

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

Injury No.: 07-051333

Employee: Dorothy Turner

Employer: The Boeing Company

Insurer: Indemnity Insurance Company of America

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence, read the parties' briefs, and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated March 15, 2011, as supplemented herein.

Introduction

The administrative law judge found the Second Injury Fund liable for 56.6 weeks of permanent partial disability benefits under § 287.220.1 RSMo. The Second Injury Fund filed an Application for Review arguing, in part, that the administrative law judge erred because certain of employee's preexisting conditions were "below threshold."

We find the arguments of the Second Injury Fund unavailing because they are premised on an erroneous application of the thresholds under § 287.220.1. We are also of the opinion that the administrative law judge applied an improper analysis as to the thresholds for triggering Second Injury Fund liability and in calculating the extent of Second Injury Fund liability, with the result that she failed to award compensation to employee to which she is entitled.

But because employee did not file an Application for Review, we are unable to disturb the award of 56.6 weeks of permanent partial disability. Instead, we write this supplemental opinion to answer the Second Injury Fund's arguments and to address the confusion surrounding this issue.

Discussion

On page 11 of her award, the administrative law judge separately discussed each of employee's preexisting disabling conditions, and found that: "the alleged disability due to the ankle injury and diabetes do not meet the thresholds and/or were not serious enough to have been a hindrance or obstacle to employment, and therefore do not qualify." The administrative law judge went on to discount these conditions from her calculation of Second Injury Fund liability. These comments and the resulting award suggest the administrative law judge was of the opinion that if one of a worker's preexisting disabling conditions, considered in isolation, fails to meet one of the thresholds in § 287.220.1, then that condition is ignored for all purposes when considering the liability of the Second Injury Fund. Such an approach has no support in the Missouri Workers' Compensation Law or in Missouri case law. We reject the administrative law judge's reasoning regarding the triggering of Second Injury Fund liability. Our analysis of the operation of the Second Injury Fund thresholds follows.

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Purpose of the Second Injury Fund

The purpose of the Second Injury Fund is “to encourage the employment of individuals who are already disabled from a preexisting injury, regardless of the type or cause of that injury.” *Pierson v. Treasurer of Mo. As Custodian of the Second Injury Fund*, 126 S.W.3d 386, 390 (Mo. 2004) (citation omitted). The Second Injury Fund statute encourages such employment by ensuring that an employer is only liable for the disability caused by the work injury. Any disability attributable to the combination of the work injury with preexisting disabilities is compensated, if at all, by the Second Injury Fund.

Purpose of the thresholds

Before 1993, any preexisting disability that was a hindrance to employment or reemployment could open the door to possible Second Injury Fund liability. The Second Injury Fund statute was amended in 1993 to limit permanent partial disability awards against the Second Injury Fund to those cases where both the preexisting disabilities and the disabilities from the work injury are more than de minimis. The provision defining what disabilities will trigger Second Injury Fund liability now states:

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, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial 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.

The thresholds found in the quoted provision serve to protect the Second Injury Fund from enhanced permanent partial disability claims of claimants with de minimis disabilities. And that is where the service of the thresholds ends. Section 287.220.1 goes on to say:

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...(emphasis added).

Under the plain language of the statute, once it is determined that the thresholds are met, all disabilities that exist at the time of the work injury should be considered in the calculation of Second Injury Fund liability.

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Application of the thresholds

The second threshold applies when a claimant has preexisting permanent partial disability of a single major extremity ("if a major extremity injury only"). In all other circumstances, the first threshold applies.

The legislature chose two different units of measurement to describe the thresholds: "fifty weeks of compensation" for preexisting disabilities of the body as a whole; and "fifteen percent permanent partial disability" for a preexisting disability to a major extremity only. We believe the legislature rested on different units of measurement to foster arithmetic simplicity.

Where a claimant has only a preexisting disability to a major extremity, the legislature made "a simple 15% disability to a major extremity the threshold rather than attempt a more complex formula based on weeks of disability to various body parts at various levels." *Motton v. Outsource Int'l*, 77 S.W.3d 669, 675 (Mo. App. 2002).

