

**FINAL AWARD ALLOWING COMPENSATION**  
(Affirming Award and Decision of Administrative Law Judge  
by Supplemental Opinion)

Injury No.: 03-112128

Employee: William Reed  
Employer: Hutkin Development Company (Settled)  
Insurer: Travelers Insurance Company (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence, read the briefs, 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 April 19, 2011, with this supplemental opinion. The Commission adopts the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the supplemental opinion set forth below.

**Preliminaries**

The administrative law judge heard this matter to consider the sole issue of Second Injury Fund liability. The administrative law judge found the Second Injury Fund liable for permanent total disability benefits.

The Second Injury Fund filed an Application for Review with the Commission alleging the administrative law judge erred: (1) by failing to include the correct legal analysis; and (2) because the evidence shows employee is permanently and totally disabled due to the last injury standing alone.

After carefully considering the evidence on record, we agree with the result reached by the administrative law judge, but the award lacks the pertinent statutory analysis and certain necessary factual findings and also fails to explain or provide any rationale for the administrative law judge's conclusions. In order to provide that analysis and also to make the clear and unequivocal findings and conclusions mandated by § 287.460.1 RSMo, we affirm the award of the administrative law judge with this supplemental opinion.

**Findings of Fact**

*Preexisting conditions*

Employee suffered preexisting disabling conditions of his bilateral wrists and low back. Dr. Poetz rated these conditions and opined that they constituted permanent partial disabling conditions. In addition, employee settled workers' compensation claims in connection with these conditions. After considering all of the relevant evidence, we find that, at the time of the primary injury, employee suffered a 17.5% permanent partial disability of the right wrist and a 15% permanent partial disability of the left wrist referable to carpal tunnel syndrome and related surgeries in 1998. We find employee also suffered a 25% permanent partial disability of the body as a whole referable to his December 2000 low back injury and related surgery. We find that in the months he worked for employer leading up to the November 2003 primary injury, employee's preexisting disabling conditions of the low back and bilateral wrists caused employee problems with bending, squatting, weakness, and numbness in his hands, and hindered his ability to perform his work.

Employee: William Reed

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Primary injury

We find employee suffered the following permanent partial disabling conditions as a result of the primary injury: 32.5% of the body as a whole referable to the neck, 25% of the left shoulder, 27.5% of the left elbow, 12.5% of the left wrist, and 10% of the right wrist.

Permanent total disability

Dr. Poetz initially rendered his opinion that the November 2003 injuries, considered alone, result in employee's permanent total disability. After being provided with further information as to the nature and extent of employee's prior conditions, however, Dr. Poetz opined that employee is not permanently and totally disabled as a result of the primary injury considered in isolation, but rather due to a combination of the effects of the primary injury and employee's preexisting disabling conditions. Dr. Poetz explained that he amended his opinion because he received further relevant information in the form of employee's records from the Social Security Administration.

The vocational expert, James England, agreed with Dr. Poetz that employee is permanently and totally disabled due to a combination of his preexisting conditions and the disability resulting from the primary injury.

We acknowledge the Second Injury Fund's arguments. We have considered the fact that employee was working full duty before the last injury and that the last injury did result in serious disability. But the Second Injury Fund did not present any expert medical or vocational evidence to support its position that the work injury alone renders employee permanently and totally disabled. We find the unopposed testimony from Dr. Poetz and Mr. England to be credible and persuasive. We find that employee is not rendered permanently and totally disabled due to the effects of the work injury considered alone. Rather, we find employee is permanently and totally disabled due to the combination of employee's preexisting disabling conditions and his injuries sustained in the accident on November 3, 2003.

**Conclusions of Law**

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid in "all cases of permanent disability where there has been previous disability." As a preliminary matter, the employee must show that he suffers from "a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed ..." *Id.* The Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a "hindrance or obstacle to employment":

[T]he 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.

*Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 637 (Mo. App. 2007) (citation omitted).

Dr. Poetz opined that employee suffered permanent partial disability referable to preexisting bilateral wrist and low back conditions, and we have found that these conditions amounted to a 17.5% permanent partial disability of the right wrist, a 15% permanent partial disability of the left wrist, and a 25% permanent partial disability of the body as a whole referable to the low back.

We are further convinced that employee's preexisting disabilities were serious enough to constitute hindrances or obstacles to employment for purposes of § 287.220 RSMo. When we consider the potential for these conditions to combine with future work-related injuries, we are persuaded that

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employee's bilateral wrist and low back disabilities had the potential to combine with future work-related injuries so as to cause greater disability than would result in the absence of these conditions. We conclude that at the time he sustained his November 3, 2003, work injuries, employee suffered from preexisting permanent partial disabling conditions of his bilateral wrists and low back and that these conditions constituted hindrances or obstacles to employment or reemployment.

