

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

Injury No.: 98-108270

Employee: Robert Sebra  
Employer: The St. Louis National Baseball Club, Inc.  
Insurer: Self-Insured  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: July 15, 1993  
Place and County of Accident: Various

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. We have heard the oral arguments of the parties. We have reviewed the evidence and considered the whole record and 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 Act, except as modified herein. Pursuant to section 286.090 RSMo, we issue this final award and decision modifying the November 23, 2005, award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

The Commission modifies the administrative law judge's allowance of attorney's fees. We reject the administrative law judge's cap on the attorney's fee. Harry Nichols, Attorney at Law, is allowed a fee of 25% of the benefits awarded for necessary legal services rendered to employee, which shall constitute a lien on said compensation.

Any past due compensation shall bear interest as provided by law.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued November 23, 2005, is attached and incorporated by this reference except to the extent modified herein.

Given at Jefferson City, State of Missouri, this 28<sup>th</sup> day of July 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Robert Sebra

Injury No.: 93-108270

Dependents: N/A

Before the  
Division of Workers'

Employer: The St. Louis National Baseball Club, Inc.

Compensation

Additional Party:

Department of Labor and Industrial  
Second Injury Fund Relations of Missouri  
Jefferson City, Missouri

Insurer: Self-Insured

Hearing Date: August 17, 2005

Checked by: JED:tr

#### 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: July 15, 1993
5. State location where accident occurred or occupational disease was contracted: Various
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer reExhibit proper notiExhibit? 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 was a baseball pitcher and developed right elbow symptoms.
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 elbow
14. Nature and extent of any permanent disability: 25% PPD of right elbow; 5 weeks disfigurement; 47.3 weeks PPD from SIF.
15. Compensation paid to-date for temporary disability: \$65,808.40
16. Value neExhibitssary medical aid paid to date by employer/insurer? \$30,636.12

Employee: Robert Sebra

Injury No.:

93-108270

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: Unknown
19. Weekly compensation rate: \$470.06/\$246.22
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

52.5 weeks of permanent partial disability	\$12, 926.55
5 weeks of disfigurement from Employer	1,231.10

22. Second Injury Fund liability: Yes

47.3 weeks of permanent partial disability from Second Injury Fund	11,646.21
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TOTAL: 25,803.86

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% (not to exceed \$5,000.00) of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Harry J. Nichols

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: Robert Sebra

Injury No.: 93-108270

Dependents: N/A

Before the  
Division of Workers'

Employer: The St. Louis National Baseball Club, Inc.

Compensation

Additional Party: Second Injury Fund

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

Insurer: Self-Insured

Checked by: JED:tr

This case involves right elbow repetitive traumas resulting to Claimant with the reported onset date of July 15, 1993. Employer admits Claimant was employed on said date and that any liability was fully self-insured. The Second Injury Fund is a party to this claim. All parties are represented by counsel.

#### Issues for Trial

1. medical causation/attribution;
2. nature and extent of permanent partial disability;
3. liability of the SIF; and,
4. liability for any temporary partial disability.

#### FINDINGS OF FACT

#### Stipulation of Parties

The parties stipulated that Employer paid medical expenses of \$30,636.12 and temporary total disability of \$65,808.40 was paid for the dates: 9/7/93 to 6/20/95; 6/27/95 to 5/21/96.

#### Evidence

The claimant testified that he was employed by the Cardinals in late 1992 or early 1993 as a professional baseball player and pitcher having previously been with various other professional baseball teams before then. He was assigned to the Louisville Cardinals and pitched every 5 days under his contract. At the time of his injury, July 15, 1993, his right arm locked up on him so that he could not pitch. Thus, he underwent surgery in September 1993 to remove bone spurs and the tip of olecranon. While playing Celebrity golf in 1995, Dr. Andrews examined him to determine if something could be done to help him from slicing the ball and, indeed, another surgery improved his motion.

In 1998 he signed a contract and began pitching for an independent league, the Sommerset Patriots; he pitched every 5 days. He testified that he was feeling pretty good. He had approximately 7 starts and 40 innings of pitching when he had another accident. On July 1, 1998, he was pitching when he "arm exploded" while pitching in a game. It filled with blood, went black and blue and had to seek immediate medical care. This resulted in a surgery by Dr. Redler on August 17, 1998. He had physical therapy. He was examined by Dr. Emanuel in June 2002, for the Cardinals and advised to have ulnar nerve surgery which he had on June 25, 2003 in Orlando by Dr. White.