But where there is more than one preexisting disability, the simplicity described above cannot be achieved. In that event, we need a method to combine the various disabilities to determine claimant's overall preexisting disability as of the moment of the primary injury. In order to combine the disabilities for comparison to the threshold, the disabilities must be converted to a common unit of measure. The legislature selected weeks of compensation as the common unit of measure.

This claim

In the instant case, employee had more than a single preexisting disabling condition so the first threshold applies. Using the ratings and findings from the administrative law judge, we observe that employee suffered from a total of 211.4 weeks of permanent partial disability at the time the last injury was sustained. Employee has met the threshold.

For these reasons, the Second Injury Fund's argument is unavailing. Simply put, the thresholds have no bearing on calculating Second Injury Fund liability once that liability is triggered, and thus they provide no support for discounting certain conditions that, considered individually, do not amount to 15% permanent partial disability of an extremity or 50 weeks of compensation.

We note that the administrative law judge discounted employee's preexisting diabetes and right ankle condition from her calculation of Second Injury Fund liability. As our analysis above makes clear, we consider this an inappropriate application of the thresholds under § 287.220.1. But employee did not file an Application for Review, and no party has asked us to review the administrative law judge's decision to deny compensation for permanent partial disability enhancement referable to these conditions. Accordingly, we will not disturb the award or modify the administrative law judge's calculation of Second Injury Fund liability.

Decision

We supplement the award of the administrative law judge with the foregoing findings and comments. In all other respects, we affirm the award.

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.

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The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued March 15, 2011, is attached hereto and incorporated herein to the extent not inconsistent with our findings in this supplemental opinion.

Given at Jefferson City, State of Missouri, this 8th day of December 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD

Employee: Dorothy Turner Injury No. 07-051333
Dependents: N/A Before the
Employer: The Boeing Company **Division of Workers'**
Compensation
Department of Labor and Industrial
Additional Party: Second Injury Fund Relations of Missouri
Jefferson City, Missouri
Insurer: Indemnity Insurance Company of North America
Hearing Date: December 7, 2010 Checked by: KOB

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: June 11, 2007
5. State location where accident occurred or occupational disease contracted: St. Louis 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? Yes
11. Describe work employee was doing and how accident happened or occupational disease contracted:
Repetitive hand gripping activities
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: both wrists
14. Nature and extent of any permanent disability: 20% of each wrist
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? \$15,847.57

- 17. Value necessary medical aid not furnished by employer/insurer? None claimed
- 18. Employee's average weekly wages: \$909.20
- 19. Weekly compensation rate: \$606.13 TTD/ \$376.55 PPD
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

- 21. Amount of compensation payable:
 - 70 weeks of permanent partial disability from Employer: \$ 26,358.50
 - 2 weeks of disfigurement from Employer \$ 753.10

- 22. Second Injury Fund liability: Yes
 - 56.6 weeks of permanent partial disability from Second Injury Fund: \$ 21,312.73

- TOTAL: \$48,424.33

- 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: Nancy Mogab

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Dorothy Turner	Injury No. 07-051333
Dependents:	N/A	Before the
Employer:	The Boeing Company	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	Indemnity Insurance Company of North America	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: KOB

PRELIMINARIES

The matter of Dorothy Turner (“Claimant”) proceeded to final hearing on December 7, 2010. Attorney Nancy Mogab represented Claimant. Attorney Jay Lory represented The Boeing Company (“Employer”) and Indemnity Insurance Company of North America (“Insurer”). Assistant Attorney General Beth Harris represented the Second Injury Fund.

The parties stipulated that:

1. On or about the 11th day of June, 2007, Claimant was an employee of Employer pursuant to Chapter 287 RSMo.
2. Venue was proper in St. Louis.
3. Employer received proper notice of the claim.
4. Claimant filed the claim within the time allowed by law.
5. The average weekly wage was \$909.20, giving rates of \$603.13/\$376.55.
6. Employer paid no TTD, but did pay medical in the amount of \$15,847.57.