We now proceed to the question whether employee met his burden of establishing entitlement to compensation from the Second Injury Fund. Section 287.220.1 RSMo provides, in relevant part, as follows:

After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for. If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury or a major extremity injury shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the "Second Injury Fund" ...

The foregoing section requires us to first determine the compensation liability of the employer for the last injury, considered alone. If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, and not the Second Injury Fund, is responsible for the entire amount of compensation. See *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007).

We have found that, as a result of the last injury, employee sustained the following permanent partial disabling conditions: 32.5% of the body as a whole referable to the neck, 25% of the left shoulder, 27.5% of the left elbow, 12.5% of the left wrist, and 10% of the right wrist. Both Dr. Poetz and Mr. England opined that employee is permanently and totally disabled due to a combination of employee's preexisting disabling conditions and his injuries sustained on November 3, 2003, and we have found the unopposed testimony of these experts to be credible. We conclude that the primary injury, considered in isolation, did not render employee permanently and totally disabled, but that employee is disabled due to a combination of his preexisting disabilities and conditions of ill as they existed on November 3, 2003, in combination with the injuries sustained on that date. We conclude, therefore, that employee has met his burden of establishing Second Injury Fund liability under § 287.220.1 for permanent total disability benefits.

### **Conclusion**

Based upon the foregoing, we affirm the award of the administrative law judge with this supplemental opinion. The Second Injury Fund is liable to employee for weekly payments of permanent total disability

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benefits in the amount of \$333.33, beginning November 9, 2011, and continuing thereafter for employee's lifetime, or until modified by law.

The award and decision of Administrative Law Judge Cornelius T. Lane, dated April 19, 2011, is attached, affirmed, and incorporated by this reference to the extent it is not inconsistent with our findings, conclusions, and decision herein.

We approve and affirm 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 20th day of December 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

Issued by DIVISION OF WORKERS' COMPENSATION

## AWARD

Employee:	William Reed	Injury No.:	03-112128
Dependents:	N/A		Before the
Employer:	Hutkin Development Company (previously settled)		Division of Workers' Compensation
Additional Party:	Second Injury Fund only		Department of Labor and Industrial Relations of Missouri
Insurer:	Travelers (previously settled)		Jefferson City, Missouri
Hearing Date:	February 3, 2011	Checked by:	CTL:ms

### 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: November 3, 2003
5. State location where accident occurred or occupational disease was contracted: St. Louis, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
Claimant slipped and fell off of a ladder.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Neck, shoulder, left elbow, left wrist, right wrist
14. Nature and extent of any permanent disability: 10% of the right wrist, 12 ½% of the left wrist, 27 ½% of the left elbow, 25 % of the left shoulder, 32 ½% of the neck previously paid by the Employer; and permanent total disability benefits from the Second Injury Fund beginning November 9, 2011.
15. Compensation paid to-date for temporary disability: \$45,332.88
16. Value necessary medical aid paid to date by employer/insurer? \$234,488.69

Issued by DIVISION OF WORKERS' COMPENSATION

Employee: William Reed

Injury No.: 03-112128

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: N/A
- 19. Weekly compensation rate: \$333.33/333.33
- 20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable by Employer/Insurer: N/A

TOTAL:

- 22. Second Injury Fund liability: The Second Injury Fund shall pay to the Claimant permanent total disability benefits in the amount of \$333.33 per week beginning November 9, 2011.

TOTAL:

TO BE DETERMINED

- 23. Future requirements awarded:

Said payments to begin 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: Attorney Brian McChesney.

Issued by DIVISION OF WORKERS' COMPENSATION

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee:	William Reed	Injury No.: 03-112128
Dependents:	N/A	Before the <b>Division of Workers' Compensation</b>
Employer:	Hutkin Development Company (previously settled)	Department of Labor and Industrial Jefferson City, Missouri
Additional Party:	Second Injury Fund only	
Insurer:	Travelers (previously settled)	Checked by: CTL: ms

### **PREFACE**

A hearing was held in the above mentioned matter on February 3, 2011. The Claimant, William Reed, was represented by Attorney Brian McChesney. The Second Injury Fund was represented by Assistant Attorney General Carol Barnard.

### **ISSUE**

The liability, if any, of the Second Injury Fund for permanent total disability.

