

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

Injury No.: 03-097164

Employee: Nolan Tinnin
Employer: Daimler Chrysler (Settled)
Insurer: Self-Insured (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: September 18, 2003
Place and County of Accident: St. Louis, Missouri

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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 21, 2007. The award and decision of Administrative Law Judge Margaret D. Landolt, issued December 21, 2007, is attached and incorporated by this reference.

The Commission further approves and affirms 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 26th day of June 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Before the
Division of Workers'
Compensation

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

Employee: Nolan Tinnin

Injury No.: 03-097164

Dependents: N/A

Employer: Daimler Chrysler (Settled)

Additional Party: Second Injury Fund

Insurer: Self-Insured (settled)

Hearing Date: October 30, 2007

Checked by: MDL: ms

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
 - 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
 - Date of accident or onset of occupational disease: September 18, 2003
 - State location where accident occurred or occupational disease was contracted: St. Louis
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? N/A
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
 - Was claim for compensation filed within time required by Law? Yes
10. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee performed repetitive work activity involving his back and neck.
12. Did accident or occupational disease cause death? No

13. Part(s) of body injured by accident or occupational disease: Body as a whole – cervical and lumbar spine

- Nature and extent of any permanent disability: 12.5% PPD of the body as a whole with respect to his cervical and lumbar spine as a result of the primary injury, and 12.5% PPD body as a whole preexisting with respect to DVT.

15. Compensation paid to-date for temporary disability: N/A

16. Value necessary medical aid paid to date by employer/insurer? N/A

Employee: Nolan Tinnin

Injury No.: 03-097164

17. Value necessary medical aid not furnished by employer/insurer? N/A

- Employee's average weekly wages: Unknown

19. Weekly compensation rate: \$662.55/\$347.05

20. Method wages computation: Stipulation

COMPENSATION PAYABLE

22. Second Injury Fund liability: Yes

15 weeks of permanent partial disability from Second Injury Fund	\$5,205.75
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Total:	\$5,205.75
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23. Future requirements awarded: None

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

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Nolan Tinnin

Injury No.: 03-097164

Before the

Division of Workers'
Compensation

Dependents: N/A

Employer: Daimler Chrysler (Settled)

Additional Party: Second Injury Fund

Insurer: Self Insured

Checked by: MDL: ms

PRELIMINARIES

A hearing was held on October 30, 2007, at the Division of Workers' Compensation in the City of St. Louis. Nolan Tinnin (Claimant) was represented by Mr. Shaun Falvey. Daimler Chrysler (Employer) previously settled its liability with Claimant, and this claim proceeded to a hearing against the Second Injury Fund (SIF), which was represented by Assistant Attorney General Joseph Diekemper. Mr. Falvey requested a fee of 25% of Claimant's Award.

The parties stipulated that on or about September 18, 2003, Claimant was an employee of Employer; venue is proper in the City of St. Louis; and the claim was timely filed. The parties stipulated to applicable rates of compensation of \$662.55 for total disability (TTD) benefits and \$347.55 for permanent partial disability (PPD) benefits.

The issues for hearing are: whether Claimant sustained an occupational disease arising out of and in the course of employment; medical causation; nature and extent of permanent partial disability sustained by Claimant; whether Claimant is permanently and totally disabled; and liability of SIF.

At the request of SIF, the Court takes administrative notice of the stipulation for Compromise Lump Sum Settlement in Injury Number 95-067263. The Court also takes administrative notice of the claims in Injury Numbers 95-075898, and 99-097378.

SUMMARY OF EVIDENCE

Claimant is a 68 year old man who completed eleventh grade and later obtained a GED. He also took classes in personal management and American history. Claimant received a barber license in 1958 which is currently inactive, and also obtained a real estate license which is also currently inactive. Claimant began working for Employer in October 1973, and worked there continuously for thirty years, except during a shutdown from 1979 to 1982. Claimant last worked for Employer in 2003 when he retired.

