

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

Injury No.: 06-109748

Employee: Steven Penrod  
Employer: Trammell Crow Company (Settled)  
Insurer: Ace American Insurance Co. (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 December 28, 2010, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Suzette Carlisle, issued December 28, 2010, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 12<sup>th</sup> day of August 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

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Alice A. Bartlett, Member

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DISSENTING OPINION FILED  
Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

Employee: Steven Penrod

### **DISSENTING OPINION**

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based upon my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed.

The administrative law judge discounted the opinion of Dr. Shuter regarding the extent of employee's right elbow disability because it was "based solely on [employee]'s history which is incomplete and inconsistent." Dr. Shuter's opinion was not based *solely* on employee's history. Dr. Shuter physically examined employee. Dr. Shuter's examination revealed objective functional limitations of employee's right arm. In particular, Dr. Shuter noted that employee is unable to fully extend at the elbow. Employee testified about how his elbow limitations affected the way he did his work.

The administrative law judge also discounted Dr. Shuter's permanent partial disability opinion because Dr. Shuter reviewed no medical records or diagnostic studies regarding the right elbow injury, and had no knowledge of the medical treatment received by employee over 20 years ago. There is no requirement that an expert opinion regarding the nature and extent of a preexisting disability can only be issued if the expert has seen all treatment records regarding the condition. In fact, in many instances including this one, medical records from many years ago are no longer available. And in this case, the old medical records are not necessary. The old medical records might have told us how employee's elbow ended up in its condition of ill, but we do not need to know that in this case. We need to know the nature and extent of that condition of ill as of the date of the primary injury. Dr. Shuter was more than qualified to determine the nature and extent of an orthopedic problem by examining the affected arm.

The Second Injury Fund seemingly urges us to discount Dr. Shuter's permanent partial disability opinion because employee has not needed medical treatment for his right elbow in years and employee has not missed work due to his right elbow condition. Many permanent conditions do not require ongoing medical care. As to missing work, I cannot conceive of a reason a worker would need to call off work because his elbow did not extend all the way.

Dr. Shuter's opinions regarding employee's right elbow condition were based upon a physical examination of employee's arm, its functional deficits and employee's description of how the elbow dysfunction affects his activities.

I find credible the opinions of Dr. Shuter regarding the disability associated with employee's right elbow, obesity and sleep apnea. I find that the limitations caused by employee's right elbow condition result in a permanent partial disability of 20% of the elbow. I find that the adverse effects of employee's obesity and sleep apnea constitute permanent partial disabilities of 25% of the body as a whole. Employee's preexisting disabilities constituted hindrances and obstacles to employee's employment or reemployment at the time employee sustained his work injury and the preexisting disabilities meet the thresholds necessary to trigger Second Injury Fund liability.

Employee: Steven Penrod

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Finally, I find persuasive Dr. Shuter's opinion that disabilities from employee's pre-existing obesity, sleep apnea and right elbow condition synergistically combine with the disability from his left elbow to produce a greater overall disability than the simple sum of the disabilities. I would award enhanced permanent partial disability from the Second Injury Fund based upon a load factor of 15%.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

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Curtis E. Chick, Jr., Member

## AWARD

Employee: Steven Penrod Injury No.: 06-109748

Dependents: N/A

Employer: Trammell Crow Company (Settled)

Additional Party: Second Injury Fund

Insurer: Ace American Insurance Co. (Settled)

Hearing Date: October 14, 2010

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

Checked by: SC

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
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: November 2, 2006
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 fell off the third rung of a ladder while working and fractured his left elbow.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Left elbow (Settled)
14. Nature and extent of any permanent disability: 30% PPD of the elbow – previously settled
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? At least \$29,274.89

Employee: Steven Penrod

Injury Number: 06-109748

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Sufficient for maximum permanent partial disability rate
- 19. Weekly compensation rate: \$376.55
- 20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

Employer previously settled.

