

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

Injury No.: 92-135488

Employee: Ronald Vaughn  
Employer: Missouri Department of Public Safety  
Insurer: Central Accident Reporting Office  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

Date of Accident: September 25, 1992

Place and County of Accident: Stone County, 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 associate 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 associate administrative law judge dated February 9, 2005. The award and decision of Associate Administrative Law Judge L. Timothy Wilson, issued February 9, 2005, is attached and incorporated by this reference.

The Commission further approves and affirms the associate 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 22<sup>nd</sup> day of July 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

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

Attest: \_\_\_\_\_  
John J. Hickey, Member

\_\_\_\_\_  
Secretary

**AWARD**

Employee: Ronald E. Vaughn

Injury No. 92-135488

Dependents: N/A  
Employer: Missouri Department of Public Safety  
Additional Party: Second Injury Fund  
Insurer: CARO  
Hearing Date: August 30, 2004

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri  
Checked by: LTW/mp

### 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: September 25, 1992
5. State location where accident occurred or occupational disease was contracted: Stone 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 occurred or occupational disease contracted:  
While participating in annual strength testing required by the Missouri State Water Patrol, Claimant sustained an injury to his right upper extremity while performing a bench press on an exercise machine.
12. Did accident or occupational disease cause death? N/A Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: right upper extremity
0. Nature and extent of any permanent disability: 15% permanent partial disability referable to the right upper extremity
15. Compensation paid to-date for temporary disability:
16. Value necessary medical aid paid to date by employer/insurer?
17. Value necessary medical aid not furnished by employer/insurer?
18. Employee's average weekly wages: \$566.54
19. Weekly compensation rate: \$235.61
0. Method wages computation: stipulation

### COMPENSATION PAYABLE

21. Amount of compensation payable:  
31.5 weeks of permanent partial disability from Employer

3.5 weeks of disfigurement from Employer

22. Second Injury Fund liability: No

The claim against the Second Injury Fund is denied.

TOTAL: \$8,246.35

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:

Richard D. Crites

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

Employee: Ronald E. Vaughn

Injury No: 92-135488

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

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

Dependents: N/A

Employer: Missouri Department of Public Safety

Additional Party Second Injury Fund

Insurer: CARO

Checked by: LTW/mp

The above-referenced workers' compensation claim, which involved the consolidation of two workers' compensation

cases, was heard before the undersigned Associate Administrative Law Judge on August 30, 2004.<sup>[1]</sup> The parties were afforded an opportunity to submit briefs, resulting in the record being completed and submitted to the undersigned on or about September 29, 2004.

In Injury Number 92-135488, the parties entered into a stipulation of facts. The stipulation is as follows:

- (1) On or about September 25, 1992, the Missouri Department of Public Safety was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully self-insured with the benefits being administered by and through CARO.
- (2) On the alleged injury date of September 25, 1992, Ronald E. Vaughn was an employee of the employer and was working under and subject to The Missouri Workers' Compensation Law.
- (3) On or about September 25, 1992, the employee sustained an accident which arose out of and in the course and scope of employment.
- (4) The above-referenced employment and accident occurred in Stone County, Missouri. The parties agree to venue lying in Springfield (Greene County), Missouri. Venue is proper.
- (5) The employee notified the employer of his injury as required by Section 287.420, RSMo.
- (6) At the time of the alleged accident, the employee's average weekly wage was \$566.54, which is sufficient to allow a compensation rate of \$377.69 for temporary total disability compensation, and a compensation rate of \$235.61 for permanent partial disability compensation.
- (7) The employee alleges that temporary disability benefits have not been provided to him. (The employee disputes the amount of temporary disability compensation and medical benefits paid by the employer, contending that certain benefits provided to him have been attributed by the employer to the 1994 file, but should be attributed to this file.)
- (8) The employer has provided medical treatment to the employee, having paid \$642.05 in medical expenses.

The sole issues to be resolved by hearing in Injury Number 92-135488 include:

- (1) Whether the Claim for Compensation was filed within the time prescribed by law?
- (2) Whether the accident of September 25, 1992, caused the injuries and disabilities for which benefits are now being claimed?
- (3) Whether the employee sustained any permanent disability as a consequence of the alleged accident; and, if so, the nature and extent of the disability?
- (4) Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for payment of additional permanent partial disability compensation?

In Injury Number 94-111529, the parties entered into a stipulation of facts. The stipulation is as follows:

- (1) On or about August 13, 1994, the Missouri Department of Public Safety was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully self-insured with the benefits being administered by and through CARO.
- (2) On the alleged injury date of August 13, 1994, Ronald E. Vaughn was an employee of the employer and was working under and subject to The Missouri Workers' Compensation Law.
- (3) On or about August 13, 1994, the employee sustained an accident which arose out of and in the course and scope of employment.

- (4) The above-referenced employment and accident occurred in Stone County, Missouri. The parties agree to venue lying in Springfield (Greene County), Missouri. Venue is proper.
- (5) The employee notified the employer of his injury as required by Section 287.420, RSMo.
- (6) At the time of the alleged accident, the employee's average weekly wage was \$601.15, which is sufficient to allow a compensation rate of \$400.77 for temporary total disability compensation, and a compensation rate of \$249.48 for permanent partial disability compensation.
- (7) The employer alleges that temporary disability compensation have been paid in the amount of \$5,610.78, which represents 16 weeks of benefits, payable for the period of February 7, 1995, through May 16, 1995. (The employee contends that this temporary disability compensation is attributed to the injury suffered in Injury Number 92-1135488 and not to this file.)
- (8) The employer alleges that it provided medical treatment to the employee, having paid \$8,858.66 in medical expenses. (The employee contends that this medical treatment and the expenses incurred are attributed to the injury suffered in Injury Number 92-1135488 and not to this file.)