During the plant shutdown from 1979 to 1982, Claimant had a job selling office supplies but was unsuccessful at that job. He also set up his own barber shop, and was in the process of building the business when the plant reopened. Claimant has not worked as a barber since that time, and he went back to work for Employer when the plant reopened.

Claimant testified he developed carpal tunnel syndrome and fractured his thumbs in 1973. He never had surgery to correct his thumbs, and he testified it has affected his entire body. Claimant testified he is unable to hold anything, he cannot grip, and he drops things. He is unable to hold a knife or fork, and has difficulty eating. He is unable to hold scissors, a comb, or clippers anymore, and he planned to work as a barber when he retired. His thumbs have grown crooked, and cause him constant pain. Claimant testified this pain was present leading up to 2003.

Claimant has a twenty year history of blood clots. Claimant testified he can get surface blood clots at any

time, and has also had deep clots. His clots produce swelling and pain. He was hospitalized several times for the clots. Claimant is on a blood thinner, and has to get a monthly blood test. In Claimant's opinion, his clots would interfere with his ability to perform a sedentary job because he would have to elevate his legs. He wears support stockings, and wore them to work when he was working for Employer. If he goes to work and thinks he has a blood clot, he has to get off his feet and elevate his legs.

Claimant testified in 1999 he injured his back when he lifted a seat, and his back went out from his shoulders to his low back. That condition continued to affect him leading up to 2003.

The primary injury arose out of Claimant's last job assignment before he retired. Claimant is asserting a claim for occupational disease arising out of the repair job he performed for a few weeks or months before he retired. The repair job required Claimant to straddle the line while holding a gun overhead and installing a hinge. It required duck walking along the side front fender of the vehicles, and also crawling in the back and lift gate to install seats. Claimant worked eight to ten hours, five to six days a week. Claimant testified he began to experience symptoms in his back when he was placed on the repair job. He felt like everything in his back exploded from lifting the seats, straddling the line, and holding the overhead gun. He felt lifting the seats, which weighed 150 to 200 pounds, and holding the gun, exacerbated his neck and back conditions. Claimant had to move the seats by himself around 15 to 20 times during the shift.

Claimant testified in September 2003, he started having neck and back problems and started losing time from work. He lost several months of work, and tried numerous times to return to the plant. He was never cleared to return to the assembly line. October 1, 2003, is the last day he physically worked at the plant.

Claimant testified he had shots in his neck which were performed by Dr. Youkilis, a spine surgeon, and had physical therapy three times a week for six weeks. Dr. Youkilis performed MRI's and X-rays, but advised Claimant surgery was risky because he was on a blood thinner.

Claimant testified he currently experiences excruciating pain even while taking pain killers. He is unable to grip or hold anything. He cannot lift 10 pounds. He experiences grinding in his neck, and his back is full of pain. He is unable to sit because it hurts his back and down his hips. He has pain if he walks up steps, and he is unable to sit for prolonged periods. He is unable to drive because he cannot hold the steering wheel and cannot turn his neck. His wife and son drive him around. He is unable to lift his grandson. Claimant testified he was hoping to work when he retired.

Claimant testified he has been experiencing memory loss for a few years, and it has gotten worse since he retired. Claimant testified his memory problems started before he left work for Employer, but have accelerated since then. Claimant testified for the past few years he has been monitored for diabetes.

Claimant does not believe he is able to return to work at Employer because of the constant pain in his neck, back, and hands. Claimant is unable to do things around the house, and cannot use a computer. He does not believe he could perform a sit down job because his back and neck are painful, and he cannot sit or stand for long. He does not believe he has any skills that would make him a candidate for an office job. He is unable to garden or do yard work. Claimant is no longer able to do wood working because he cannot hold anything, and he is no longer able to garden.

In a typical day, Claimant gets out of bed, gets coffee, and is unable to do much because of pain. He gets cold easily because of his blood thinner medication so he can't go out when it's cold. Claimant currently takes 800 milligrams of Ibuprofen, codeine, and a blood thinner.

