

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

Injury No.: 08-095300

Employee: Gloria G. Stiers

Employer: Production Products, Mfg. (Settled)

Insurer: National Union Fire Insurance Company of Pittsburgh (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, heard the parties' arguments, reviewed the evidence and considered the whole record, we find that the award of the administrative law judge allowing compensation 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 by this supplemental opinion.

We offer this supplemental opinion to address the primary argument raised in the brief of the Second Injury Fund.

**Second Injury Fund Argument**

The Second Injury Fund argues that employee's repetitive motion injury does not qualify as "a subsequent compensable injury" for purposes of triggering Second Injury Fund liability under § 287.220.1 RSMo, which provides, as follows:

...If any employee who has 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, ...receives a subsequent compensable injury resulting in additional permanent partial disability...so that the degree or percentage of disability, ...caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. 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.

(Emphasis added).

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We summarize our understanding of the Second Injury Fund's legal reasoning: "Injury" as defined in § 287.020.3 RSMo excludes occupational diseases. A repetitive motion injury is an occupational disease by virtue of § 287.067 RSMo. Thus, a repetitive motion injury is not an "injury." A repetitive motion injury can never be a compensable "injury" that can trigger Second Injury Fund liability under § 287.220.1.

We summarize the Second Injury Fund's argument as applied to the facts of this claim: Employee's bilateral overuse syndrome is a repetitive motion injury. Employee's bilateral overuse syndrome is an occupational disease. Employee's bilateral overuse syndrome is not an injury. Employee's bilateral overuse syndrome is not a "subsequent compensable injury." Employee has failed to prove she suffered a subsequent compensable injury, so the Second Injury Fund is not implicated in this matter.

### Discussion

The Second Injury Fund argument fails. The Second Injury Fund fails to give effect to the complete definition of injury in § 287.020.3. The complete definition includes occupational diseases within the definition of "injury" where specifically provided in Chapter 287.

Section 287.020.3(5) RSMo states:

The terms "injury" and "personal injuries" shall mean violence to the physical structure of the body and to the personal property which is used to make up the physical structure of the body, such as artificial dentures, artificial limbs, glass eyes, eyeglasses, and other prostheses which are placed in or on the body to replace the physical structure and such disease or infection as naturally results therefrom. *These terms shall in no case except as specifically provided in this chapter be construed to include occupational disease in any form, nor shall they be construed to include any contagious or infectious disease contracted during the course of the employment, nor shall they include death due to natural causes occurring while the worker is at work.*

(Emphasis added).

Chapter 287 specifically provides for injuries by occupational disease and specifically says those injuries are compensable.

Section 287.067 RSMo states, in relevant part:

2. An injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

3. An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. An occupational disease due to repetitive motion is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or

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

8. With regard to occupational disease due to repetitive motion, if the exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than three months and the evidence demonstrates that the exposure to the repetitive motion with the immediate prior employer was the prevailing factor in causing the injury, the prior employer shall be liable for such occupational disease.

(Emphasis added).

The above sections specifically refer to a condition of ill caused by occupational disease, including one caused by repetitive motion, as an "injury." That is, the legislature specifically provided that the term "injury" includes occupational disease and that injuries by occupational disease, including injuries by repetitive motion, are compensable.

Based upon the foregoing, we construe the term "injury" as it appears in the phrase "subsequent compensable injury" in § 287.220.1 to include occupational diseases.

**Conclusion**

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

The award and decision of Administrative Law Judge David L. Zerrer, issued September 16, 2011, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 8<sup>th</sup> day of March 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

\_\_\_\_\_  
James Avery, Member

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

Attest:

\_\_\_\_\_  
Secretary

## AWARD

Employee: Gloria G. Stiers

Injury No. 08-095300

Dependents:

Employer: Production Products, Mfg.