As a result of this injury the Sommerset Patriots have paid him approximately 72 weeks of temporary total compensation from 8/17/98 to 1/9/99, and 6/25/03 to 3/17/04, and 4/6/04 to 7/13/04. He has a pending workers' compensation claim against this team and recently testified in May 2005, requesting medical treatment and vocational rehabilitation.

Claimant is not currently working, but acknowledged that he has done various jobs since this injury in 1998. These include selling time shares for a year and a half; working as a stage hand in Philadelphia; doing construction work with a friend from September 2004 to the end of February 2005, including putting a metal roof on his mother's home, which involved lifting up to 50 pounds. The most money he has made is around \$15,000.00 since his injury and thinks he has averaged about \$8,000.00. He acknowledged other medical conditions, cirrhosis of the liver diagnosed in 2001 for instance have affected his ability to work. He has not returned to baseball since this 1998 injury. He has not played any golf for the last several years. He has lost about 50% of the strength in his elbow and cannot straighten it out or fully bend it. It is markedly smaller than his uninjured left elbow and arm. Claimant stated Dr. White placed permanent restriction on him on September 29, 2003 of no lifting greater than 20 pounds, no repetitive lifting, pushing or pulling.

#### *Prior Injuries*

He has an extensive prior history of physical problems and injuries. He was treated in 1984 for his left shoulder, in 1985 for left foot fracture, in 1987 for sciatic low back pain, in 1988 for right shoulder bursitis and bone

chips in his right elbow which led to surgery in the off-season; for sciatica in 1989, for shoulder and sciatic problems in 1990, for fracture of right foot in 1991 and for back and shoulder problems in 1992, and also for right thumb and right elbow bone chips with surgery in 1992, and then for right knee and right shoulder problems in 1993. His two prior right elbow surgeries in 1988 and 1992, were both done in the off-season so he did not miss his turn at pitching.

### Medical Evidence Chronology

In 1998, Dr. James Andrews of Healthsouth Medical Center, performed arthroscopy of the right elbow, removing some chips. (Exhibit 4:1). In 1992, the Cubs doctor also performed an operation, making a small incision posteriorly and performing arthroscopic work. (Exhibit 4:1). On September 2, 1993, Dr. Walter Badenhauen performed a debridement and diagnosed osteocartilagenous loose body, right elbow. (Exhibit A).

Dr. Richard Gaines of the Halifax Orthopaedic Clinic, Daytona Beach, Florida, treated and evaluated the claimant from September 14, 1993 until August 12, 1994, (Exhibit 11) for a diagnosis of arthrofibrosis, right elbow. He found that range of motion was restricted from 40 to 114 degrees of flexion and a loss of 10 degrees of pronation/supination and rated the claimant under Florida guidelines as having a 25% permanent partial impairment of the right upper extremity. He further found the claimant to have reached MMI. (Exhibits 11:2-3; B). On August 12, 1994, Dr. Gaines recommended surgery, namely a partial osteophyctomy of the olecranon, removal of part of the olecranon and re-insertion of the triceps as he found the claimant's condition was worsening and would not improve with further surgery. (Exhibits 11:1; B). His record does not state whether this treatment recommendation was due to the injury of July 1993, or to the pre-existing degenerative arthritis condition.

On May 2, 1995, a Dr. Spears noted osteoarthritic change of the right elbow with multiple osteocartilagenous loose fragments and bone spur formation. (Exhibit C). On July 11, 1995, Dr. Spears performed arthroscopy, manipulation, capsulectomy, scar debridement, and olecranon osteotomy. (Exhibit D). He underwent chiropractic treatment from July 19, 1995 through October 23, 1995 for his chronic right elbow problem. (Exhibit E).