Dr. Youkilis examined Claimant on October 30, 2003. Claimant's chief complaints were neck and back pain with bilateral shoulder and bilateral lower extremity pain. Dr. Youkilis noted a past medical history of bilateral deep venous thrombosis and pulmonary embolism approximately ten years before. Claimant reported no previous surgeries on his back or neck.

With regard to Claimant's upper and lower extremities examination, Dr. Youkilis found good range of motion in all extremities. The muscular structure of the upper and lower extremities showed no loss of functional strength. Re-examination of the upper and lower extremities revealed no loss of pin or touch sensation. Claimant did have pain with full extension in the cervical spine, but no tenderness to palpation or percussion.

Dr. Youkilis examined X-rays and an MRI of Claimant's neck and back which were done on October 18, 2003. He found degenerative disc disease at C5-6, with anterolisthesis of C4 on C5. The MRI of the cervical spine showed degenerative disc disease at C5-6 with osteophyte formation bilaterally. In the lumbar spine there was evidence of multi-level spondylosis with mild to moderate lumbar stenosis in the mid lumbar region. The cervical and lumbar studies showed a loss of lordosis.

Dr. Youkilis stated Claimant's problem was from degenerative disc disease and spondylosis in the cervical and lumbar spine. He saw no evidence of a clear cut cervical myelopathy or radiculopathy. He found evidence of previous lumbar radiculopathy on the left in an S1 distribution, and probable previous C6 radiculopathy on the right given his decreased biceps reflex.

Dr. Youkilis recommended a trial of conservative management for his multiple problems including physical therapy for neck and back problems, and cervical spine traction. Dr. Youkilis referred Claimant to Dr. Epstein for his opinion regarding Claimant's chronic Coumadin use with history of previous DVT and pulmonary embolism. Dr. Youkilis prescribed Ibuprofen 800 milligrams and a prescription for home cervical traction. Dr. Youkilis released Claimant from work for two months while undergoing therapy.

On December 30, 2003, Claimant returned to Dr. Youkilis for a follow up visit. Dr. Youkilis recommended a C4-5 bilateral facet block which was performed on January 2, 2004. Claimant reported the C4-5 bilateral facet block he received did not provide any lasting relief, and physical therapy and traction had not been helpful. Dr. Epstein reported to Dr. Youkilis that Claimant should stay on Coumadin for life.

On March 3, 2004, Dr. Youkilis recommended a C4-5 and C5-6 anterior cervical discectomy and fusion. Dr. Youkilis recommended Claimant not smoke for several weeks before his surgery. Claimant did not wish to proceed with surgery. Claimant was concerned about his risk of blood clots, and the possibility that his neck pain might not improve with surgery.

Claimant settled his claim with Employer for the primary injury for 12.5% of the body as a whole related to the neck and low back.

Dr. Robert Poetz, a family practice physician, examined Claimant on January 27, 2006, and testified on behalf of Claimant. Dr. Poetz took Claimant's prior medical history. Claimant reported several DVT's and a pulmonary embolism which requires him to be on Coumadin for the rest of his life. Claimant reported the following: an injury to his thumbs due to excessive use at work in the 1970's; some hairline fractures and pains in his thumbs as a result of the fractures; a back injury in 1999 while installing a seat in a van; and being taken off work for four weeks and being prescribed Celebrex. After the 1999 back injury Claimant experienced back pain, but he learned to work around it up until he was put on the assembly repair job in 2003. Claimant denied any other significant previous injuries.

Upon physical examination, Dr. Poetz found marked muscle weakness and decreased pinch strength in both hands, lateral angulation of both thumbs at the IP joints, and fusiform swelling of the fingers with early ulnar deviation of both hands suggestive of rheumatoid arthritis. He found restricted range of motion in the cervical spine, with myospasm in the root of the neck and the trapezii. Straight leg raising and Fabre Patrick were both positive bilaterally for lower back pain, but there were no radicular signs.