Additional Party: Second Injury Fund

Insurer:

Hearing Date: May 25, 2011/June 20, 2011

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Checked by: DLZ

### 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: October 23, 2008
5. State location where accident occurred or occupational disease was contracted: Callaway County, 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? N/A
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
Claimant had repetitive injury to both upper extremities
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: Bilateral hands, wrists, and arms
14. Nature and extent of any permanent disability: 32% of the right arm at the 210-week level; 30% of the left arm at the 210-week level
15. Compensation paid to-date for temporary disability: \$13,758.21
16. Value necessary medical aid paid to date by employer/insurer? \$35,121.14

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- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$303.50
- 19. Weekly compensation rate: \$202.33
- 20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable: All issues previously settled with Employer
- 22. Second Injury Fund liability: Yes  No  Open

Permanent total disability benefits from Second Injury Fund:  
\$202.33 per week beginning August 11, 2012, for the remainder of Claimant's lifetime.

TOTAL: \$202.33 PER WEEK BEGINNING AUGUST 11, 2012, FOR THE REMAINDER OF  
CLAIMANT'S LIFETIME

- 23. Future requirements awarded: None

Said payments to begin August 11, 2012 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: Christine Kiefer/VanCamp Law Firm

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

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Injury No: 08-095300

Dependents:

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Employer: Production Products, Mfg.

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

Additional Party: Second Injury Fund

Insurer:

Checked by: DLZ

On the 25<sup>th</sup> day of May, 2011, the parties appeared before the undersigned Administrative Law Judge for final hearing. The Claimant appeared in person and by her attorney, Christine Kiefer. The Employer, having previously settled and compromised all issues, does not appear. The Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, appears by Assistant Attorney General David Zugelter. The record was ordered to remain open until 5:00 p.m., June 20, 2011, for the receipt of legal briefs or memorandums.

The parties entered into a stipulation as to certain facts which are not at issue in this claim, as follows, to wit: On or about October 23, 2008, Production Products, Mfg. was an employer operating subject to the Missouri Workers' Compensation Law; on the alleged injury date of October 23, 2008, Gloria G. Stiers was an employee of the Employer; the Claimant was working subject to the Missouri Workers' Compensation Law; the parties agree that on or about October 23, 2008, Claimant sustained an occupational disease, which arose out of the course of and scope of employment; the employment occurred in Callaway County, Missouri, and the parties agree that Cole County, Missouri, is the proper venue for this hearing; the Claimant notified the Employer of the injury as required by Section 287.420; the Claimant's claim was filed within the time prescribed by Section 287.430; at the time of the claimed occupational disease, Claimant's average weekly wage was \$303.50, sufficient to allow a compensation rate of

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\$202.33 for temporary total disability, permanent partial disability, and permanent partial disability; temporary disability benefits have been paid in the amount of \$13,758.21, prior to the date of this hearing; the Employer has paid medical benefits in the amount of \$35,121.14, prior to the date of this hearing; Claimant's attorney seeks approval of an attorney fee of 25% of the amount of any award.

## **ISSUE**

The liability of the Second Injury Fund for permanent total disability/enhanced permanent partial disability?

## **DISCUSSION**

A legal file was established for this hearing which consisted of the following documents, to wit: Report of Injury; Claim for Compensation, filed with the Division June 3, 2009; Amended Claim for Compensation, filed with the Division January 29, 2010; Second Amended Claim for Compensation, filed with the Division March 18, 2010; Third Amended Claim for Compensation, filed with the Division April 9, 2010; Answer of the Second Injury Fund to the Amended Claim for Compensation, filed with the Division February 4, 2010; Answer of the Second Injury Fund to the Second Amended Claim for Compensation, filed with the Division March 24, 2010; Answer of the Second Injury Fund to the Third Amended Claim for Compensation, filed with the Division April 14, 2010; Stipulation for Compromise Lump Sum Settlement, approved by the Division December 21, 2010; Request for Final Hearing, filed with the Division March 1, 2011.