The issues to be determined are:

1. Whether the condition of bilateral (“CTS”), was an occupational disease, which arose out of and in the course of Claimant’s employment;
2. Nature and Extent of permanent partial disability(“PPD”);
3. Liability of the Second Injury Fund;
4. Future medical care.

This matter was the subject of a prior hearing before the Honorable John H. Percy on September 4, 2008. In a detailed Temporary or Partial Award issued December 8, 2008, Judge Percy found Claimant developed bilateral CTS, and the work activities which she performed for Employer for twenty-eight years were the prevailing factor in causing her to develop bilateral CTS. Employer has since complied with Judge Percy’s order to provide treatment, and the parties presented evidence for a final award.

The hearing for Final Award picked up where the prior hearing left off, and all evidence and testimony (transcript) from the first hearing were made a part of the record in the instant matter. Likewise, the Temporary Award issued by Judge Percy is incorporated into and made a

part of this Award by reference, to the extent the finding herein are not inconsistent with the Temporary Award.

The parties offered the following Exhibits (those marked with an * were part of the record in the hearing for Temporary Award)¹:

- A. Boeing Medical records*
- B. MRI of the left shoulder*
- C. Dr. Schlafly's deposition of 7/10/08*
- D. Boeing Clinic records from 1/15/04
- E. Deposition of Dr. Eli Shuter from 1/20/10
- F. Certified Stipulation for Injury No. 03-077029
- G. Certified Award for Injury No. 06-087675
- H. Certified copy of Temporary Award for Injury No. 07-05133
- I. Dr. Eric Washington's records
- J. Operative note of Dr. Mark Miller
- K. Certified Settlement Stipulations for Injury No. 06-087675

The Employer/Insurer offered the following exhibits:

- 1. Dr. Rotman's deposition of 8/12/08*
- 2. Dr. Brown's deposition of 6/30/08*
- 3. Certified copies of Dr. Brown's records
- 4. Records associated with Dr. Phillips' 2/4/08 consultation report
- 5. Records associated with Dr. Phillips' 1/27/10 consultation report
- 6. Dr. Whittico's records

The Second Injury Fund offered the following exhibit:

Roman No. I: Certified Stipulations for Injury Nos. 95-019405, 95-148311, 97-021091

Claimant's attorney objected to the admission of parts of Exhibits 4 and 5, arguing they are narrative reports as defined by statute, and can only be admitted pursuant to 287.210(3) or (6). *See Springett v. St. Louis Independent Packaging Company*, 431 S.W.2d 698 (Mo. App.1968). No other objection was made. I find Claimant's reliance on *Springett* to be misplaced, and overrule the objection. Claimant saw Dr. Phillips for consultative electrical diagnostic studies, and the pages at issue report the results of the tests. They are business records properly admissible under §490.680, and have otherwise been timely served. However, such records require expert interpretation, and Employer did not submit any evidence providing such analysis.

¹ Judge Percy also issued a final award in a companion case regarding the shoulder, Injury 06-087675, tried simultaneously with the temporary case; Exhibits A, B & 1 focus on the shoulder.

FINDINGS OF FACT

Based on the competent and substantial evidence presented, including the testimony of Claimant, my personal observations, expert medical testimony, and all other exhibits received into evidence in both hearings, including the prior findings of Judge Percy, I find:

Claimant is now 64 years old, and has retired. She cares for her 91 year old, disabled mother with some help from family and aides. She previously worked in Employer's maintenance department for twenty-eight years. Her specific job duties, which were described in detail by Judge Percy in the Temporary Award, involved computer work, gathering and carrying supplies, driving a rickety forklift, moving and using mops, brooms and buckets, vacuuming, and cleaning of all sorts. She testified that her symptoms arose while working for Employer, especially when she was mopping, sweeping, waxing, and scrubbing with her hands, wiping down the oven or the big machines that she had to polish up. It was a hand intensive job, and after the first hearing, Judge Percy found causation and ordered Employer to provide treatment.