Dr. Poetz diagnosed severe cervical degenerative disc disease, and degenerative joint disease with bulging discs preexisting; a cervical strain with exacerbation of degenerative disc disease and degenerative joint disease with bulging disc as a result of the 2003 injury; lumbar strain with residual severe lumbar degenerative disc disease and degenerative joint disease with bulging discs as a result of the 1999 injury; lumbar strain with exacerbation of severe lumbar degenerative disc disease and degenerative joint disease with bulging disc as a result of the 2003 injury; hair

line fractures of both thumbs by history in the 1970 injury; bilateral hand and degenerative joint disease preexisting; chronic DVT of both lower extremities with pulmonary embolism requiring anti-coagulation therapy; hypertension; hyperlipidemia; and borderline diabetes and obesity, otherwise called metabolic syndrome, also preexisting.

Dr. Poetz recommended Claimant avoid heavy lifting and strenuous activity. He recommended Claimant avoid prolonged sitting, standing, walking, stooping, bending, squatting, twisting, or climbing; and any activity that exacerbates the symptoms or is known to cause progression of the disease process.

Dr. Poetz rated a 10% PPD of the body as a whole measured at the cervical spine preexisting; a 20% PPD of the body as a whole at the cervical spine from the 2003 injury; a 20% PPD body as a whole at the lumbar spine preexisting; a 20% PPD to the body as a whole measured at the lumbar spine from the 2003 injury; 15% PPD to both hands from the 1970 thumb fracture; 10% PPD of each hand for the preexisting degenerative joint disease; 25% PPD body as a whole due to the chronic DVT preexisting; and 25% PPD body as a whole due to metabolic syndrome preexisting. Dr. Poetz testified the combination of the present and prior disabilities result in a total which exceeds the simple sum by 20 – 25%, and it renders Claimant permanently and totally disabled as a direct result of the 2003 injuries, in addition to the preexisting injuries, multiple disease processes, and age.

Dr. Poetz did not review any medical records pre-dating Claimant's 2003 injury. Dr. Poetz based his opinion on Claimant's history and the x-ray findings obtained after Claimant's 2003 injury.

Timothy Lalk, a rehabilitation specialist testified on behalf of Claimant. Mr. Lalk opined Claimant is unable to secure and maintain employment in the open labor market, and is not able to compete for any position. Mr. Lalk did not have any medical records describing treatment for medical conditions prior to 2002. Mr. Lalk based his opinion upon the symptoms and limitations Claimant described.

Mr. Lalk testified if Claimant's only concern was controlling his symptoms, he could certainly attempt to work as a cashier or in a similar position, using a stool to control his symptoms if he stood too long. Mr. Lalk felt due to claimant's DVT he would be unable to work in unskilled, sedentary positions such as desk clerk, cashier at a convenience store or self-service store, or in a variety of customer service positions.

Mr. Lalk acknowledged he was not aware of any work restrictions placed on Claimant by any doctor. Mr. Lalk acknowledged there were no work restrictions by any physician with respect to Claimant's DVT, but in his opinion a DVT condition usually requires a person to walk whenever possible and elevate his legs if he has been standing.

Dr. John Buettner, a vascular surgeon, testified on behalf of SIF. Dr. Buettner is a board certified surgeon with a sub-specialty in vascular surgery. Dr. Buettner testified Claimant should not do assembly line work that required prolonged standing in one position because of his chronic DVT, but in the absence of any other complications of DVT, in his opinion, there is no reason Claimant could not engage in sedentary employment. Dr. Buettner testified if Claimant stays on Coumadin and uses compression stockings, there is no reason Claimant could not be considered for sedentary office type work.