22. Second Injury Fund liability: No

**TOTAL:**

**NONE**

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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Nancy Mogab

## FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Steven Penrod	Injury No.: 06-109748
Dependents:	N/A	Before the <b>Division of Workers' Compensation</b>
Employer:	Trammell (Settled)	Department of Labor and Industrial Relations of Missouri
Additional Party:	Second Injury Fund	Jefferson City, Missouri
Insurer:	Ace American Insurance Co. (Settled)	Checked by: SC

### STATEMENT OF THE CASE

The parties appeared before the undersigned administrative law judge on October 14, 2010 for a final hearing to determine the liability of the Second Injury Fund (SIF) in a matter regarding Steven Penrod (Claimant).<sup>1</sup> Attorney Nancy Mogab represented Claimant. Assistant Attorney General Todd Matheny represented the SIF. The Employer, Trammell Crow Company, and its' Insurer, Ace American Insurance Company, previously settled with Claimant for 30% of the left elbow on October 16, 2009.<sup>2</sup>

The parties stipulated to the following:

1. On or about November 2, 2006, Claimant was an employee of Employer pursuant to Chapter 287 RSMo.;
2. Claimant sustained an accident which arose out of and in the course of employment and resulted in injury to Claimant;
3. The accident occurred in St. Louis County;
4. Venue is proper;
5. Employer and Claimant operated under the Missouri Workers' Compensation Law;
6. Employer's liability was fully insured;
7. Employer received proper notice of the claim;
8. Claimant filed the claim within the time allowed by law;
9. Claimant's average weekly wage was sufficient for a maximum Permanent Partial Disability (PPD) rate of \$376.55,
10. Employer paid Temporary Total Disability (TTD) benefits but the amount is unknown, and
11. Employer paid medical benefits totaling at least \$29,274.89

The issues to be determined are:

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<sup>1</sup> All statutory references are to the 2005 Revised Statutes of Missouri unless otherwise stated.

<sup>2</sup> All references in this award to Employer also include the Insurer unless otherwise indicated.

1. What is the nature and extent of Claimant's disability?; and
2. What is the liability of the Second Injury Fund, if any?

### **SUMMARY OF THE EVIDENCE**

Only evidence necessary to support the award will be summarized. 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, those markings were made prior to being made part of this record, and were not placed thereon by the Administrative Law Judge.

#### ***Exhibits***

Claimant offered Exhibits A-E without objection. The SIF offered no Exhibits.

#### ***Live Testimony***

1. Claimant testified live. Claimant is 40 years old, married and has two dependent children, Dillon age 17 and Katlyn age 14. Claimant is a high school graduate with an associates' degree in heating and cooling. Claimant is six feet tall and weighed about 450 pounds in 2006 when he was injured at work.
2. For the past two years Claimant has worked as a facility engineer for Jones, Lange, and LaSalle. His maintains the building which includes HVAC, hot/cold calls, electrical, fire safety, and security issues with the doors.
3. Claimant worked for Employer for six years. On November 2, 2006, Claimant sustained an accidental injury arising out of and in the course of employment that resulted in injury to his left elbow when he fell off the third rung of a ladder and fractured his elbow.
4. Claimant received medical care at St. John's Emergency Room in the form of medication and a sling. Claimant was referred to Dr. Howard who performed surgery on November 6, 2006. Plates and screws were inserted. Claimant missed work for several weeks before returning to work on light duty.
5. Due to poor healing, a bone stimulator was implanted; however Claimant continued to heal slowly. The radial head of the elbow was removed and physical therapy was prescribed. Claimant was released to full duty in April 2007.
6. On October 16, 2009 Claimant and Employer settled the workers' compensation claim arising out of the accident for 30% PPD of the left elbow and future medical expenses.