Claimant underwent bilateral CTS surgery with Dr. Brown on June 25, 2009 on the left, and December 3, 2009 on the right. She also saw Dr. Phillips before and after her surgeries for nerve conduction tests. She has not seen either doctor since January 27, 2010, and has not seen any other doctor for treatment other than her exam with Dr. Eli Shuter on April 20, 2010.

At the final hearing, Claimant reported continued numbness and tingling with the middle, index and thumb on both hands, and pain and weakness, left hand worse than the right. Even after the surgeries, she continues to have symptoms in her the three (3) fingers that wake her up at night, or when she is applying pressure with her hands.

Unlike at the first hearing, Claimant testified about her preexisting conditions. On September 6, 2006, Claimant injured her left shoulder. She underwent surgery with Dr. Rotman but she continued to have limitations in range of motion and lifting her left arm above her shoulder without increased pain. She has pain of the left shoulder. It aggravates her when she uses it especially when she attempts to lift anything heavy or when she is rolling her mother and holding her while she places pillows to prop her up. She was awarded 25% PPD of the left upper extremity at the left shoulder on December 8, 2008.

On August 15, 2003, Claimant injured her right shoulder while throwing trash in a dumpster. Following surgery with Dr. Mark Miller, she was off work for a few days, then had work restrictions. She had physical therapy. She continued to have some pain in her right shoulder with use and limitation of range of motion and not being able to get it much above shoulder level without increased pain. She had some difficulty reaching behind her back but not so much trouble reaching out in front of her. She reported it was a little weak and it swells two to three times a week causing her to remove her bra strap to allow the swelling to go down. That claim was settled for 32.5% of the right shoulder.

She had low back problems beginning around 1999. She saw her family doctor, Dr. Whittico, and then went to Dr. Eric Washington who treated her conservatively. She had an MRI of her back, and it was her understanding she had arthritis. She testified that she continued to have problems with her back at work bending over and stooping. She took over-the-counter

medication for the last several years, but more recently began taking Tylenol 3. The Second Injury Fund previously paid 12.5% of the body as a whole for the low back.

Claimant had prior injuries to her lower extremities the '90s, including an injury to her right ankle on January 17, 1995, to her left knee on October 25, 1997, and again to her left knee on March 26, 1997. She settled those injuries for 7.5% of the right ankle, 12.2% of the left knee and 2.5% of the left knee. She received medical treatment through the Boeing Clinic and Dr. Washington. She understood the problems were from arthritis and that not much could be done. She occasionally used Tylenol 3 prescribed for her back to alleviate the pain in her knees. The main knee and ankle problems are walking or standing too long, kneeling, climbing stairs and slowness. When she was working it would cause her problems, especially the walking, bending, kneeling, squatting, when she would have to get down to clean at a lower level.

With regard to her diabetes, Claimant had some ongoing treatment and numbness in her left big toe, which has not progressed. She does not remember having numbness or tingling in her legs at all. She said her blood sugars have been very good lately and two months ago she had a check up and everything was excellent. She said her blood sugar is running around 92 to the 102 range. She did not testify as to how diabetes affected her employment.

Since she has retired, Claimant has been taking care of her mother with help. Her activities are mainly cleaning her mother, rolling her to avoid bed sores, administering medication and tube feeding. She does not lift her mother, but has a device that lifts her mother if she needs to be lifted. An ambulance transports her mother to doctor appointments. She takes care of her own house, but has somebody do her yard work. She does grocery shop, clean her house, mop, dust and do laundry. Claimant currently weighs between 185-190 pounds. She has no hobbies but does attend the theatre five times a year between January and May.

Additional Medical Evidence Subsequent to Prior Hearing

On February 4, 2009, Claimant returned to Dr. Brown for evaluation and treatment reporting continued numbness, tingling and pain in both hands with decreased strength. He ordered a nerve conduction study and gave her a wrist splint to wear. On February 5, 2009 his interpretation of the February 4, 2009 electro diagnostic study by Dr. Phillips confirmed Claimant had severe bilateral CTS as well as ulnar neuropathy in the left elbow. He recommended surgical treatment. On June 25, 2009, he released a "flattened and narrowed median nerve in her left wrist". She was released to one-handed work. He did the right carpal tunnel release on December 3, 2009, again releasing a "flattened and narrowed median nerve". On January 11, 2010, he noted that while Claimant reported improvement in the numbness in her right hand, she had recurrent numbness in her left hand. On exam, he found only tenderness, but recommended a repeat nerve conduction study and released her with no restrictions.