On July 2, 1996, Dr. Hankins, Orthopaedic Clinic of Daytona Beach, Florida, examined on behalf of Cigna and Charles D. Hood, Jr., Esq. (Exhibit G:2). He assessed post-traumatic arthropathy and early cubital tunnel syndrome of the right elbow. (Exhibit G:2). He placed Claimant at MMI from his previous surgeries and estimated a 25% permanent partial impairment of the right upper extremity based on Florida Guidelines, but he did not state whether this impairment was related to the injury of July 1993 (Exhibit G:2). He recommended cubital tunnel release with anterior transposition of the ulnar nerve due to scarring and entrapment neuropathy at the cubital tunnel on the medial side of the elbow but further noted Claimant would not be able to return to professional baseball regardless of any further treatment to the right elbow. (Exhibit G:2). He does not state whether or not this treatment is related to the injury of July 1993, or to the pre-accident condition.

On July 3, 1996, Dr. Ahmed of Daytona Beach, Florida examined the Claimant but rendered no treatment. (Exhibit H). He diagnosed traumatic arthrosis, right elbow, with degenerative joint disease associated with partial ankylosis and probable loose body and probable ulnar neuropathy; and probable Guyon and carpal tunnel syndrome. (Exhibit H). He indicated Claimant to be a candidate for bone scan, CT scan, MRI, and EMG. (Exhibit H). He opined Claimant to be totally disabled as a baseball pitcher and his impairment and disability would persist for an indefinite period of time into the future. (Exhibit H). He noted Claimant may benefit from ulnar nerve transfer in Exhibit but EMG/NCV and neurological/neurosurgical consultation were first advised. (Exhibit H). X-rays of the right elbow showed a loose body and degenerative joint disease. (Exhibit H).

The reports of Dr. Hankins and Dr. Ahmed were objected to by the employer as prepared for litigation purposes. Neither of these Exhibits were qualified either under the *Sixty Day Rule* or as business records under Section 490.670 RSMo. and remain hearsay and inadmissible without stipulation of the parties. Neither appear to be rendering opinions to primarily address claimant's treatment needs which would be admissible. Section 287.140.6 and .7 RSMo 1993. Furthermore, opinion letters from physicians that are prepared for litigation purposes are inadmissible hearsay and excludable. *Kaufman v. Tri-State Motor Transit Co.*, 28 S.W.3d 369 (Mo.App.S.D.2000).

After his injury pitching for the Somerset Patriots on July 1, 1998, Claimant complained of severe right elbow pain and was diagnosed by Dr. Michael Redler of Fartrell, Ct., with olecranon impaction syndrome, triceps tendon contusion, and possible olecranon stress fracture. (Exhibit1:2; 6; Exhibit P). On July 22, 1998 Dr. Redler noted Claimant had degenerative joint disease and a loose body of the right elbow. (Exhibit1:2; Exhibit P).

On August 18, 1998 Dr. Redler performed right elbow arthroscopy, removal of multiple loose bodies, partial osteotomy, olecranon tip, extensive synovectomy, and excision of fibroarthrosis. (Exhibits1:3, 4; P). His postoperative diagnosis was loose bodies, chronic scarring and pain right elbow. (Exhibits1:4; P). He was to proceed with an intensive therapy program in Florida. (Exhibits1:3; P).

He underwent extensive physical therapy for his elbow at Complete Wellness from September 9, 1998 through August 30, 1999. (see Exhibits 2:1-68; F). He was evaluated at Seminole Orthopaedic Associates on December 21, 1998 for his multiple surgeries with scars on the elbow and was diagnosed with Ankylosis, right elbow and arthritis. (Exhibits 4:1-2; I).

On April 9, 1999 he described his pain as constant with periods of exacerbation. (Exhibit1:64). He attended additional physical therapy for his elbow, arm and shoulder at Advanced Wellness from November 15, 1999 through December 2, 1999. (Exhibits 3:1-14; Q).

Dr. James Emanuel of St. Louis, an orthopedic surgeon, evaluated Claimant on June 25, 2002 and assigned a 25% PPD rating to the right elbow to be increased by 5% if an ulnar nerve transposition was added. (Exhibit J). On October 9, 2002 an EMG/NCV indicated cervical and lumbar radiculopathy and median neuropathy of the right upper extremity consistent with carpal tunnel syndrome. (Exhibits 5:5; K).