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Claimant offered, and there was admitted without objection, the following exhibits, to wit:

**Claimant's Exhibits**

- A Medical records, report, Hand Surgery Associates, P.C.
- B Medical records, Orthopaedic & Rheumatology Associates, PC
- C Medical records, Trinity Family Medical Associates
- D Medical records, Callaway Community Hospital
- E Medical records, Select Physical Therapy
- F Medical records, Fulton State Hospital/Mid-Missouri Mental Health
- G Medical records, Arthur Center/Options Unlimited
- H Medical records, Neurology Consultants, PC
- I Medical records, University Physicians Callaway
- J Medical records, Women's Health Associates, Inc
- K Division of Workers' Compensation dated February 4, 2010
- L Records, Covington City Public Schools dated April 16, 2010
- M Stipulation for Compromise Settlement for Injury No. 08-095300
- N Deposition of A.E. Daniel, MD
- O Deposition of Phillip Eldred, MS
- P Deposition of Dr. David T. Volarich, D.O.
- Q Medical report, Dr. Russell, Columbia Orthopedic Group

Gloria G. Stiers, Claimant herein, testified in her own behalf. Claimant is 39 years of age at the date of hearing and lives in Fulton, Missouri, in an apartment which is rent free and for which Claimant pays the utilities only, as a qualified disabled person. Claimant is not employed and has not worked since October 23, 2008.

The Claimant was employed by the Employer as a seamstress where she worked full-time, eight hours a day, and was involved in the process of manufacturing plastic liners. As a part of her job task, she would sit at a sewing machine and push or pull large pieces of fabric through a machine. The pieces of fabric were heavy and from time to time required a co-employee to assist in running the fabric through the machine. The Claimant was employed by the Employer for several different periods over several years. She testified that she would

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frequently have depression, anxiety and other psychiatric issues which would keep her from steadily maintaining her employment.

Prior to working at Production Products Mfg., the Claimant was a Security Aide at Fulton State Hospital for approximately a year and a half. She reported that she did have some lower back pain and one instance of a back strain while employed there, but she did not file a workers' compensation claim. Claimant testified that she resigned her employment from the Fulton State Hospital because she was having anxiety attacks and depression. Other previous employment of the Claimant included cleaning for a restoration company, working as a cashier at a gas station, working at other factories as a seamstress, and working in restaurants as a cook, waitress, and dishwasher.

Claimant testified that all of her prior employment was sporadic and that over the course of her entire employment history, she has had difficulty maintaining a job. Claimant testified that she attributes her inability to maintain steady employment to her long standing psychiatric issues which made her anxiety level strong enough that she was unable to leave the house on several occasions, which resulted in excessive absenteeism.

Claimant testified that she attended school up until the 9<sup>th</sup> grade when she dropped out and got married at the age of 15. She testified that she always had difficulty reading and comprehending school work and that she also had problems with numbers, particularly with inverting them and reading them backwards. Claimant testified that she was placed in special education classes during her school career and that once she became old enough to quit school, she immediately did so because of her long standing and significant struggle with all academics. The Claimant reported that she studied for the GED on several occasions, but never took the test.

Claimant testified that her learning disabilities made it very difficult for her to perform

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the job as cashier at a gas station since she had difficulty counting change. She also testified that there was a specific incident while working at the gas station where she became so paranoid and anxious that she was pacing throughout the store during her shift. Her anxiety and behavior caused her employer to send her home and to tell her she would be on medical leave. She was not allowed to return to work.

Claimant reported a troubled childhood as well as adolescence, and stated that her depression, anxiety, and paranoia began as a teenager. She reported that her behavior was a concern of her parents, but that they didn't know what to do and did not get her into treatment. She testified that as a teenager she burned a house down and was involved in the juvenile justice system. She struggled with agoraphobia and paranoia regarding driving, so much so that she did not obtain her driver's license until the age of 26. She reported that there were occasions when she would pull the car over feeling paralyzed and unable to continue driving. These instances also resulted in the loss of jobs over the years.

Claimant reported that her depression began as a teenager, and that when she was the age of 24, she made her first suicide attempt. She was hospitalized soon after that and began taking the medication Effexor. The medication made her drowsy, and she then struggled with maintaining jobs due to the side effects of the medication. She reported episodes of staying in bed for days at a time, followed by manic episodes where she would stay up all night and be unable to control her racing thoughts. This would be followed by another depressive episode where she would be unable to function. Following a second suicide attempt, the Claimant began taking Trazodone, Klonopin, and Cymbalta. Claimant has treated with a psychiatrist in Fulton, both outpatient and inpatient, and remains on medication.