On January 27, 2010, Dr. Brown advised Claimant the electrical studies revealed significant improvement in the median nerve consistent with decompression and that she had evidence of underlying diabetic type peripheral neuropathy. He related her continued symptoms on diabetic type peripheral neuropathy evidence in the nerve conduction tests. On March 12, 2010, Dr. Brown opined she had five percent (5%) PPD to the right and left wrists, respectively.

The February 4, 2009 and January 27, 2010 records of Dr. Daniel Phillips were admitted over Claimant's objection. Dr. Brown referred Claimant to Dr. Phillips for the tests to confirm the diagnosis (2009) and for evaluation of continued left upper extremity complaints (2010). Dr. Brown considered the results when he noted the 2009 studies, "revealed electrodiagnostic evidence consistent with severe bilateral carpal tunnel syndrome," and the 2010 studies showed "significant improvement in the median nerve condition value across the carpal tunnel, consistent with decompression. There was evidence of an underlying diabetic type peripheral neuropathy." The records of Dr. Phillips are relevant in that they form the basis of the opinions of Dr. Brown. However, the results of Dr. Phillip's tests are not competent evidence on the issue of causation. If Employer wished to rely on Dr. Phillip's testimony, it should have been presented by deposition with the opportunity to cross examine.

The only new deposition testimony offered since the temporary hearing was that of Dr. Eli Shuter, a board certified neurologist who examined Claimant on August 3, 2004 and April 20, 2010, issued reports dated September 24, 2004 and June 20, 2010, and testified on her behalf October 20, 2010.

In 2004, Dr. Shuter made the following positive findings on exam: tenderness and limited range of motion of the shoulder; antalgic gait, weakness and edema of the left knee, and tenderness of the low back. Her sensation to pinprick throughout the lower extremities was intact. He noted knee jerks were absent and ankle jerk on the right was trace and absent on the left, which he opined may be due to diabetic neuropathy. He noted moderate swelling and weakness and signs of patellar chondromalacia in the right knee. He diagnosed a tear of the labrum and rotator cuff, impingement syndrome and aggravation of the AC arthritis of the right shoulder and provided ratings.

Dr. Shuter noted in his second exam that Claimant had numbness and tingling in her thumbs, index and middle fingers worse at night. Following surgery by Dr. Brown, her hand symptoms improved but continued to be numb in her index, middle and ring finger in her left and right hand. The symptoms in her right fingers were not as severe.

Claimant reported her left knee had worsened since 2004 and was unstable and painful with motion. She reported she could not kneel and used two stair rails to climb stairs instead of one. She reported her right ankle continued to swell after she was up and walking for an hour. Her low back and left leg radiation was constant and interfered with activities. She also reported a left shoulder injury in 2006 and that she developed tingling and pain in her feet due to diabetes.

Positive findings at Dr. Shuter's second exam included: weakness, tenderness and limited range of motion in both shoulders; bilateral incisions from carpal tunnel releases; positive Phalen and reverse Phalen signs with increased tingling in the thumbs, index and middle fingers bilaterally, greater on the left; reduced grip strength; diminished sensation to pinprick; and abnormal two-point discrimination on the thumbs.

She had decreased back movement when walking, could walk on her heels but could not walk on her toes due to knee pain. Dr. Shuter noted bilateral lumbar spasm and decreased range of motion in her back. Straight leg raising was diminished on the left side due to knee pain. She had some atrophy of the right leg. Knee and ankle reflexes were absent; sensation to

pinprick was diminished bilaterally in the lower extremities up to the knees. Vibratory sensation was diminished in the toes and in the ankles. He opined the sensory loss was due to diabetic neuropathy. Dr. Shuter noted left knee swelling, tenderness, crepitation and limited range of motion. He noted swelling over the right ankle with tenderness and limited plantar flexion.