An MRI of the lumbar spine showed disc bulging at L1-2, L4-5, and L5-S1 with neural encroachment at L4-5 and L5-S1. (Exhibits 6:2; L). A further MRI showed straightening of the cervical spine suggesting underlying musculoligamentous strain and disc bulging at C6-7. (Exhibits 6:4; L).

On February 25, 2003 Dr. White of Orlando Hand Surgery Associates, noted Claimant developed essentially progressive degenerative arthritis due to multiple repetitive activities. (Exhibits 8:1; M). He lost progressive range of motion to 120 degrees of flexion, -25 degrees of extension. (Exhibits 8:1; M). The impression was degenerative arthritis and possible retained loose bodies of the right elbow. (Exhibits 8:2; M). Dr. White indicated his progressive degenerative arthritis of his right elbow started in 1988, progressed in 1999. (Exhibits 8:1; M).

An MRI of the right elbow taken on February 28, 2003 showed osteophytes throughout the elbow, small subarticular cysts, and degenerated common tendons. (Exhibits 7:2; T).

On April 23, 2003, Dr. White recommended surgery. (Exhibit 7:3). He indicated Claimant's biggest problem is that it is just progressive arthritis of the elbow. (Exhibit 8:3). He had seventeen physical therapy visits from June 24, 2003 through August 27, 2003. (Exhibits 9:1-7; R) His date of injury at his initial evaluation was listed as July 1, 1998. (Exhibits 9:1; R). On September 29, 2003 he was returned to more normal activities. (Exhibits 8:7; M).

On January 1, 2004 Dr. John Kihm of Delta Choice Orthopedic Evaluation, Daytona Beach, Florida, examined and observed weak right arm flexors and extensors to the elbow secondary to surgery. (Exhibit S). On July 13, 2004, Dr. White indicated he had reached MMI. (Exhibits 8:10; M). On August 6, 2004, Claimant was treated for cervical myofascial pain disorder, lumbar radiculopathy and right elbow pain. (Exhibit N).

#### PPD Opinions

*Dr. Poetz*

Robert Paul Poetz, D.O. testified by deposition on behalf of Claimant on July 22, 2005. (Exhibit O:1). His practice involves 95 to 96% practice of family medicine. (Exhibit O:28). He does not hold a board certification in

orthopedic surgery or neurology and has never performed elbow surgery as Claimant has had. (Exhibit O: 30). The history taken by Dr. Poetz noted Claimant to be pitching every five days with pain in his right elbow, and in July 1993, while throwing a pitch, his right elbow popped and he continued to pitch the rest of the season in pain.

Notable is Dr. Poetz's review of the medical records began with treatment by Dr. Badenhause on August 30, 1993. (Exhibit O:8-9). He did not have or review the records of the 1988, 1992 or 1998 elbow surgeries. He had no record of a re-injury while pitching for the Somerset Patriots in July 1998. He did not have a history of a fourth surgery due to pain after the incident in July 1998. He did not have any information that Claimant was out of work for a year or more after the July 1998 injury or that he has a pending workers' compensation claim against the Somerset Patriots. (Exhibit O:31-35).

His employment history noted Claimant to have been a baseball pitcher for ten years, playing for six different teams. (Exhibit O:12). Previous surgeries included right elbow surgeries in 1988 and 1992 to remove osteocartilagenous loose bodies. (Exhibit O:13-14). He lacks extension by 15% and flexion by 20% of the right elbow; muscle strength of 3/5 and lacks 20% rotation at the elbow. (Exhibit O:15). There is also slight atrophy of the right forearm. (Exhibit O:16)

Dr. Poetz noted Claimant to have a right elbow degenerative joint disease with osteocartilagenous loose bodies status post debridement times two pre-existing the July 15, 1993 injury. (Exhibit O:19). Dr. Poetz recommended avoiding overhead reaching and lifting, excessive and repetitive use of the right upper extremity, avoiding heavy lifting and strenuous activity or any activity that exacerbates the symptoms or is known to cause progression of the disease process and to consider steroid injections. (Exhibit O:21). These recommendations and restrictions were made without knowledge of a subsequent injury in 1998. (Exhibit O:40).