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Claimant testified that in 1999 she was trying to exit through a window during a domestic disturbance when she was tackled to the ground. She testified that she fell flat on her tailbone and immediately felt pain, leading to nausea and a feeling of “seeing stars.” She reported that within two weeks, she felt like her left hip was out of place and was going numb. She felt a radiating pain from her low back into her tailbone and down her left hip. Claimant was treated by a chiropractor for her back and leg pain complaints. She reported ongoing difficulty sitting for long periods of time. Claimant testified that following this incident, she began bringing a pillow to work to alleviate some of her discomfort while sitting. She also would sit with her leg underneath her to take some pressure off of the left side of her buttocks. She did report the pain was less severe when she was working at a cashier job, which required more standing. However, she reported longstanding pain and difficulties in her low back, hip, and tailbone area when working at the various factories as a seamstress. She reported that the pain wakes her at night and that she often sleeps on the couch, which is more comfortable than the bed.

Claimant testified that in 2000 she was lifting heavy tents while working as a seamstress and suffered severe pain in her left arm. She also indicated ongoing pain in the left hand and arm in 1993 and 1994 when she was working at a different sewing job than this Employer. No surgery or treatment was ever provided for carpal tunnel syndrome at that time.

Claimant testified that on October 23, 2008, she felt ongoing pain in both arms, and on that day she felt a pain in her right arm at which time her right arm “locked up” and she was unable to move it. The Claimant reported the injury and was sent for medical treatment where she was diagnosed with right lateral epicondylitis and was advised to use a non-steroid anti-inflammatory. She was also sent for physical therapy. In a follow-up appointment, it was noted that she had bilateral wrist and hand pain with numbness, as well as decreased range of motion.

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She was diagnosed with bilateral carpal tunnel syndrome and received an injection in the left wrist.

In February of 2009, an EMG showed mild to moderate carpal tunnel syndrome in the right hand and mild carpal tunnel syndrome in left hand. On April 13, 2009, an open carpal tunnel release was performed on both wrists. Following the surgery Claimant continued to complain of right wrist pain and swelling, with tingling to the fingertips. In May of 2009, Claimant complained of pain in the right palm with loss of movement, for which she received physical therapy. The medical records indicate that in June 2009 there was numbness and tingling in the fingers, which was worse at night, and Claimant was restricted from all lifting. In August 2009 Claimant underwent surgery for right cubital tunnel release on her right elbow. Claimant was released in December 2009 by Dr. Ripperger with permanent restrictions of no repetitive gripping, pushing or pulling, and no lifting more than 20 pounds.

Dr. Garth Russell provided an independent medical evaluation which included a history from Claimant, review of medical records, and a physical examination. Dr. Russell diagnosed Claimant with chronic synovitis of the upper extremities bilaterally with aggravation of prior chronic synovitis with physical activity. Dr. Russell further reported that Claimant had a long history of chronic anxiety bipolar type II disorder with depression. Dr. Russell reported that Dr. Ripperger's permanent restrictions were correct, and the Claimant should not perform activities which require extensive use of Claimant's upper extremities.

Dr. David Volarich testified by deposition. Dr. Volarich testified that he performed an independent medical evaluation of the Claimant and that he authored a report dated July 19, 2010, following the evaluation. Dr. Volarich diagnosed Claimant with overuse syndrome of the upper extremities at the wrists, bilaterally. In addition, he diagnosed overuse syndrome of the

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right upper extremity at the elbow causing cubital tunnel syndrome and lateral epicondylitis, as well as overuse syndrome of the left upper extremity at the elbow causing cubital tunnel syndrome and lateral epicondylitis.

Dr. Volarich rated Claimant's permanent disability at 35% of the right upper extremity at the wrist; 35% of the left upper extremity at the wrist; 35% of the right upper extremity at the elbow; and 40% of the left upper extremity at the elbow. Dr. Volarich further opined that due to the combination of Claimant's injuries, a multiplicity factor of 10% of the total number of weeks of disability should be added.