### **EXHIBITS**

The Claimant offered the following exhibits into evidence:

- Exhibit A: Stipulation for Compromise Settlement – Injury No. 98-080231.
- Exhibit B: Stipulation for Compromise Settlement – Injury No. 00-135223 (primary).
- Exhibit C: Stipulation for Compromise Settlement – Injury No. 00-135223 (SIF).
- Exhibit D: Report of Dr. Robert Poetz 10/11/06.
- Exhibit E: Report of Dr. Robert Poetz 11/05/10.
- Exhibit F: Deposition transcript of Dr. Robert Poetz.
- Exhibit G: Deposition transcript of Dr. James M. England.
- Exhibit H: Social Security Records.
- Exhibit I: Records of Dr. William Feinstein.
- Exhibit J: Records of Dr. Daniel Phillips.
- Exhibit K: Records of Dr. Barry Feinberg.
- Exhibit L: Records of Dr. David Raskas.
- Exhibit M: Records of Dr. Ravi Shitut and Dr. Ashok Kumar
- Exhibit N: Records of Dr. Herbert Haupt
- Exhibit O: Records of Dr. John Graham
- Exhibit P: Operative Note 8/24/98.
- Exhibit Q: Operative Note 8/31/98.
- Exhibit R: Stipulation for Compromise Settlement – Injury No. 03-112128.

The Second Injury Fund had an exhibit of one Stipulation for Settlement.

### FINDINGS OF FACT

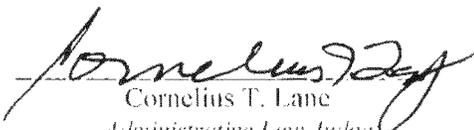
1. The Claimant testified that on November 3, 2003, when he was 57 years of age he was working for the Employer, Hutkin Development when he was on a ladder changing a light and the ladder broke and he fell to the ground.
2. Claimant and his evidence show that as a result of his falling from the ladder he underwent five different surgeries, January 23, 2004, left elbow surgery, April 23, 2004, left wrist surgery, September 9, 2004, left shoulder surgery, May 10, 2005, neck surgeries, a C6-C7 microdissection, anterior cervical fusion with bone and plating, January 26, 2006, neck surgery C6-C7 segmental instrumentation bilateral foraminotomies, iliac crest bone graft.
3. Claimant testified very credibly that he still has pain and stiffness in his neck, left shoulder pain with trying to lift over his shoulder, above his shoulder, and his left shoulder is just real weak. Claimant testified with regard to his left elbow he still has problems losing his grip and his left wrist is still very painful.
4. Prior to the Claimant's primary injury of November 3, 2003, Claimant in 1998 sustained bilateral wrist injuries while working for his Employer Lohr Distributing Inc. Claimant as a result of the bilateral carpal tunnel syndrome underwent left carpal tunnel release on August 24, 1998 and right carpal tunnel surgery on August 31, 1998. Claimant settled his Workers' Compensation case for 17.5% of the right wrist and 15% of the left wrist with 10% multiplicity.
5. Also prior to Claimant's primary injury of November 3, 2003, the Claimant injured his low back while working for his Employer at that time, KFS trucking company. Claimant had herniation of disc at L4-L5, and L5-S1 level which required lumbar fusion surgery. Claimant settled that Workers' Compensation case with his Employer KFS for 25% of the body as a whole referable to the low back, and also received a Second Injury Fund settlement which represented disability to the right wrist at 17.5% and the left wrist at 15%.
6. The Claimant testified also that even while working for his Employer on November 3, 2003, he suffered from the various problems for his prior injuries to his low back, left wrist, and right wrist.
7. The Claimant was seen by Dr. Poetz for an independent medical examination and the doctor testified very credibly that the Employee is permanently disabled because of the combination of his November 3, 2003, injuries along with his pre-existing low back, right wrist, and left wrist problems.
8. James England, a vocational expert, saw the Claimant and he was of the opinion that the Claimant was permanently and totally disabled as a result of his November 3, 2003,

injuries along with his pre-existing low back disabilities and the right wrist and left wrist disabilities.

**RULINGS OF LAW**

1. The Claimant is permanently and totally disabled because of his primary injury along with his pre-existing disabilities. The Second Injury Fund is liable for payment to the Claimant of permanent total disability in the amount of \$333.33 per week beginning November 9, 2011.

Date: April 19, 2011

Made by:   
 Cornelius T. Lane  
 Administrative Law Judge  
 Division of Workers' Compensation

A true copy: Attest:



*Division of Workers' Compensation*