He related 55% PPD to the right upper extremity at the elbow from the July 15, 1993 injury. (Exhibit O:22). He also assessed a 20% PPD pre-existing at the elbow; he further noted PPD at the lower left extremity at the foot, the knee, the right upper extremity at the shoulder, to the body as a whole at the lumbar spine and the body as a whole due to cirrhosis secondary to alcoholism. (Exhibit O: 23-24).

He opined the various conditions combine to render Claimant permanently and totally disabled and the simple sum of the permanent partial disabilities combine to exceed their simple sum. (Exhibit O:24-25). This assessment was made without knowledge of a subsequent injury in July 1998. (Exhibit O:40). There were no records showing limitations from the cirrhosis, the foot, the right shoulder, the knee, or the lumbar spine which prior to 1993. (Exhibit O:48-57).

Dr. Poetz was unable to determine whether perhaps part of the 55 percent disability is due to the July 1998 injury. He did not have enough information as to what injuries were incurred and what surgeries were performed. (Exhibit O:35-36). He conceded it is possible that such an incident may have aggravated or contributed to his disability, but testified he did not have enough information about the July 1998 injury to determine if it would explain his current complaints. (Exhibit O:36-37).

*Dr. Emmanuel*

James P. Emanuel, M.D. testified on behalf of Employer on May 23, 2005. (Exhibit10:1). Dr. Emanuel is a board certified orthopedic surgeon specializing in orthopedic surgery for 25 years and focusing his practice on shoulder and elbow work, including performing elbow surgeries on pitchers. (Exhibit10:5).

He evaluated Claimant first on June 25, 2002 including a history from Claimant of loss of motion in his elbow which had progressed over the four years prior to June 25, 2002. (Exhibit O:7). His past surgical history included elbow surgeries in 1988, 1992, 1993 and 1998. (Exhibit 10:9). In 2002, Claimant was a full-time stagehand. (Exhibit 10:9). He did not disclose to the Doctor that on July 1, 1998 his right elbow popped while pitching for the Somerset Patriots. (Exhibit 10:10).

Dr. Emanuel noted well-healed scars about the elbow, a range of motion of minus 37 degrees to 130 degrees of flexion, full supination and pronation, some tenderness along the medial epicondyle, tenderness in the

area of the ulnar groove, a positive Tinell's at the elbow and a positive Phalen's at the elbow for cubital tunnel syndrome with slight weakness in elbow extension. (Exhibit 10:13).

He concluded Claimant to have osteoarthritis of the right elbow with a flexion contracture and status-post multiple surgical procedures on the elbow. (Exhibit 10:16). He recommended an EMG/NCV to rule out the possibility of entrapment of the ulnar nerve at the elbow. (Exhibit 10:17). The findings indicated evidence in Exhibit of a possible C7 greater than C5-6 radiculopathy of the right upper extremity and an S1 greater than L4-5 radiculopathy of the lumbar spine, a right upper extremity carpal tunnel syndrome and a mild tibial neuropathy of the lumbar spine. (Exhibit 10:17-18). As a result of the EMG study, he did not feel a transposition of the ulnar nerve was necessary at the elbow. (Exhibit 10:18). He did not have Dr. White's records to determine whether or not the surgical procedure was medically indicated at that point. (Exhibit 10:43). He agreed there can be occasions in which an EMG comes up negative but where positive findings in a clinical examination show the actual presence of cubital tunnel or carpal tunnel syndrome. (Exhibit 10:42).

Dr. Emanuel next examined Claimant on April 28, 2005. (Exhibit 10:18). Claimant had gone on to have another surgery on his right elbow in June 2003, the sixth right elbow surgery he had undergone. (Exhibit 10:18-19). He was released from Dr. White's care on July 13, 2004 lacking only 2 degrees of full extension and having full flexion, supination and pronation. (Exhibit 10:19). X-rays suggested extensive degenerative arthritis at the right elbow with restrictions in regard to lifting, pushing and pulling and Claimant was noted to be at MMI. (Exhibit 10:19).