Dr. Volarich gave Claimant restrictions with regard to her hands, wrists, and elbows. Claimant's restrictions included minimizing repetitive gripping, pinching, squeezing, pushing, pulling, twisting, and rotary motions; avoiding impact and vibrating use of hands; no lifting more than two pounds with either upper extremity alone with arm extended; no lifting more than ten pounds.

Dr. Volarich's report set out diagnoses for Claimant's pre-existing conditions of repetitive strain of bilateral wrists with carpal tunnel syndrome; chronic lumbar syndrome secondary to bulging disk at L5-S1; and depression, anxiety and bipolar disorder. Dr. Volarich rated Claimant's pre-existing conditions at 10% of the right upper extremity at the wrist; 10% of the left upper extremity at the wrist; and 20% of the body as a whole, referable to the lumbar spine. Dr. Volarich deferred any rating for Claimant's psychiatric conditions to a specialist. Dr. Volarich did opine that the simple sum of Claimant's various conditions and injuries created a substantially greater disability.

Dr. Volarich also set out restrictions for the Claimant's pre-existing lumbar condition which included no bending, twisting, lifting, pushing, pulling, carrying, or climbing, except to

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tolerance; lifting weights to tolerance; maintaining fixed positions to tolerance; changing positions as needed.

Dr. A.E. Daniel testified by deposition. Dr. Daniel testified that he performed a psychological evaluation of the Claimant on May 3, 2010, and on May 11, 2010. He testified that he took a history and performed certain tests, as well as reviewing certain medical records identified in his report.

Dr. Daniel reported that Claimant's history included sexual abuse, including rape; a history of "suicidal gestures;" and a long history of treatment, including, but not limited to, psychotropic medications. Dr. Daniel diagnosed Claimant with Generalized Anxiety Disorder with panic attacks and paranoia; major depressive disorder, chronic; and possible post-traumatic stress disorder. He also found that Claimant had a learning disorder. He opined that Claimant's Global Assessment of Functioning score was 45.

Dr. Daniel opined that Claimant had significant psychiatric impairment due to depression, anxiety, panic attacks, and paranoia, all of which contributed to affect her concentration, persistence, and pace in the workplace, which resulted in partial disability in her work as a seamstress, as well as at other jobs.

Dr. Daniel opined that Claimant's physical and psychiatric impairments combined to cause Claimant to be unable to compete in the open labor market and that Claimant should be considered permanently totally disabled as a result of Claimant's "significant and exhaustive pre-existing psychiatric conditions and the most recent work-related injury."

Mr. Phillip Eldred testified by deposition. Mr. Eldred testified that he performed a rehabilitation consultation and evaluation of the Claimant and issued a report of his evaluation

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dated August 3, 2010. Mr. Eldred reviewed certain medical and other records furnished by Claimant's attorney, administered certain tests to Claimant, and interviewed Claimant.

Mr. Eldred reported that after reviewing work restrictions set out by Drs. Schlafly, Ripperger, and Russell, Claimant was restricted to the sedentary work level. Mr. Eldred opined that, based on his evaluation, Claimant's pre-existing conditions constituted a hindrance or obstacle to employment; Claimant is unable to perform any of her past work; it is highly unlikely that any reasonable employer in the normal course of business would hire Claimant for competitive, gainful employment; Claimant lacks any transferable job skills for the sedentary work level; Claimant would have a difficult time retraining due to constant pain, lack of high school education and low academic test scores; Claimant is unemployable in the open labor market; and Claimant is permanently totally disabled as a result of her injury of October 23, 2008, combined with her pre-existing mental condition.

The Second Injury Fund presented no live testimony at the hearing. The Second Injury Fund offered, and there was admitted without objection, Exhibit I, which sets out a functional capacity evaluation dated December 28, 2009. The result of the evaluation was that Claimant would be employable on a full time basis within the medium physical demand level. The evaluation was ordered by Dr. Ripperger.

## **FINDINGS OF FACT AND RULINGS OF LAW**

### **The liability of the Second Injury Fund for permanent total disability/enhanced permanent partial disability?**

If the last injury in and of itself renders a claimant permanently and totally disabled, the Second Injury Fund has no liability, and the employer is responsible for the entire compensation.