FINDINGS OF FACT AND RULINGS OF LAW

Based upon my observations of Claimant at hearing, a comprehensive review of the evidence, and the application of Missouri Law I find:

Claimant met his burden of proving he sustained an occupational disease arising out of and in the course of his employment when he began the repair job in 2003. Dr. Poetz diagnosed a cervical strain with exacerbation of degenerative disc disease and degenerative joint disease with bulging disc, and lumbar strain with exacerbation of severe lumbar degenerative disc disease and degenerative joint disease as a result of the 2003 injury. Dr. Poetz's testimony is uncontroverted.

Claimant is not permanently and total disabled. Claimant is not unemployable in the open labor market. Mr. Lalk opined when considering Claimant's diagnoses and complaints in his neck, arms, low back and legs, he would remain employable. He speculated Claimant would have an additional restriction due to his DVT that would eliminate sedentary employment. However, Dr. Buettner testified Claimant would not be restricted from sedentary employment. Dr. Buettner is a treating physician and surgeon with a specialty in vascular surgery. Mr. Lalk's opinion was based on the faulty assumption Claimant would have a restriction of no sedentary work due to his DVT condition. Furthermore, Dr. Poetz's opinion that Claimant is permanently and totally disabled is not credible. Dr. Poetz's opinion is based on Claimant's complaints, and there were no medical records, x-rays, or other documentary evidence predating the primary injury to substantiate Claimant's complaints.

SIF is liable for permanent partial disability benefits. In order to recover from SIF, a claimant must first prove a pre-existing permanent partial disability whether from compensable injury or otherwise, pursuant to § 287.220.1. The permanent disability pre-dating the injury in question must "exist at the time the work-related 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." *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 214 (Mo.App.1999); *Karoutzos v. Treasurer* 55 S.W.3d 493, 498 (Mo.App. W.D., 2001)

As a result the primary injury Claimant sustained 12 ½ % PPD of the body as whole referable to the cervical spine. Claimant settled his claim with employer for the primary injury for 12.5%, and the evidence supports this level of disability. This injury combined with Claimant's prior DVT condition to create a greater overall disability. Claimant's DVT condition resulted in disability of 12 ½ % PPD of the body as a whole. It constituted a hindrance or obstacle to employment. Claimant had difficulty working with the DVT condition, and Dr. Buettner restricted Claimant from assembly line work as a result of the DVT condition. A load factor of 15% shall apply.

I do not find SIF liable for PPD benefits with regard to Claimants's preexisting alleged carpal tunnel syndrome or thumb fractures. No medical records were offered to support his claim that he had carpal tunnel syndrome in 1973. Claimant did settle a bilateral upper extremity claim for a 1995 date of injury, but it did not reach the threshold for SIF liability. Dr. Poetz's opinion on PPD with regard to Claimants hands, and his preexisting cervical and lumbar spine lacks foundation, because his ratings are based on Claimant's subjective complaints rather than medical records. Claimant's testimony regarding his symptoms is not credible. He exaggerated his symptoms with regard to his carpal tunnel syndrome, and testified to numerous preexisting job restrictions, none of which was substantiated by any medical records. Because Claimant's testimony was confusing, preexisting medical records were necessary to support his subjective complaints.

Claimant is entitled to 15 weeks PPD benefits from SIF for his primary injury combined with his preexisting DVT condition.

This award is subject to a lien in the amount of 25% in favor of Claimant's attorney, Mr. Shaun Falvey.

Date: _____

Made by: _____

Margaret D. Landolt
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey W. Buker
Director
Division of Workers' Compensation

Claimant settled a 1995 injury for 7.5% of each wrist for alleged carpal tunnel syndrome and the thumbs regarding a date of injury of April 7, 1995. However, Claimant, did not testify to any bilateral upper extremity injuries in 1995.

Claimant testified he had a back injury in 1999, but there is a stipulation for compromise settlement in Injury No. 95-075898 for 2.5% of the low back. It is unclear if Claimant was confused in his testimony about the date of the injury, or if the 1995 settlement represents a different low back injury he did not remember.