Claimant complained of more numbness and tingling in the index and long finger with his entire elbow throbbing with pain radiating up into his shoulder; he described increased motion but less strength following the latest surgery. (Exhibit 10:20). Dr. Emanuel noted Claimant's range of motion was -28 degrees to 133 degrees; a prominence over the area of the lateral epicondyle (a resection of his radial head); full pronation and supination; good strength in elbow flexion and extension; some laxity with valgus stress at the elbow at 30 degrees flexion. (Exhibit 10:21). X-rays showed further degeneration of the joint with joint space narrowing and the new resection of the radial head caused by a degenerative condition of the elbow as a result of his throwing, multiple loose bodies and bone spurs and multiple surgeries leading to the deterioration and arthritic degeneration of his elbow. (Exhibit 10:22).

Dr. Emanuel believes the degeneration of his elbow started probably in the late 1980's as Claimant had difficulty with locking, loose bodies and bone spurs. (Exhibit 10:23). He had signs of early deterioration of the elbow joint that led to surgeries in 1988 and 1992. (Exhibit 10:24-25). Claimant's injury of July 15, 1993 was part of a continuum with his continued physical activities causing it to degenerate further. (Exhibit 10:25). He testified his pitching for Employer on July 15, 1993 aggravated the preexisting degenerative condition. (Exhibit 10:26). He also noted the pitching for the Somerset Patriots on July 1, 1998 when his elbow popped on him was a substantial factor aggravating his right elbow condition further. (Exhibit 10:26). He could not make a causal relationship between Claimant's neck injury and his pitching. (Exhibit 10:27).

He believes Claimant to be limited to sedentary to light duty with regards to his upper extremity. (Exhibit 10:29). He testified Claimant had a 30 percent permanent disability to the elbow but does not think the July 15, 1993 incident pitching for the Cardinals caused the disability as it started with his prior injuries and since it is a degenerative condition which will continue to degenerate with time. (Exhibit 10:29 - 30).

Dr. Emanuel was unable to determine which incident caused his condition and was unable to determine what amount of his disability was related to the July 15, 1993 incident as Claimant's condition probably predated even 1988 and deteriorates over time as a result of his throwing. (Exhibit 10:30-31)

He testified it would take three to four months after an arthroscopy and removal of loose bodies to reach MMI; about six months for MMI after open capsulotomy and removal of spurs; and six months for MMI after an ulnar nerve transposition with an excision of the radial head and capsulotomy. (Exhibit 10:32-33).

Dr. Emanuel evaluated Claimant on April 28, 2005 and rendered an assessment of degenerative arthritis status post multiple surgeries. He gave a 30% PPD rating at the elbow and placed him at MMI. (Exhibit J)

## Nature and Extent of PPD and Medical Causation

The testimony of Dr. Poetz is offered by the claimant to prove that he sustained a permanent partial disability of 55% of the right elbow in addition to a pre-accident disability of 20% of the right elbow. Dr. Poetz knew nothing about the subsequent accident of July 1998, when the claimant said his arm “exploded” on him while pitching, after which he had to undergo two more operative procedures or of his pursuing a workers’ compensation claim against the Somerset Patriots. The claimant thought he had told Dr. Poetz about that injury, but the doctor had no knowledge of it, nor did the claimant advise Dr. Emanuel of this new injury when first seen on June 25, 2002, although the doctor was aware of it when he re-examined the claimant on April 28, 2005.

Dr. Emanuel has expertise in all of these surgeries and with treating baseball players in the past. Dr. Emanuel rated the disability as on April 28, 2005 at 30% PPD of the elbow. He could not, in light of the newest injury, determine which injury caused this disability as the claimant had a long standing degenerative arthritic condition dating back to even before his first elbow surgery in 1988. He further stated that the pitching incident of July 15, 1993 aggravated the preexisting degenerative condition (Exhibit 10:26), and the pitching incident of July 1, 1998, was a substantial factor further aggravating the right elbow condition further. (Exhibit 10:26).

Claimant’s *overall* PPD of the right upper extremity at the level of the elbow is easily placed in the range of three-quarters loss thereof. Based upon the nature of the prior injury, the reported (current) injury, and treatment thereafter until re-injury (or subsequent) on July 1, 1998, together with Claimant’s testimony, a PPD of approximately one-quarter of the right elbow seems attributable to the current injury. In addition, the record suggests a pre-1993 PPD of 25% of the right elbow as a result of the two surgeries in 1988 and 1992 based upon the progression of his arthritis after those surgeries. Post-game therapies (even with few scheduled “work days”) and chronic pain evidence PPD despite the unusually demanding nature of Claimant’s job duties. It is reasonably inferred that significant additional PPD ensues from his newest injury of July 1, 1998 in the range of and additional twenty percent. Treatment procedures and Claimant’s testimony provide sufficient basis for this attribution model.