The sole issues to be resolved by hearing in Injury Number 94-111529 include:

- (1) Whether the Claim for Compensation was filed within the time prescribed by law?
- (2) Whether the accident of August 13, 1994, caused the injuries and disabilities for which benefits are now being claimed?
- (3) Whether the employee sustained any permanent disability as a consequence of the alleged accident; and, if so, the nature and extent of the disability?
- (4) Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for payment of additional permanent partial disability compensation?

### **EVIDENCE PRESENTED**

The employee, Ronald Vaughn, testified at the hearing in support of his claim. Also, the employee presented at the hearing of this case the testimony of his wife, Linda Vaughn. In addition, the employee offered for admission the following exhibits:

Exhibit A ..... Missouri State Water Patrol Retirement Card Issued for Ronald Vaughn  
 Exhibit B ..... Deposition of Patrick O'Brien, M.D.  
 Exhibit C ..... Medical Records from Patrick O'Brien, M.D.  
 Exhibit D ..... Deposition of Esther Wadley, D.O.  
 Exhibit E ..... Medical Report from Esther Wadley, D.O.

The exhibits were received and admitted into evidence.

The employer presented at the hearing of this case the testimony of one witness – Rebecca Heet. Also, the employer offered for admission the following exhibits:

Exhibit 1 ..... Business Records of Central Accident Reporting Office within the Office of Administration Relative to Claim of Accident Dated September 25, 1992  
 Exhibit 2 ..... Business Records of Central Accident Reporting Office within the Office of Administration Relative to Claim of Accident Dated August 13, 1994

The exhibits were received and admitted into evidence.

The Second Injury Fund did not present any witnesses or offer any evidence at the hearing of this case.

In addition, the parties identified several documents filed with the Division of Workers' Compensation which were made part of a single exhibit identified as the Legal File. The undersigned took official notice of the documents contained in the Legal File which include: Notice of Hearing; Answer of Second Injury Fund to Claim for Compensation (Injury No. 94-111529); Answer of Employer to Claim for Compensation (Injury No. 94-111529); Claim for Compensation (Injury No. 94-111529); Report of Injury (Injury No. 94-111529); Answer of Employer to Claim for Compensation (Injury No. 92-135488); Answer of Second Injury Fund to Claim for Compensation (Injury No. 92-135488); Claim for Compensation (Injury No. 92-135488); and Report of Injury (Injury No. 92-135488).

## DISCUSSION

The employee, Ronald Vaughn, is 63 years of age, having been born on November 16, 1941. Additionally, Mr. Vaughn is married and, having retired from the Missouri State Water Patrol, now resides with his wife in the state of Florida. Prior to moving to Florida, Mr. Vaughn resided in Branson, Missouri.

As a child, Mr. Vaughn suffered an illness in the nature of polio, which resulted in him having a shortened and weakened left upper extremity, and a shortened and weakened left lower extremity. Further, this illness caused him to limp and to be limited in the length and duration of his walking. Additionally, Mr. Vaughn experienced spasticity and diminished muscle mass; and he wore a brace to correct the "pigeon toe" effect in his left foot.

Ronald Vaughn is a high-school graduate who has taken some college classes involving law enforcement. Also, subsequent to graduating from high school, during the period of 1960 to 1964, Mr. Vaughn served in the United States Air Force. Although Mr. Vaughn suffered from the effects of polio, the illness did not preclude him from serving in the military. Notably, according to Mr. Vaughn, the Air Force utilized a test which measured endurance and not speed; and he was able to pass this test.

Following his service in the military, and then working briefly for Chrysler, in or around 1965 Mr. Vaughn secured employment with the St. Louis Police Department, working in this employment during the period of 1965 to 1967. Again, according to Mr. Vaughn, although he suffered from polio, he was able to pass the physical test presented by the St. Louis Police Department because the test rewarded a person for endurance and not speed.

On or about July 1, 1968, Mr. Vaughn secured employment with the Missouri State Water Patrol. Mr. Vaughn noted that, in securing this employment, he had to pass a swimming test, but he did not have to concern himself with any running requirements. Upon engaging in this employment, the Water Patrol issued him a boat and trailer which he had to operate in and out of the water without assistance. Also, since the 1970s, Mr. Vaughn has worked for himself as a fishing guide, which has provided him with additional part-time income.

In or around 1971 or 1972, Mr. Vaughn suffered a work-related injury while engaged in his employment with the Water Patrol. This injury, which occurred while he was cleaning the boat assigned to him, caused him to suffer a disc herniation in his lumbar spine and resulted in him undergoing low back surgery. According to Mr. Vaughn, he experienced complications associated with the surgery in the nature of a staph infection, which resulted in him being off work five to six months. At the hearing Mr. Vaughn noted that he eventually settled the workers' compensation case associated with this injury, and he continues to experience problems with his low back. These problems include right lower extremity pain, with tingling into the toes; difficulty in stooping or bending over; difficulty with climbing or walking uphill; and varying difficulty in being able to sit continuously.

