (SIF)

Insurer: Self (previously settled)

Hearing Date: January 10, 2012

Checked by: KMH

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: on or about May 7, 2009
5. State location where accident occurred or occupational disease was contracted: St. Louis
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
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 bilateral carpal tunnel syndrome as a result of repetitive work.
12. Did accident or occupational disease cause death? No Date of death? n/a
13. Part(s) of body injured by accident or occupational disease: right and left hands and wrists
14. Nature and extent of any permanent disability: 17.5% each wrist
15. Compensation paid to-date for temporary disability: \$707.60
16. Value necessary medical aid paid to date by employer/insurer? \$13,568.36

Employee: Michael Onder

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- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: unknown
- 19. Weekly compensation rate: \$619.20/\$404.66
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

61.25 weeks of permanent partial disability from Employer	(previously paid)
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22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund: weekly differential \$214.54 payable by SIF for 61.25 weeks beginning September 24, 2009, and thereafter, \$619.20 weekly for Claimant's lifetime	Indeterminate
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TOTAL:	INDETERMINATE
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23. Future requirements awarded: none

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

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

D. Andrew Weigley

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Michael Onder

Injury No.: 09-035715

Dependents: n/a

Before the
**Division of Workers'
Compensation**

Employer: St. Louis County (previously settled)

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: SIF (Only)

Insurer: self (previously settled)

Checked by: KMH

A hearing was held on the above captioned matter January 10, 2012. Michael Onder (Claimant) was represented by attorney Andrew Weigley. The SIF was represented by Assistant Attorney General Todd Metheny. Claimant and Employer/Insurer previously settled the primary claim in this matter.

All objections not expressly ruled on in this award are overruled to the extent they conflict with this award.

Claimant alleges he is permanently and totally disabled as a result of the combination of his disabilities.

STIPULATIONS

The parties stipulated to the following:

1. Claimant sustained an injury by occupational disease while in the course and scope of his employment in St. Louis.
2. Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law.
3. Employer's liability was self-insured.
4. Employer had notice of the injury and a claim for compensation was timely filed.
5. Claimant's rates are \$619.20 for TTD and PTD, and \$404.66 for PPD.
6. Employer paid 1 1/7 weeks of TTD, or \$707.60, and \$13,568.36 in medical benefits.
7. Claimant and Employer settled the primary case, and the parties stipulate Claimant sustained 17.5% PPD to each wrist.
8. If Claimant is permanently and totally disabled, his total disability began September 24, 2009.

ISSUES

The parties stipulated the issue to be resolved is the nature and extent of SIF liability.

FINDINGS OF FACT

Based on the competent and substantial evidence, my observations of Claimant at trial, and the reasonable inferences to be drawn therefrom, I find:

1. Claimant is a 55 year-old male. He is a high school graduate, with no additional formal education or training. After high school, Claimant worked for Firestone as a general service mechanic for several years. He was laid off and then began working for Employer.
2. Claimant began his career with Employer in 1980. He began as a laborer and worked his way up to equipment operator, maintenance worker senior, road worker II, and then road worker III lead. As a lead road worker, he was a working foreman and supervised a concrete crew. He performed the same labor as his crew, but had additional supervisory duties. He spent part of his time handling paperwork, and part of his time working with his crew repairing sidewalks, streets, gutters, and driveways.
3. Claimant had a number of injuries while working for Employer.
4. In July 1996, Claimant injured his left shoulder and arm while lifting a rock compactor. He felt a rip in his left arm. He had therapy on his left elbow and shoulder. His elbow complaints improved, but his shoulder did not respond to conservative treatment. Dr. Haupt repaired a partial rotator cuff tear in January 1997. After additional physical therapy, he was released from treatment in March 1997. He settled this case with Employer for 28% of his left shoulder.
5. Claimant continues to have snapping, popping and cracking in his shoulder. He feels he can't do anything with his left shoulder or arm. He can't sleep on his left side. He can't drive with his left arm. It hurts all the time. He feels even the weight of his arm is heavy on his shoulder. He can't lift a gallon of milk.
6. In April 2000, Claimant injured his low back while removing concrete forms from a road. These steel forms are 10' long, 2" thick, and weigh 75 pounds. They are put in the ground to make a straight line to pour concrete. Claimant pulled a form up and felt a burning sensation in his low back with shooting pain in his right leg. He treated at Unity Health, and an MRI showed a bulging disc at L5-S1.
7. Claimant saw Dr. Kennedy in August 2000, and he recommended trigger point injections. Claimant testified he only saw Dr. Kennedy once because he recommended surgery with pins and screws. Claimant was not interested in surgery. He settled this case with Employer for 12.5% of his back, and continued to see his primary care physician for occasional increases in back pain.
8. Claimant continues to have problems with his back. He has reduced flexion and extension. He can't sit or stand long or his right leg goes numb. He has difficulty sleeping. In the morning, he has to stretch and take his time getting out of bed. His biggest problem is with sitting and standing.