## SIF Liability

The numerous pre-existing injuries carry significant but finite PPD that is best described in terms of the body as a whole (BAW) rather than individually. Legally significant among them are the low back condition, and right shoulder and right knee conditions. Claimant’s continued work through these injuries and diffuse number of joints with degenerative disease, together with a trim body habitus and easy ambulation make the assessment unusual. Collectively, the above instances of injury accompanied by degenerative joint disease, when combined with the primary injury, suggest an overall *pre-existing* disability (PPD) in the range of one-third PPD of the body (BAW), or 166.6 PPD. This assessment is based upon low back PPD in the range of 15%, right shoulder PPD in the range of 15% and right knee PPD in the range of 15%. The record does not permit greater findings of pre-existing PPD. However, when combined with the primary injury, an increased overall disability may be found on the basis of the upper and lower body synergies. The inability to compensate in many ways due to the severity of the right elbow PPD is especially apparent in consideration of working regular and sustained hours. This increased overall disability is found to be two-thirds of the body, or 66.6% PPD (266.6 weeks). This results in SIF liability of 47.3 weeks.

## Temporary Partial Disability

Temporary partial disability is disability temporary in nature and partial in degree. Section 287.180 RSMo. Such benefits are temporary because they are designed to provide compensation during the “healing period” but not beyond the point where the condition has stabilized or reached maximum medical improvement or where the worker can return to work. Minnick v. South Metro Fire Prot. Dist., 926 S.W.2d 906, 909 (Mo.App.W.D.1996). Once the worker has reached maximum medical improvement the determination is one of permanent disability. Minnick at 909. This issue is determined by:

the amount which the employee, in the exercise of reasonable diligence, will be able to earn during the

disability, to be determined in view of the nature and extent of the injury and the ability of the employee to compete in an open labor market. Minnick at 910.

Receipt of some occasional earnings would not preclude an award of temporary partial disability as the employee need not be disabled from all work during the recovery period to be entitled to temporary partial disability. "...[N]either the worker's ability to engage in occasional or light duty work nor the worker's good fortune in obtaining work other than through competition on the open labor market should disqualify the worker from receiving such total disability benefits under the Workers' compensation Law." What must be determined here is not only what work the claimant actually did do during the disability period but also whether he could compete for employment on the open labor market. Minnick at 910.

In this case the claimant received temporary total disability benefits by stipulation of the parties until May 21, 1996. His next significant employment was in March 1998 when he joined the Somerset Patriots earning \$4,500.00 to \$5,000.00 monthly and then was reinjured on July 1, 1998. His testimony on his earnings and work from the time of termination of his temporary total disability compensation on May 21, 1996, was too vague to be probative on his ability or inability to work or as to his earnings or lack thereof or his ability to compete in the open labor market until he took the position with the Somerset Patriots in March 1998, again earning \$4,500.00 to \$5,000.00 monthly.

The record is insufficient to find a basis for TPD benefits between May 21, 1996, when temporary total compensation was terminated and March 1998 when he returned to baseball. A reasonable inference is that Claimant was at MMI concurrent with the termination of TTD benefits. One can only speculate what those earnings were, but speculation will not support an award. This compels a finding that Claimant failed to prove his entitlement to temporary partial disability compensation.

#### Conclusion

Accordingly, on the basis of the substantial competent evidence contained within the whole record, Claimant is found to have sustained a twenty-five percent PPD of the right elbow as a result of the reported injury. Five weeks of disfigurement is awarded. In addition, the SIF shall be liable for 47.3 weeks PPD for increased overall disability.

Given the obvious severity of the primary injury and preparation of expert evidence, an attorney fee is allowed in the amount requested of twenty percent (not to exceed \$5,000.00). Section 287.260 RSMo (2000). Cervantes v. Ryan, 799 S.W.2d 111, 115 (Mo.App. 1990).

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

Joseph E. Denigan  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Patricia "Pat" Secret  
*Director*  
*Division of Workers' Compensation*