On or about September 25, 1992, Mr. Vaughn sustained a work-related injury while participating in annual strength testing required by the Missouri State Water Patrol. The injury, which occurred as Mr. Vaughn was performing a bench press on an exercise machine, caused him to experience swelling and tenderness over the lateral epicondyle of his right upper extremity. According to Mr. Vaughn, as a consequence of this injury, he experienced pain in his right arm with tingling and numbness in the fingers of his right hand. In light of continuing symptoms, on or about October 20, 1992, Mr. Vaughn presented to Patrick O'Brien, who is an orthopedic surgeon for examination and evaluation. Notably, according to Mr. Vaughn, during the period of September 25, 1992, to October 20, 1992, he took some time off from work because of the pain he was experiencing in his right elbow.

At the time of presenting to Dr. O'Brien on October 20, 1992, Mr. Vaughn underwent an examination and evaluation which revealed Mr. Vaughn exhibiting full range of motion, but with swelling and "exquisite tenderness over his lateral epicondyle." Additionally, Dr. O'Brien noted that Mr. Vaughn exhibited increased pain with resisted dorsa flexion, and that Mr. Vaughn appeared to have "a slight defect in his extensor tendon." In light of his examination and evaluation of Mr. Vaughn, and taking into consideration that Mr. Vaughn was approximately one-month post injury, Dr. O'Brien recommended that Mr. Vaughn be treated conservatively with the hope of him healing on his own without surgical intervention. Also, Dr. O'Brien put Mr. Vaughn in a "Nirschl" brace and directed him to avoid gripping or lifting with his right arm. A follow-up examination was scheduled in three weeks.

On or about November 10, 1992, Mr. Vaughn returned to see Dr. O'Brien, continuing to exhibit some symptoms, but showing improvement. The medical entry of November 10, 1992, states:

Mr. Vaughn's elbow is still a little tender but it is much better. He can fully extend his elbow now. He does have a little tenderness about his lateral epicondyle. I recommend no weight lifting, at least, for another six weeks and then a gradual resumption and he will return if his symptoms get worse.

In light of the noted improvement, Dr. O'Brien effectively released Mr. Vaughn from treatment with his noting, "he will return if his symptoms get worse." Dr. O'Brien did not issue a disability rating for the injury of September 25, 1992.

Following the evaluation of November 10, 1992, Mr. Vaughn returned to work with the Missouri State Water Patrol. But he notes that he never became pain free, and he continued to experience some numbness and tingling in the right hand. Although Mr. Vaughn used the hand in his employment, he noted at the hearing that he was not able to pass the Water Patrol test, which eventually led to him filing an action against the Missouri State Water Patrol for discrimination. According to Mr. Vaughn, this claim of discrimination resulted in the parties entering into a settlement agreement; and he continued to engage in employment with the Water Patrol.

The employer, by and through CARO, provided Mr. Vaughn with medical care referenced above (examinations performed by Dr. O'Brien on October 20, 1992, and November 10, 1992), with payment dates of November 3, 1992 and November 23, 1992. The records of CARO indicate that, relative to Injury No. 92-135488, the employer did not provide Mr. Vaughn with any additional benefits that CARO believed were covered under Chapter 287, RSMo, and similarly did not make any additional payments on account of the injury. Subsequent to the evaluation of November 10, 1992, and continuing to August 1994, Mr. Vaughn did not obtain any medical treatment for his right elbow.

On or about August 13, 1994, Mr. Vaughn sustained an incident wherein he bumped up against the rail of a dock, injuring his right elbow. This injury, which arose out of and in the course of his employment, resulted in the employer referring Mr. Vaughn back to Dr. O'Brien. Thereafter, on August 19, 1994, Mr. Vaughn presented to Dr. O'Brien for an examination and evaluation. Relative to this examination, Dr. O'Brien makes the following notation:

Mr. Vaughn bumped his right elbow on something a week ago and has a lot of pain over the lateral epicondyle. He says that he also gets intermittent tingling in all of the fingers of his right hand. His exam shows: tenderness over the lateral epicondyle, increased a little bit with resisted dorsa flexion. He has a negative tincl sign. He says his phalens test makes the tingling go away. I think he likely has a contusion of his common extensor tendon. I put him in a tennis elbow brace and gave him some Naprosyn for two weeks and in two weeks if he is still symptomatic we will inject his lateral epicondyle.

Notably, in this examination there is no reference to this medical concern relating to the accident and injury of September 25, 1992.

In light of continuing pain with numbness and tingling and loss of full extension, Mr. Vaughn received additional medical treatment with Dr. O'Brien that included examinations and evaluations on September 12, 1994, and a surgical repair in the nature of a tendon repair and debridement on February 7, 1995. Thereafter, Dr. O'Brien provided Mr. Vaughn with follow-up treatment that included examination and evaluations on February 20, 1995; March 13, 1995; April 12, 1995; May 16, 1995; July 3, 1995; October 31, 1995; and November 8, 1995. During this period of follow-up treatment, Mr. Vaughn obtained varying modalities of conservative treatment that included prescription medication, braces, physical therapy, injections, and ultrasound. Through this treatment Mr. Vaughn's right upper extremity improved, but continued to cause him pain and give him "a lot of trouble," including numbness in his forearm and marked tenderness over his radial tunnel.

Also, during this period of treatment, Mr. Vaughn retired from his employment with the Missouri State Water Patrol. According to Mr. Vaughn, he retired from the Water Patrol because he was afraid of not being able to get a person out of the water in the event an emergency situation should arise. Subsequently, however, Mr. Vaughn worked for Stone County Sheriff's Office, patrolling the parks along Table Rock Lake, mostly at night. Additionally, Mr. Vaughn worked as a security guard for Stonebridge Development.