Based on his exam, history and review of medical records, Dr. Shuter diagnosed continued symptoms for CTS despite surgical release. He concluded that the work activities she described to him were the prevailing factor in causing her bilateral CTS. He testified that he saw no evidence of peripheral neuropathy in Ms. Turner's upper extremities. Because diabetic neuropathy affects the longer nerves before it affects the shorter nerves, the symptoms of diabetic neuropathy appear in the feet several years before they appear in the upper extremities. He testified that symptoms would usually be in the thigh area for an individual to have symptoms in her hands, but he only saw symptoms of sensory loss knee level and below.

He provided the following ratings, which combine to create a substantially greater disability:

- a) With respect to the 2007 primary injury: 35% of the left upper extremity at the level of the wrist and 30% of the right upper extremity at the level of the wrist.
- b) With respect to the preexisting disabilities, which constituted a hindrance and obstacle to employment:
 - i. 40% of the upper right extremity at the level of the right shoulder;
 - ii. 45% of the upper right extremity at the level of the left shoulder
 - iii. 40% of the left lower extremity at the level of the knee;
 - iv. 20% of the right lower extremity at the level of the ankle;
 - v. 25% of the low back; and
 - vi. 20% of the body as a whole regarding diabetes mellitus with peripheral neuropathy.

Dr. Shuter stated that diabetes and obesity were a causative factor of CTS, but gender and hypertension were not. He further stated that diabetes can cause sensation to pinprick loss but it would be a more diffuse loss affecting all fingers not restricted to a particular group of fingers. He testified that if diabetes was the cause of loss of sensation in a two-point discrimination test it would affect all the fingers not just one or two. He testified the electrical study revealed an objective finding, and that since the radial nerve was normal the CTS was not due to diabetes. Dr. Shuter would not expect Claimant's CTS symptoms to improve after she retired on June 29, 2007 because there was permanent damage.

He felt the findings of degenerative disease and a disc protruding at L4-5 in 2001 in Dr. Washington's records were supportive of her continued back complaints she had during his exam in 2010. He agreed that x-ray findings of degenerative arthritis in her left knee also supported the complaints and findings in his 2010 exam.

Dr. Shuter concluded on reviewing the 2010 nerve test, which only showed neuropathy in the median nerve and not the radial nerve, that she did not have diabetic induced peripheral neuropathy in her hands, and that her continued symptoms post carpal tunnel release was due to her CTS not diabetic neuropathy and was caused from the work activities at Boeing.

ADDITIONAL FINDINGS OF FACT AND RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

I. Causation

Despite an unfavorable finding in the first hearing, Employer is again raising a challenge to causation in this case, and seeking a different finding on the issue than that rendered by Judge Percy. It is well-settled in Missouri that findings and conclusions made by an ALJ in a temporary award are not binding on any subsequent proceeding. *See Dilallo v. City of Maryland Heights*, 996 S.W.2d 675, 676 (Mo.App. E.D.1999)(holding that the temporary award of the ALJ, which found that injury to claimant's lower back was not compensable under the Workers' Compensation Act, was not res judicata on the issue of medical causation). Furthermore, the language of Section 287.510 recognizes that the final award may not be in accordance with the temporary or partial award. *Welch v. Eastwind Care Center*, 890 S.W.2d 395, 398 (Mo.App. W.D.1995). The legislature clearly contemplated that the ALJ may render a decision in a final hearing which differed from that of the temporary or final award. *Id.* Even so, to modify a temporary award, the ALJ in the final award must find there was **“additional significant evidence”** not before the ALJ at the temporary award. *Dilallo*, 996 S.W.2d at 676; *Jennings v. Station Casino St. Charles*, 196 S.W.3d 552, 558 (Mo.App. E.D. 2006)(emphasis added).