9. In December 2003, Claimant injured his left arm while lifting a rock compactor. He had pain in his elbow, shooting pain in his forearm, and numbness in his fingers. Dr. Crandall ordered an MRI, and diagnosed left lateral epicondylitis. He sent Claimant for physical therapy, and recommended an elbow brace and light duty. He was released from treatment in September 2004 and settled this case with Employer for 7.5% of the elbow.
10. Claimant continues to have pain in his left arm from this injury and his prior injury. He feels his whole left arm is no good and he does most things right handed.
11. In 2007 Claimant developed neck pain with radiating pain into his right arm. He saw his primary care physician who performed injections without improvement. Claimant saw Dr. Youkilis, a neurosurgeon, who diagnosed C7 radiculopathy and an arachnoid cyst with spinal cord compression at T6-7. He performed a C6-7 microdiscectomy in February 2008. Claimant testifies he missed work from the date of surgery until June 2008 when he returned to office work only. Employer accommodated Claimant's condition and gave him less physical work, and more office work.
12. Claimant continues to have daily pain in his neck with looking up, down, or from side to side. He has reduced range of motion and has difficulty looking to the left to check for traffic when driving. He has pain at the end of the day and it is hard to hold his head up without support.
13. In August 2008, he injured his left shoulder when pouring concrete. He treated again with Dr. Haupt and had an MRI, therapy, injections, and returned to work October 28, 2008. Claimant settled this case with Employer April 14, 2010, for 10% of his left shoulder.
14. Claimant continues to have daily left shoulder pain with restricted range of motion. His symptoms are similar to those he had after his 1997 shoulder injury, but are more severe following the 2008 injury.
15. In 2009, Claimant sought treatment for complaints of pain and tingling in his hands that woke him up at night. His primary care physician sent him for nerve conduction studies, which revealed bilateral carpal tunnel syndrome. Employer sent Claimant to Dr. Crandall who opined Claimant's condition was work related, and he recommended surgery.
16. Dr. Crandall performed right open carpal tunnel release in June and left open carpal tunnel release in August 2009. Claimant returned to work light duty while undergoing physical therapy. Claimant last saw Dr. Crandall September 23, 2009, and was to return in five months for a final evaluation. Claimant testified by the time Dr. Crandall released him from care, Claimant was already retired. Dr. Crandall told him to take it easy and do what he felt he could do. Claimant and Employer settled this case April 14, 2010, for 17.5% PPD to each wrist.
17. Claimant continues to have pain in his hands, decreased grip strength, and decreased sensation in his fingertips.

18. Claimant has been taking Percocet for the last several years. He continues to see his primary care physician twice a year for pain management and monitoring of his Percocet and Valium. The Percocet was prescribed to help with the pain for all of his injuries. The Valium helps him sleep and relax.
19. Claimant planned to continue working until he was 62 years old and eligible for Social Security. He testified he had to stop working in 2009 because he could not do the job anymore. He had too much pain at the end of the day. He took early retirement with reduced benefits. He believes all his injuries together prevent him from working. He has pain in his hands, neck, back and shoulders. He doesn't sleep well due to his pain. He has always worked in maintenance, and that work is too hard for him now due to his pain and restrictions.
20. Claimant's expert, Dr. Musich, examined him several times and issued reports. He recommend Claimant refrain from work that requires repetitive cervical flexion, extension and rotation. He should refrain from activities that require work on ladders or above shoulder level. He should also refrain from activities that require repetitive heavy lifting over 50 lbs. Dr. Musich opined Claimant's injuries and disabilities combined to create a greater overall disability and produce a chronic hindrance to his employment. He recommended Claimant undergo a vocational assessment to determine if he is capable of obtaining and maintaining employment, given his numerous disabilities and restrictions.
21. Claimant's vocational expert, Jim Israel, issued a report and testified regarding Claimant's employability. He noted Claimant had gained 30 pounds due to inactivity. He noted Claimant has complaints into his shoulders, hands and wrists. He has extensive discomfort in his neck, radiating through his shoulders. His pain intensifies with enduring activity. He continues to have back pain and an inability to sit or stand for more than an hour. Mr. Israel opined Claimant could not return to any of his previous jobs. He does not have transferable skills to light or semi-skilled occupations. Mr. Israel opined Claimant is unprepared vocationally and substantially disadvantaged to compete in any way in the open labor market. This is the result of a combination of his functional limitations, his physical restrictions, his age, his work experience, and his education.
22. Jim England issued a report and testified on behalf of the SIF. He opined based on the treating physicians' findings, Claimant could return to work. Based on Dr. Musich's restrictions, Claimant could not return to his previous work, but could perform entry level service employment. He agreed some of Claimant's current complaints would make it more difficult for him to perform many of these entry level jobs, and his pain medications would make it difficult to Claimant to perform work requiring driving.
23. Claimant is credible.