With continuing complaints of pain, and Dr. O'Brien diagnosing Mr. Vaughn with radial tunnel syndrome, Dr. O'Brien proceeded to treat Mr. Vaughn with radial tunnel decompression surgery of the right upper extremity on or about March 7, 1996. On April 9, 1996, Mr. Vaughn returned to see Dr. O'Brien, indicating that the surgery was successful. Relative to this examination, Dr. O'Brien notes the following medical entry:

Mr. Vaughn's arm looks great. He says that it does not hurt anymore. He is going to start going back to fishing and he will call me if he has trouble.

Following the examination and apparent release from treatment on April 9, 1996, Mr. O'Brien did not return to see Dr. O'Brien or secure other medical treatment for nearly one year. However, on or about March 25, 1997, Mr. Vaughn returned to see Dr. O'Brien, presenting with complaints of tenderness and pain in his right forearm. At the time of this March 25, 1997, examination, Dr. O'Brien propounds the following comment:

He has been doing some fishing and it bothers him. He has tenderness in his muscle. It is not particularly over the radial tunnel. He has no tenderness over his lateral epicondyle. I wanted to put some Ultrasound on it but instead he decided he was going to use heat and his wife is going to massage his forearm. We will examine him in 3 weeks.

Thereafter, Dr. O'Brien provided Mr. Vaughn with follow-up treatment, which included a prescription for physical therapy. In light of this prescription, Mr. Vaughn underwent physical therapy for approximately three months and returned to see Dr. O'Brien on June 4, 1997. At the time of the June 4, 1997, examination, and in noting that the physical therapy had helped Mr. Vaughn, Dr. O'Brien opines that Mr. Vaughn is at maximum medical improvement and he could be released from his medical care to return as needed. Additionally, at the time of this examination, and in releasing Mr. Vaughn from his care, Dr. O'Brien provided Mr. Vaughn with a prescription for Ultram to take symptomatically.

The records of CARO indicate that, relative to the medical care provided to Mr. Vaughn during the period of August 19, 1994, through June 4, 1997, the employer considered the medical care to be benefits covered under Chapter 287, RSMo, and related to the August 13, 1994 injury. Following the treatment he received on June 4, 1997, Mr. Vaughn has not received any additional treatment for his right upper extremity. And the last date of payment for the medical expenses he incurred during the period of August 19, 1994, through June 4, 1997, occurred on or about July 16, 1997.

At the evidentiary hearing of August 30, 2004, Mr. Vaughn testified that he is no longer working and has retired to the state of Florida. Mr. Vaughn noted that he quit his employment with the Sheriff's office and as a security guard because of safety concerns – concerns for both his personal safety and the safety of others. In describing his current condition, Mr. Vaughn indicated that his right arm continues to cause him pain and difficulty, which he attributes to the 1992 injury. In this regard, Mr. Vaughn indicates that his right arm never fully recovered from the 1992 injury. Similarly, Mr. Vaughn's wife noted that Mr. Vaughn experienced problems with his right arm continuously since the injury he sustained in 1992.

Also, in describing his overall medical condition, Mr. Vaughn noted that he suffers from a drop foot; and, without custom shoes, he limps. This condition causes instability, and necessitates use of a cane. Additionally, Mr. Vaughn notes that he suffers from asthma, which necessitates use of an inhaler; and he has diabetes, which he controls through medication in the form of pills. Further, Mr. Vaughn takes medication for his heart.

In light of the multiple medical conditions suffered by Mr. Vaughn, he is governed by limitations and restrictions, which impact his daily activity. According to Mr. Vaughn, he is no longer able to engage in golfing, bowling, or dancing. However, he is able to do some light gardening and to cut grass. Also, he is able to drive, but limits his driving to no more than two to three hours at a time before he stops and gets out of the vehicle. His activities commonly include: watching TV; painting ceramics; swimming; and going to garage sales.

Esther E. Wadley, D.O., who is a physician practicing in the specialty of \_\_\_\_\_ family and osteopathic manipulative medicine, testified by deposition on behalf of Mr. Vaughn. Dr. Wadley performed an independent medical examination of Mr. Vaughn on August 5, 2004. At the time of this examination, Dr. Wadley took a history from Mr. Vaughn, reviewed various medical records, and performed a physical examination of him. In light of his examination and evaluation of Mr. Vaughn, Dr. Wadley opined that, as a consequence of the work-related injury sustained by Mr. Vaughn in 1992, he suffers from the following conditions: common extensor tendon tear to the right forearm; radial nerve impingement to the right upper extremity; and depression. Dr. Wadley further opined that, as a consequence of this 1992 injury, Mr. Vaughn sustained a permanent impairment of 46 percent referable to the right upper extremity; and he suffered from a permanent partial disability of 7 percent to the body as a whole referable to the depression.

In evaluating Mr. Vaughn's overall medical condition and permanent disability, Dr. Wadley opined that, prior to the accident of 1992, Mr. Vaughn presented with a permanent partial disability of 38 percent referable to the right upper extremity. Additionally, Dr. Wadley opined that, as a consequence of the prior injury and surgery involving the low back, Mr. Vaughn presented with a permanent partial impairment of 15 percent to the body as a whole; as a consequence of the prior illness involving poliomyelitis syndrome, Mr. Vaughn presented with a permanent partial impairment of 23 percent to the body as a whole; as a consequence of the hypertension suffered by Mr. Vaughn, he presented with a permanent partial impairment of the 3 percent to the body as a whole; and, as a consequence of the diabetes, Mr. Vaughn presented with a permanent partial impairment of 5 percent to the body as a whole. Taking into consideration the multiple effects of the injuries and illnesses combining with one another, Dr. Wadley opined that Mr. Vaughn presented with a permanent disability of 79 percent to the body as a whole.