The finding on causation rendered by Judge Percy is sound, comprehensive, well-reasoned, and consistent with all the evidence. There was no additional significant evidence presented by Employer at the final hearing that was not before the Judge at the temporary hearing, or which would lead to a different result. Employer submitted the treatment records of Dr. Brown for the two surgeries, as well as the consultation report and associated paper work generated by Dr. Phillips (admitted over Claimant's objection). Claimant saw Dr. Phillips for consultative electrical diagnostic studies, and the pages at issue report the results of the tests. They are business records properly admissible, but such records require expert interpretation, and Employer did not submit any evidence providing such analysis. Dr. Brown considered the Phillips reports in his records, but makes no comment in his own record, or regarding Dr. Phillips' report, to suggest Judge Percy's decision was in error. The fact Claimant had diabetes prior to 2007, and had symptoms of numbness in her lower extremities, was known to the experts and Judge Percy as it was in the record from the first award.

On the other hand, Claimant submitted additional deposition testimony of neurologist Eli Shutter to substantiate causation, and repudiate the suggestion her diabetes is the primary cause of Claimant's CTS. Considering his substantive testimony and his professional expertise, I find Dr. Shuter provides further credible evidence to support the finding that Claimant's hand intensive work activities are the prevailing factor in causing her CTS and resultant disability.

Based on Judge Percy's comprehensive, detailed analysis, the lack of additional significant evidence, the additional credible evidence supporting causation, and my findings and observations, I find Claimant sustained a compensable occupational disease arising out of and in the course of her employment. The issue of causation is decided in favor of Claimant.

II. Nature and Extent of Disability

Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. *Sanders v. St. Clair Corp.*, 943 S.W.2d 12, 16 (Mo.App. S.D. 1997). A disability is “permanent” if “shown to be of indefinite duration in recovery or substantial improvement is not expected.” *Tiller v. 166 Auto Auction*, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997). In a workers' compensation case, in which the employee is seeking benefits for PPD, the employee has the burden of proving, inter alia, that his or her work-related injury caused the disability claimed. *Rana v. Landstar TLC*, 46 S.W.3d 614, 629 (Mo. App. W.D. 2001).

The evidence submitted by the parties is consistent with respect to the fact there is PPD from the CTS and surgery, but the experts differ as to the degree of disability. Dr. Shuter suggests a rating of 35% of the left wrist and 30% of the right wrist. He also provides a reasonable explanation of how and why Claimant would continue to have problems with her upper extremities even after she had retired and no longer performed the hand intensive work. Dr. Brown rated the PPD at 5% of each wrist. He advised the electrical studies noted significant improvement in the median nerve consistent with decompression, and showed evidence of an underlying diabetic type peripheral neuropathy in the left hand. The finder of fact "may consider all the evidence, including the testimony of the employee, and draw all reasonable inferences in arriving at the percentage of disability." *Patchin v. National Super Markets, Inc.*, 738 S.W.2d 166, 167 (Mo.App. 1987). The fact finder is also not bound by the percentage estimates of the medical experts, *id.*, see also, *Wiedower v. ACF Industries, Inc.*, 657 S.W.2d 71, 74 (Mo.App. 1983), and is free to find a disability rating higher or lower than that expressed in medical testimony. *Quinlan v. Incarnate Word Hosp.*, 714 S.W.2d 237, 238 (Mo.App. 1986). See also, *Sellers v. TWA*, 776 S.W.2d 502, 505 (Mo.App. W.D. 1989).

Considering all the evidence, including Claimant's testimony, the medical evidence, and the expert opinion, I find Claimant has sustained permanent partial disability equivalent to 20% of each wrist. The diagnostic evidence suggest Claimant receive a good outcome from surgery in that median nerve was successfully released. The studies conducted in 2010 suggest a underlying diabetic type peripheral neuropathy had arisen since the date of injury in 2007 and may now be contributing to some of the symptoms in the left hand. Drawing reasonable inferences from the evidence, I find Claimant had a reasonably average outcome for her CTS surgery, and award 20% PPD of each hand, and two additional weeks for disfigurement.