RULINGS OF LAW

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

1. Claimant's occupational disease is a compensable injury and triggers SIF liability.

The SIF argues they have no liability because Claimant's primary case involved an occupational disease rather than an accident. Section 287.220.1 (RSMo 2005) provides compensation from the SIF for the combination of certain preexisting disabilities with a subsequent "compensable injury" that results in additional permanent disability meeting the statutory thresholds. The SIF asserts an occupational disease does not qualify as a subsequent "compensable injury" because the definition of "injury" in Section 287.020.3 excludes occupational disease. I do not agree with this interpretation.

287.020.3(5) defines "injury" and states the term "shall in no case except as specifically provided in this chapter be construed to include occupational disease in any form". This is not an absolute exclusion of occupational diseases from SIF liability. The law provides for injuries by accident and for injuries by occupational disease. Section 287.067.2 provides "An injury by occupational disease is compensable..." 287.067.3 provides "An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter." The chapter specifically provides occupational diseases are injuries.

The SIF argues the holding in *State ex rel. KCP&L v. The Honorable Jacqueline Cook*, 353 S.W.3d 14 (Mo.App. W.D. 2011) excludes occupational diseases from SIF liability. In *KCP&L*, the question before the court was whether the exclusive remedy provision of Section 287.120 applied to occupational disease claims. The court explained the amendments in 2005 narrowed the scope of employer immunity, but did not exclude occupational diseases from liability under the worker's compensation system. The new law more clearly distinguishes between injuries by accident and injuries by occupational disease, and separates the standards for compensability of these two types of injuries. Sections 287.063 and 287.067 specifically provide for the compensability of occupational diseases. Thus, occupational disease claimants have an available, but not exclusive, workers' compensation remedy.

2. Claimant is permanently and totally disabled as a result of the combination of his primary injury with his prior injuries and disabilities.

Section 287.220 RSMO provides that in cases of permanent total disability against the Second Injury Fund, there must be a determination of the following:

- the percentage of disability resulting from the last injury alone;
- that there was a pre-existing permanent disability that was a hindrance or obstacle to employment or to obtaining re-employment;

- that all of the injuries and conditions combined, including the last injury, have resulted in the employee being permanently and totally disabled.

Based on my review of the medical records, Claimant’s testimony, and the stipulation of the parties, I find Claimant sustained 17.5% PPD to each hand as a result of his primary injury.

Claimant had a number of pre-existing injuries and disabilities. He continues to have significant complaints and restrictions to his neck, shoulders, arms, elbow, and low back. He has taken prescription pain medications for several years. Each of these injuries limit Claimant’s ability to work. I find Claimant’s preexisting injuries and disabilities were a hindrance or obstacle to employment or to obtaining re-employment.

The final question is whether the combination of Claimant’s injuries rendered him permanently and totally disabled. The test for total disability is whether Claimant is able to adequately compete in the open labor market. The question is whether any employer in the usual course of business would reasonably be expected to employ Claimant given his condition.

Dr. Musich is the only physician to examine Claimant regarding all of his injuries. He imposed significant restrictions on Claimant. The vocational experts agree these restrictions preclude Claimant from returning to his previous occupation. When looking at entry-level service type employment, Mr. Israel opined these jobs generally do not afford the latitude and accommodations Claimant’s overall physical disabilities necessitate, and he could not sustain this type of work. Mr. England agreed Claimant would have difficulty performing a number of these jobs given his complaints and ongoing use of prescription pain medications.

Based on my observations of Claimant, his credible testimony, the vocational and medical evidence, I find Claimant is permanently and totally disabled as a result of the combination of his injuries and disabilities. He is not able to compete in the open labor market and no employer in the usual course of business would reasonably be expected to employ Claimant.

The parties stipulated if Claimant is permanently and totally disabled, that total disability began September 24, 2009. The SIF is hereby ordered to pay permanent total disability benefits at the differential rate of \$214.54 per week beginning September 24, 2009, for 61.25 weeks, and thereafter \$619.20 per week for as long as provided by law. The amount accrued to date shall be paid forthwith with interest as provided by law.

D. Andrew Weigley is allowed a fee of 25% of all benefits awarded for necessary legal service rendered, which shall constitute a lien on said compensation.

Date: _____

Made by: _____

KATHLEEN M. HART
 Administrative Law Judge
 Division of Workers' Compensation