Also, in light of the multiple injuries and illnesses suffered by Mr. Vaughn, Dr. Wadley is of the opinion that Mr. Vaughn is governed by significant limitations and restrictions. In addressing this concern, Dr. Wadley propounds the following comments:

He [Mr. Vaughn] will be restricted from activities that would require reaching on a repetitive basis for less than 1/3 of a day. The patient will be unable to do activities because of muscle loss and contractors in the left upper extremity from his Post-Poliomyelitis syndrome. He also is unable to reach with his right upper extremity secondary to injuries and multiple surgeries,

which has caused subsequent nerve damage and decreased muscular tone. The patient [Mr. Vaughn] will be restricted from any activities that require balance, climbing, squatting, lifting from floor to waist, or waist to head. The patient will be restricted to walking even ground for only a distance of less than forty feet. The patient will be restricted to sitting less than one hour. The patient will be restricted to standing for less than fifteen minutes. The patient needs allowances to lie down for one hour at least once during a day. The patient will be restricted from the use of any pedals or levers with his lower extremities secondary with his radiculopathy in his right leg from the herniated disc. He will be restricted from use of pedals and levers with his left leg because of his Post-Poliomyelitis syndrome and contractures along with decreased muscle tone. The patient will be restricted from operating controls or levers with his upper extremities on the left because of his Post-Poliomyelitis syndrome and on the right because of his muscle surgeries with decreased muscle tone and nerve damage.

Notably, in rendering her opinions of permanent disability or impairment, Dr. Wadley failed to give consideration and attention to the events and conditions, which reference a work-related injury occurring to Mr. Vaughn on August 13, 1994, and which relate to Injury No. 94-111529. In this regard the medical report of Dr. Wadley identifies a medical history provided to her, but the history is void of any reference or consideration to the 1994 incident. Nor does Dr. Wadley identify or recognize the discontinuation of treatment and lack of symptoms attributable to the right elbow for the period of November 10, 1992, to August 1994. Similarly, Dr. Wadley does not reference or identify the recurrence of pain in the right upper extremity and the initiation of renewed pain in the right upper extremity following the August 13, 1994, incident. Further, on cross-examination Dr. Wadley acknowledges that Mr. Vaughn did not inform her of having sustained the second injury to his right arm on August 13, 1994; and she was unaware of the fact that both surgeries to Mr. Vaughn's right arm occurred after the August 13, 1994, incident.

Robert Patrick O'Brien, M.D., whom is a physician practicing in the specialty of orthopedic surgery, and who provided treatment for Mr. Vaughn's right upper extremity, testified by deposition. In light of his examinations and treatment of Mr. Vaughn, and after taking into consideration his review of medical records and applicable medical history, Dr. O'Brien opined that, as a consequence of the injury sustained by Mr. Vaughn on September 25, 1992, which involved weight lifting while participating in annual strength testing, Mr. Vaughn sustained an injury in the nature of right lateral epicondylitis. Dr. O'Brien further opined that, the September 25, 1992 injury resulted in Mr. Vaughn suffering a chronic tendon tear which caused him to undergo a tendon repair and debridement on February 7, 1995; and the surgery to repair the extensor tendon caused Mr. Vaughn to experience swelling in his forearm, which resulted in him suffering radial tunnel syndrome, necessitating a surgical release of the radial nerve on March 7, 1996.

In addressing the medical causal relationship existing between the two surgeries and the September 25, 1992 injury, as compared to the August 13, 1994 injury, Dr. O'Brien propounds in pertinent part the following testimony:

Q. And Doctor, do you have an opinion to a reasonable degree of medical certainty as to whether or not the lateral epicondylitis that you treated him for in October and November 1992, whether that had ever healed prior to August 19, 1994?

\* \* \*

A. With his history of bumping his elbow and causing it to hurt as it did, I believe that there is a high likelihood that the tendon had never completely reconstituted. I wouldn't have expected a bump by itself to cause the findings that I encountered at the time that we repaired his tendon.

Q. And when you say a high likelihood, would that be to a reasonable degree of medical certainty?

A. Yes.

\* \* \*

Q. And could you describe that operation [tendon repair and debridement on February 7, 1995]?

A. A small longitudinal incision was made over the lateral epicondyle and for about two centimeters distally the common extensor tendon was identified and, in fact, had an area of degeneration on its under surface where there had been a chronic tear. The area of degeneration was excised and the tendon was repaired.

Q. And did you look at the tissue that you removed?

A. Yes.

Q. And did it appear to you to have been something that had been in existence for quite

some period of time --

A. Yes.

Q. -- the damaged tissue?

A. Yes, it looked like it had -- he had had a chronic tendon tear in that area.

Q. And is that why you state that your opinion to a reasonable degree of medical certainty was that the October 1992 injury or the injury that you saw him for on October 20<sup>th</sup> of '92, had never fully healed?

A. Yes.

\* \* \*

Q. Okay. And do you have an opinion to a reasonable degree of medical certainty whether the radial nerve release that you performed on March 7 of 1996 was caused by the initial injury that you saw Mr. Vaughn for on October 20<sup>th</sup> of 1992?