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Nance v. Treasurer of Missouri, 85 S.W.3d 767 (Mo.App. W.D. 2003) Missouri courts have articulated that in order for Second Injury Fund liability to be triggered:

An employee must have a preexisting permanent partial disability, whether from a compensable injury or otherwise. The permanent disability predating the injury in question must exist at the time the work injury was sustained and be of such seriousness as to constitute a hindrance or obstacle to employment or re-employment should the employee become unemployed. Liability of the Second Injury Fund is triggered only by the finding of the presence of an actual and measurable disability at the time the work injury is sustained. E.W. vs. Kansas City, Missouri School District, 89 S.W.3d 527, 537 (Mo.App. 2002) Overruled on other grounds by Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. banc 2003); citations omitted.

In order to be entitled to Second Injury Fund liability, a claimant must establish that a preexisting partial disability combined with a disability from a subsequent injury, to create permanent and total disability. Gassen vs. Lienbengood, 134 S.W.3d 75, 79 (Mo.App. 2004). Various factors may be considered, including the employee's physical and mental condition, age, education, job experience and skills in making a determination as to whether the employee is permanent, totally disabled. Tiller v. 166 Auto Auction, 941 S.W.2d 863 (Mo.App. 1997); and Olds v. Treasurer, 864 S.W.2d (Mo.App.1993).

Section 287.020.7 of the Missouri Revised Statutes defines "total disability as the inability to return to any employment and not merely an inability to return to the employment in which the employee was engaged in at the time of the accident." The test for permanent total disability is whether a claimant is able to competently compete in the open labor market given his or her condition and situation. Messex v. Sachs Elec. Co., 989 S.W.2d 206, 210 (Mo.App. E.D. 1999). "An inability to return to any reasonable or normal employment" further defines total disability. The issue, in making this determination, is whether or not an employer, in the normal course of business, would be reasonably expected to employ the individual in the usual course of business, and if the employee, in her present physical condition could be reasonably expected to

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perform the work for which she is hired. Thornton v. Haas Bakery, 858 S.W.2d 831, 834 (Mo.App. 1993).

After a review of all the evidence presented at the hearing, both oral and written, and based on the record as a whole, I find that Claimant was not permanently totally disabled as a result of the injury of October 23, 2008, alone. I further find that the testimony and opinions of Drs. Volarich and Daniel are credible and contain a clear evaluation of Claimant's condition as a result of the injury of October 23, 2008, and Claimant's pre-existing conditions and injuries.

I further find that Claimant is permanently and totally disabled as a result of the combination of Claimant's work-related injury of October 23, 2008, which was resolved by a settlement of permanent partial disability of 32% of the right arm at the 210-week level and permanent partial disability of 30% of the left arm at the 210-week level.

I further find that the Claimant's permanent total disability began February 11, 2010, 68 weeks after the date of injury, at which time temporary total disability payments were no longer paid.

I further find that the Second Injury Fund is obligated to pay permanent total disability benefits from and after the date of February 11, 2010. I further find that Claimant received 130.2 weeks of permanent partial disability benefits at the rate of \$202.33 per week, for which the Second Injury Fund is entitled to credit.

Based on the findings set out above, the Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, is hereby ordered to pay to Claimant the sum of \$202.33 per week from and after February 11, 2010. The Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, is hereby granted a credit in the amount of \$202.33 per week for a period of 130.2 weeks beginning February 12, 2010. Thereafter, Treasurer shall pay to Claimant, as and

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for permanent total disability benefits, the sum of \$202.33 per week for the remainder of Claimant's lifetime.

I find this issue in favor of Claimant.

Claimant's attorney requested approval of an attorney fee of 25% of the amount of this award. Claimant's attorney's fee request is hereby approved. Claimant's attorney is awarded a fee of 25% of the amount of this award. Claimant's attorney is hereby granted a lien on the proceeds of this award unless and until the attorney fee shall have been paid in full.

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

David L. Zerrer  
*Administrative Law Judge*  
*Division of Workers' Compensation*