7. Complaints included constant left elbow pain, decreased strength, limited range of motion, and grinding. It is difficult to reach and rotate his left wrist. He takes 800 milligrams of Tylenol twice a day. Dr. Howard offered no additional treatment.
8. Dr. Haueisen surgically implanted a prosthetic elbow on April 10, 2008 and returned Claimant to regular duty in July 2008. In 2009 Dr. Haueisen removed an elbow cyst and informed Claimant that he may need a replacement joint in the future.
9. Ongoing left arm and elbow problems include tingling in the fingers, increased weakness and decreased grip strength with use, pain and grinding, and limited extension, difficulty with reaching and rotating his arm to screw light bulbs. Claimant sought assistance when needed. Claimant has limited work activities out of caution. It is more difficult to use a screw driver, bolt items, and hammer with the left hand. Claimant has problems playing catch with his kids. He continues to hunt and fish. He no longer felt safe climbing ladders while holding items. To compensate he hoisted items or had someone else carry them.
10. Prior to the date of injury, Claimant had the following disabling injuries or conditions:
  - a) In 1985 while in high school, Claimant sustained an injury to his **right elbow** while playing football, wrestling, and weight lifting. He developed pain and tingling. Claimant testified Dr. Lehman surgically removed bone fragments and smoothed the bone. He was casted and received physical therapy. No medical records are available.
  - b) Ongoing complaints include soreness and tingling in his fingers with bowling or throwing a soft ball, lack of extension, decreased range of motion, and stiffness. Claimant takes Tylenol for pain.
  - c) Prior to November 2006, Claimant substituted his left hand at work. Use of drills and saws caused soreness and tingling from the elbow into three fingers of the right hand. He stopped playing softball and bowling because of pain, age, and weight. He took Tylenol as needed, but received no further treatment and has not missed work for his right elbow.
  - d) Claimant has weighed at least 400 pounds since 2002, but continued to play softball, fish, hunt, and coach his kids' soccer teams. He tried dieting, walking, and limiting intake with some progress until he stopped and started diets. He is considering gastric by-pass surgery.

- e) Claimant testified he was diagnosed in 1998 with sleep apnea caused by obesity. Claimant was constantly tired and could not get sufficient sleep. Claimant was prescribed a continuous positive airway pressure (CPAP) machine. The machine improved his condition but he is still tired and sleepy when the mask comes off at night.
- f) Recently, Claimant gained weight after two knee surgeries and back pain. He is unable to walk and maintain physical activity.
- g) Prior to November 2006, Claimant did not work with physician imposed restrictions or Employer accommodations, and controlled his blood pressure with medication.
- h) After November 2006, Claimant had two knee surgeries and back problems so he has not walked or performed other activities.

***Medical Treatment Primary Injury***

- 11. On November 2, 2006, an MRI revealed a comminuted markedly displaced fracture of the left radial head and neck. On November 6, 2006, **Richard F. Howard, D.O.**, surgically repaired Claimant's left radial head with a plate and screws. Claimant was placed in a bone stimulator due to slow healing. On March 7, 2007 Dr. Howard removed the hardware and radial head which became necrotic and caused the fracture to collapse. Claimant completed physical therapy and work hardening and on June 4, 2007, Dr. Howard found Claimant had achieved maximum medical improvement, released him from care with no work restrictions, and rated 15% PPD of the elbow.
- 12. On April 10, 2008, **David C. Haueisen, M.D.** performed a left bipolar radial head implant. On July 22, 2008, he released Claimant to work full duty, without restrictions. Dr. Haueisen rated 15% PPD of the left elbow due to restricted range of motion and multiple surgeries. He opined the implant may need revision or replacement in the future.
- 13. On July 16, 2009 Dr. Haueisen removed a cyst on Claimant's left elbow and released him from care on September 4, 2009.

***Opinion Evidence***

- 14. On August 26, 2008, **Eli R. Shuter, M.D.**, examined Claimant, took a history, and issued a report. Dr. Shuter found Claimant sustained an accident which arose out of and in the course of employment and resulted in injury. Dr. Shuter provided the following ratings of permanent partial disability:

- a) The primary injury: 35% of the elbow.
- b) The preexisting disabilities, which constituted a hindrance and obstacle to employment included:
  - i. 25% PPD of the body as a whole for obesity with sleep apnea
  - ii. 20% PPD of the right upper extremity at the elbow.

Dr. Shuter opined the disability from the primary and preexisting injuries is greater than their simple sum.