A. Mr. Vaughn had complained -- to answer your question directly. I think that his radial tunnel syndrome was aggravated by his surgery to repair his extensor tendon, which in turn was likely caused by his initial injury in '92. He felt all along his forearm was tight and felt swollen and swelling in a forearm can initiate symptoms of radial tunnel syndrome if you're anatomically predisposed to that. And my supposition, on the basis of what he told me, was that that was the case.

Q. And you say supposition, supposition about what?

A. That his swelling in his forearm that had been produced by his original injury initiated his radial tunnel syndrome.

\* \* \*

Q. And is it your opinion to a reasonable degree of medical certainty that the surgical procedure you performed on March 7 of '96 to release the radial nerve was necessitated by the reaction to the first surgical procedure you performed on him?

A. Yes.

Q. And that the first surgical procedure you performed on him was caused by the injury for which you saw him on October 20<sup>th</sup> of '92?

A. Yes.

Finally, in considering the nature and extent of disability to Mr. Vaughn's right upper extremity, relative to the injury of September 25, 1992, and the incident of August 13, 1994, Dr. O'Brien opined that Mr. Vaughn did not sustain any residual permanent disability. Relative to this concern, Dr. O'Brien propounded the following testimony,

Q. Okay. Did you ever rate Mr. Vaughn's right arm?

A. I believe I did. I felt that on the basis of his previous surgeries and the result that he had obtained that he didn't have any permanent disability secondary to his previous injuries.

## FINDINGS AND CONCLUSIONS

The fundamental purpose of The Workers' Compensation Law for the State of Missouri is to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment. The law is to be broadly and liberally interpreted and is intended to extend its benefits to the largest possible class. Any question as to the right of an employee to compensation must be resolved in favor of the injured employee. *Cherry v. Powdered Coatings*, 897 S.W. 2d 664 (Mo.App., E.D. 1995); *Wolfgeher v. Wagner Cartage Services, Inc.*, 646 S.W.2d 781, 783 (Mo.Banc 1983). Yet, a liberal construction cannot be applied in order to excuse an element lacking in the claim. *Johnson v. City of Kirksville*, 855 S.W.2d 396 (Mo.App., W.D. 1993).

The party claiming benefits under The Workers' Compensation Law for the State of Missouri bears the burden of proving all material elements of his or her claim. *Duncan v. Springfield R-12 School District*, 897 S.W.2d 108, 114 (Mo.App. S.D. 1995), citing *Meilves v. Morris*, 442 S.W.2d 335, 339 (Mo. 1968); *Brufflat v. Mister Guy, Inc.* 933 S.W.2d 829, 835 (Mo.App. W.D. 1996); and *Decker v. Square D Co.* 974 S.W.2d 667, 670 (Mo.App. W.D. 1998). Where several events, only one being compensable, contribute to the alleged disability, it is the claimant's burden to prove the nature and extent of disability attributable to the job-related injury.

Yet, the claimant need not establish the elements of the case on the basis of absolute certainty. It is sufficient if the claimant shows them to be a reasonable probability. "Probable", for the purpose of determining whether a worker's compensation claimant has shown the elements of a case by reasonable probability, means founded on reason and experience, which inclines the mind to believe but leaves room for doubt. See, *Cook v. St. Mary's Hospital*, 939 S.W.2d 934 (Mo.App., W.D. 1997); *White v. Henderson Implement Co.*, 879 S.W.2d 575,577 (Mo.App., W.D. 1994); and *Downing v. Williamette Industries, Inc.*, 895 S.W.2d 650 (Mo.App., W.D. 1995). All doubts must be resolved in favor of the employee and in favor of coverage. *Johnson v. City of Kirksville*, 855 S.W.2d 396, 398 (Mo.App. W.D. 1993).

## I.

### Nature of Injury or Injuries

The employee contends that on September 25, 1992, he sustained a work-related injury involving the lateral epicondyle of his right upper extremity; and this injury resulted in him suffering a chronic tendon tear that caused him to undergo a tendon repair and debridement on February 7, 1992. Further, the employee contends, the surgery of February 7, 1992, caused him to experience swelling in his right forearm which resulted in him suffering radial tunnel syndrome, necessitating a surgical release of the radial nerve on March 7, 1996. Notably, in asserting this claim of injury, the employee acknowledges that he sustained a second work-related incident on August 13, 1994, which involved an injury to his right elbow. The employee, however, asserts that the August 13, 1994, incident involved a minimal injury that resulted in no residual permanent disability; and, the August 13, 1994, incident is not causally related to the two surgeries and the resulting permanent disability attributable to his right upper extremity.

The employer and Second Injury Fund dispute the contentions of the employee. Although conceding that the employee sustained two separate work-related injuries (September 25, 1992 and August 13, 1994), the employer and Second Injury Fund suggest that the accident of September 25, 1992, involved a minimal injury for which the employee received only two examinations, and was then released from medical care without any permanent restrictions. Further, asserting that the employee worked during the period of November 10, 1992, to August 1994 without obtaining any medical treatment for his right upper extremity, the employer and Second Injury Fund suggest that the two surgeries provided to Mr. Vaughn in 1995 and 1996 relate to the accident of August 13, 1994, which represents a separate and intervening event unrelated to the accident of September 25, 1992.