III. Future Medical

The right to medical aid is a component of the compensation due an injured worker. *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo. App. S.D. 1996). In order to merit an award for future medical care, there must be evidence of a "subsistent condition of injury and a need of treatment proven beyond speculation by competent and substantial evidence ... and a causal flow between the original and compensable injury and the subsistent condition." *Williams v. A.B. Chance Company*, 676 S.W.2d 1, 4 (Mo.App. 1984). Section 287.140.1 places on the claimant the burden of proving entitlement to benefits for future medical expenses. *Conrad v. Jack Cooper Transport Co.* 273 S.W.3d 49, 51 (Mo.App. W.D. 2008)

I find there is insufficient evidence on which to base an award of future medical treatment. Claimant has not met her burden to establish entitlement to future medical treatment. The claim for future medical care is denied.

IV. Liability of the Second Injury Fund.

Claimant has established a right to recover from the Second Injury Fund. A claimant in a worker's compensation proceeding has the burden of proving all elements of his claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 911 (Mo.App. E.D.2008). In order for a claimant to recover against the SIF, he must prove that he sustained a compensable injury, referred to as "the last injury," which resulted in permanent partial disability. Section 287.220.1 RSMo. A claimant must also prove that he had a pre-existing permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment should he become unemployed; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15% for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo.App. E.D. 2008)(Citations omitted). In order for a claimant to be entitled to recover permanent partial disability benefits from the Second Injury Fund, he must prove that the last injury, combined with his pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. *Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 138 S.W.3d 714, 717-18 (Mo. banc 2004). Claimant has met the burden imposed by law.

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find Claimant is entitled to recover from the Second Injury Fund. Claimant sustained a compensable last injury which resulted in PPD equivalent to 20% of each wrist (70 weeks).

As of the time the last injury was sustained, Claimant had the following preexisting permanent partial disabilities, which meet the statutory thresholds and were of such seriousness as to constitute a hindrance or obstacle to employment or reemployment:

- a. 32.5% of the right shoulder (75.4 weeks).
- b. 25% of the left shoulder (58 weeks).
- c. 12.5% of the low back (50 weeks).
- d. 17.5% of the left knee (28 weeks).

The above ratings are based on Claimant's testimony, the medical records, the ratings, prior stipulations and awards. With respect to the left knee, I note that the prior stipulations total 14.7%, which is below the threshold. However, the credible evidence, particularly Dr. Shuter's exam, establishes that the condition of Claimant's left knee deteriorated between her last left knee injury in 1997 and the primary injury, and thus the overall disability exceeds the required minimum. I specifically find the alleged disability due to the ankle injury and diabetes do not meet the thresholds and/or were not serious enough to have been a hindrance or obstacle to employment, and therefore do not qualify.

Section 287.220 RSMo. sets forth the statutory authority for the determination of Second Injury Fund liability. Assuming the employee is entitled to receive compensation on the basis of a combined disability and the injuries under consideration meet the statutory threshold, the

Administrative Law Judge is charged with making three determinations: 1) the degree of disability attributable to all injuries or conditions existing at the time the last injury was sustained; 2) the degree of disability which would have resulted from the last injury considered alone and of itself; and 3) the degree of disability which existed prior to the last injury. The sum of the second and third determinations is then subtracted from the first, with the balance representing the liability of the Second Injury Fund.

I find the degree of Claimant's disability that is attributable to all injuries existing at the time of the last injury is equivalent to 338 weeks of disability. The sum of the primary injury/disability (70 weeks) and the preexisting disability (multiple injuries totaling 211.4 weeks) is 281.4 weeks. The Second Injury Fund is liable for 56.6 weeks (334 weeks - 281.4 weeks = 56.6 weeks).

CONCLUSION

Claimant's work for Employer is the prevailing factor in causing her bilateral carpal tunnel syndrome and the disability herein awarded. The Second Injury Fund shall compensate Claimant for the synergistic combination of her primary and qualifying prior disabilities.

This award is subject to an attorney fee lien of 25% in favor on attorney Nancy Mogab.

Made by: _____

KARLA OGRODNIK BORESI
Administrative Law Judge
Division of Workers' Compensation

This award is dated, attested to and transmitted to the parties this _____ day of March, 2011 by:

Naomi Pearson
Division of Workers' Compensation