### **FINDINGS OF FACT & RULINGS OF LAW**

Claimant has not 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 Second Injury Fund, 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 not 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:

#### ***The Last Injury***

- 15. Claimant sustained a compensable last injury which resulted in sufficient permanent partial disability to meet the statutory threshold for SIF liability.
- 16. However, Claimant did not meet his burden to show his alleged preexisting disabilities meet the threshold to trigger SIF liability.

***Preexisting Disabilities***

17. Claimant's testimony is not credible regarding his preexisting disabilities. At the hearing, Claimant gave a detailed account of right elbow surgery and treatment and testified he reported his preexisting conditions to Dr. Shuter. But Claimant did not tell Dr. Shuter his right elbow was surgically repaired, and Dr. Shuter did not identify a surgical scar during examination. However Dr. Shuter did identify a surgical scar on the left elbow. Claimant has not missed work or sought treatment for his right elbow in 25 years.
18. Claimant testified he has always been "big but active," played softball, fished, hunted, bowled, and coached his kids' soft ball teams. In fact, he walked, eliminated soda, reduced intake, dieted, and "did good for so long then got off and tried it again." Claimant is considering gastric by-pass surgery.

The record contains no evidence prior to November 2006 of a medical condition that would make it impossible for Claimant to lose weight, a morbid obesity diagnosis, or attempts to lose weight.

Claimant testified he has gained weight because he cannot workout due to knee and back problems, which developed after 2006. Preexisting disability is determined at the time of the work accident, not subsequent to it. *Garcia v. St. Louis County*, 916 S.W.2d 263, 267 (Mo.App. 1995).<sup>3</sup> The SIF is not liable for post-accident worsening of a preexisting disability that was not caused or aggravated by the last work related injury or any condition that may have arisen from it. *Id.*

19. The record contains no diagnosis or treatment for sleep apnea before 2006, or the name of the medical provider who prescribed the CPAP machine, although Claimant continues to use the machine. Claimant testified the machine provides marked improvement as long as he properly uses the mask.
20. Dr. Shuter's opinion is not persuasive regarding preexisting disability because it is based solely on Claimant's history which is incomplete and inconsistent. Dr. Shuter reviewed no medical records or diagnostic studies, and had no knowledge of any medical treatment received by Claimant. Dr. Shuter diagnosed obesity and found PPD based on Claimant's weight of 487 pounds when he was examined. However, he weighed at least 37 fewer pounds on the date he was injured. Dr. Shuter only examined Claimant's upper extremities and performed no diagnostics.

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<sup>3</sup> Overruled on an unrelated issue by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224-32 (Mo. banc 2003).

21. Claimant offered no explanation for the absence of medical records for the preexisting medical conditions. Nor did he explain why Dr. Shuter's report lacks a history of right elbow surgery.
22. Based on less than credible testimony by Claimant and Dr. Shuter, and medical reports related to the primary injury, I find Claimant sustained 5% PPD of the right elbow and 10% PPD of the body for obesity and sleep apnea. I find the preexisting disabilities do not reach the threshold to trigger SIF liability.
23. Prior to the 2006 work accident Claimant worked full time, without physician imposed restrictions or accommodations from Employer or the use of prescription medication. Claimant continues to work full duty with a new employer, without physician imposed restrictions, accommodations or prescription medications. He also continues to hunt and fish.
24. I find Claimant's obesity, sleep apnea, and right elbow conditions did not meet the threshold to trigger Second Injury Fund liability, were not serious enough to constitute a hindrance or obstacle to employment or reemployment, and did not combine with the left elbow injury to create greater overall disability than their simple sum.

### CONCLUSION

The Second Injury Fund is not liable for permanent partial disability benefits. The Second Injury Fund claim is denied.

Made by: \_\_\_\_\_  
**Suzette Carlisle**  
*Administrative Law Judge*  
*Division of Workers' Compensation*

This award is dated and attested to as of this \_\_\_\_\_ day of \_\_\_\_\_, 2010.

\_\_\_\_\_  
**Naomi Pearson**  
*Division of Workers' Compensation*

Issued by DIVISION OF WORKERS' COMPENSATION