The adjudication of this issue is not without difficulty. The evidence is supportive of a finding that Mr. Vaughn suffered two separate and distinct work-related incidents involving his right upper extremity, with the first incident occurring on September 25, 1992, and the second incident occurring on August 13, 1994. And, the facts presented by the parties could conceivably support the contention of either party. Notably, following the accident of September 25, 1992, Mr. Vaughn treated with Dr. O'Brien, but received only two evaluations before being released from medical care without permanent restrictions on or about October 20, 1992. Yet, at the time of this October 20, 1992, examination, Dr. O'Brien did not specifically issue an opinion that Mr. Vaughn had reached maximum medical improvement, and did not issue a disability rating or an opinion of no disability. Also, following the examination of October 20, 1992, Mr. Vaughn returned to work performing full duties in his employment as a water patrol officer, and for approximately one year did not obtain any medical treatment for his right upper extremity. Yet, according to Mr. Vaughn, he never became pain free; and he continued to experience some numbness and tingling in his right hand. Additionally, Mr. Vaughn suffers from multiple preexisting medical conditions, together with subsequent occurring medical conditions, which complicate an understanding and an assessment of Mr. Vaughn's medical condition.

Notwithstanding the aforementioned difficulty, the adjudication of this issue may be readily resolved in light of medical opinion. The contention of the employee is supported by medical opinion, while the contentions of the employer and Second Injury Fund are without the benefit of any medical or expert opinion. Although I do not find Dr. Wadley to be competent to address this issue, as she rendered her opinion without consideration of all the relevant and pertinent facts, the medical opinions of Dr. O'Brien are supportive of the contentions of the employee. Seeking to address specifically this issue, Dr. O'Brien opined that, the September 25, 1992, injury resulted in Mr. Vaughn suffering a chronic tendon tear, which caused him to undergo a tendon repair and debridement on February 7, 1995; and the surgery to repair the extensor tendon caused Mr. Vaughn to experience swelling in his forearm, which resulted in him suffering radial tunnel syndrome, necessitating a surgical release of the radial nerve on March 7, 1996. Additionally, the opinion of Dr. O'Brien is supported by his physical observation of the right upper extremity, which he had occasion to observe during the surgeries, which evidenced a chronic (and not acute) tear that could not be attributed to the type of bumping incident described in the August 13, 1994, claim of injury. There is no medical or expert opinion challenging or disputing the testimony and opinion of Dr. O'Brien.

Accordingly, after consideration and review of the evidence, I find and conclude that the employee, Ronald Vaughn, sustained two separate and distinct work-related incidents involving his right upper extremity, with the first incident occurring on September 25, 1992, and the second incident occurring on August 13, 1994. In both instances Mr. Vaughn

sustained an injury by accident that arose out of and in the course of his employment. Further, in light of the testimony and opinion of Dr. O'Brien, who is the treating physician selected by the employer and who I find to be credible, I find and conclude that the September 25, 1992, injury resulted in Mr. Vaughn suffering a chronic tendon tear, which caused him to undergo a tendon repair and debridement on February 7, 1995; and the surgery to repair the extensor tendon caused Mr. Vaughn to experience swelling in his forearm which resulted in him suffering radial tunnel syndrome, necessitating a surgical release of the radial nerve on March 7, 1996. Additionally, in light of the testimony and opinion of Dr. O'Brien, I find and conclude that the August 13, 1994, accident did not cause Mr. Vaughn to sustain any permanent injury or necessitate receipt of the aforementioned medical care.

## II. Statute of Limitations

An initial question that must be addressed is whether the filing of the Claim for Compensation by Mr. Vaughn occurred within the statutory period of limitations, which is being asserted by the employer and Second Injury Fund as an affirmative defense. The period of limitations, which governs the timely filing of a Claim for Compensation, differs according to whether the claim was filed against the employer / insurer, or against the Second Injury Fund.

In a proceeding against the employer or insurer, the Claim for Compensation must be filed within two years, or possibly three years, of the date of injury or death, or the last payment made under the workers' compensation act on account of the injury or death. In a proceeding against the Second Injury Fund, however, the Claim for Compensation must be filed within two years of the date of the injury, or within one year of the filing of the claim against the employer or insurer under Chapter 287, RSMo. *See*, Section 287.430, RSMo. Further, in evaluating the timely filing of a claim against the employer or insurer, consideration must be given to whether the applicable period of limitations is two or three years, which necessitates consideration of Sections 287.380 and 287.430, RSMo.

Section 287.430, RSMo, in pertinent part, states as follows:

Except for a claim for recovery filed against the second injury fund, no proceedings for compensation under this Chapter shall be maintained unless a claim therefore is filed with the division within two years after the date of injury or death, or the last payment made under this chapter on account of the injury or death, *except that if the report of the injury or the death is not filed by the employer as required by section 287.380*, the claim for compensation may be filed within three years after the date of injury, death, or last payment made under this chapter on account of the injury or death. ... A claim against the second injury fund shall be filed within two years after the date of the injury or within one year after a claim is filed against an employer or insurer pursuant to this chapter, whichever is later. ... [Emphasis added.]

Section 287.380, RSMo, in pertinent part, states:

Every employer or his insurer in this state, whether he has accepted or rejected the provisions of this chapter, shall *within 10 days* after knowledge of an accident resulting in personal injury to any employee notify the division [Division of Workers' Compensation] thereof, and shall, *within one month* from the date of filing of the original notification of injury, file with the division under such rules and regulations and in such form and detail as the division may require, a full and complete report of every injury ... [Emphasis added.]

A plain reading of Sections 287.380 and 287.430, RSMo indicates that, in order for an employer or insurer to avoid the application of the three year period of limitations, the employer / insurer must satisfy minimally two requirements. First, within 10 days of receiving knowledge of an accident resulting in personal injury to an employee, the employer / insurer must notify the division of the sustaining of an accident by its employee. Secondly, within one month from the date of filing of the original notification of injury, the employer / insurer must file with the Division of Workers' Compensation a full and complete report of injury.

### A. (Injury No. 92-135488)

The Report of Injury (Form 1) prescribed by the Division of Workers' Compensation and utilized by the employer in this case states that the form serves as both the notice and the report of injury referred to in Section 287.380, RSMo. Additionally, this report of injury appears to have been prepared by the employer on October 2, 1992, and submitted to Central Accident Reporting Office (CARO) on October 8, 1992. Thereafter, the report of injury was submitted to and filed

with the Division of Workers' Compensation on or about October 28, 1992. No other notice or report of injury appears to have been filed with the Division of Workers' Compensation.

In light of the foregoing, the employer did not comply with the requirements set forth in Section 287.380, RSMo. Although the employer filed the Report of Injury within one month of being notified of the injury sustained by Mr. Vaughn, the employer did not notify the Division of Workers' Compensation of the injury sustained by Mr. Vaughn within 10 days of being notified of the injury. At the latest the employer received notification of the September 25, 1992, injury on October 2, 1992, but did not notify the Division of Workers' Compensation of this injury until October 28, 1992, which is beyond the 10-day requirement of Section 287.380, RSMo. Accordingly, the applicable period of limitation for the filing of the claim against the employer is three years – three years from the date of injury or the date of last payment made under the workers' compensation act on account of the injury.

The filing of the Claim for Compensation by Mr. Vaughn in Injury No. 92-135488 occurred on May 28, 1996, which is more than three years after the date of injury. Thus, in order for the Claim for Compensation to be considered timely filed, the claim must have been filed within three years of the last date of payment made under the workers' compensation act on account of the injury. The employer argues that this date is November 23, 1992; and, therefore, Mr. Vaughn did not timely file the Claim for Compensation.

The records of CARO support the employer's contention that the last date of payment for medical care, which they attributed to Injury No. 92-135488, was November 23, 1992. However, the evidence is supportive of a finding that the employer provided Mr. Vaughn with additional treatment for the injury he sustained in Injury No. 92-135488 after November 23, 1992; but the employer simply erred in not reporting the treatment as being for this injury. Instead, the employer reported incorrectly that the treatment and expenses incurred for the September 25, 1992, injury was for the injury Mr. Vaughn sustained in Injury No. 94-111529. The injury of September 25, 1992, injury resulted in Mr. Vaughn suffering a chronic tendon tear, which caused him to undergo a tendon repair and debridement on February 7, 1995; and the surgery to repair the extensor tendon caused Mr. Vaughn to experience swelling in his forearm, which resulted in him suffering radial tunnel syndrome, necessitating a surgical release of the radial nerve on March 7, 1996. The employer, through CARO, provided Mr. Vaughn with this medical care under Chapter 287, RSMo; and the last date of payment for the medical expenses incurred during the period occurred on or about July 16, 1997.

Therefore, in light of the Claim for Compensation (in Injury No. 92-135488) being filed against the employer on May 28, 1996, which is less than three years (and two years) from the date of the last payment made under Chapter 287, RSMo, on account of the injury, the Claim for Compensation filed against the employer was timely filed and is not barred by the statute of limitations. Similarly, in light of the timely filing of the claim against the employer, and in light of the Claim for Compensation (in Injury No. 92-135488) being filed against the Second Injury Fund on May 28, 1996, which is less than one year from filing of the claim against the employer, the Claim for Compensation filed against the Second Injury Fund was timely filed and is not barred by the statute of limitations.

B.  
(Injury No. 94-111529)

In Injury No. 94-111529, the employee sustained an injury on August 13, 1994, but did not notify the employer of this injury until on or about August 17, 1994. Thereafter, the employer referred Mr. Vaughn to Dr. O'Brien for a medical evaluation which occurred on August 19, 1994. (The employer paid for this treatment on January 27, 1995.) Additionally, on or about August 23, 1994, the employer, through CARO, prepared the Report of Injury, which appears to have been submitted to and filed with the Division of Workers' Compensation on or about September 7, 1994. No other notice or report of injury appears to have been filed with the Division of Workers' Compensation.

In light of the foregoing, the employer did not comply with the requirements set forth in Section 287.380, RSMo. Although the employer filed the Report of Injury within one month of being notified of the injury sustained by Mr. Vaughn, the employer did not notify the Division of Workers' Compensation of the injury sustained by Mr. Vaughn within 10 days of being notified of the injury. The employer received notification of the August 13, 1994, injury on August 17, 1994, but did not notify the Division of Workers' Compensation of this injury until September 7, 1994, which is beyond the 10-day requirement of Section 287.380, RSMo. Accordingly, the applicable period of limitation for the filing of the claim against the employer is three years – three years from the date of injury or the date of last payment made under the workers' compensation act on account of the injury.

The filing of the Claim for Compensation by Mr. Vaughn in Injury No. 94-111529 occurred on July 12, 2000, which is more than three years after the date of injury; and, the Claim for Compensation filed by Mr. Vaughn in Injury No. 94-111529 occurred more than three years after January 27, 1995, the date of last payment made under the workers' compensation act on account of the injury. Accordingly, the Claim for Compensation filed against the employer in Injury No. 94-111529 was not timely filed, and is barred by the statute of limitations. Similarly, the Claim for Compensation filed

against the Second Injury Fund was not timely filed, and is barred by the statute of limitations. The Claim for Compensation filed against both the employer and the Second Injury Fund in Injury No. 94-111529 is denied. All other issues presented in Injury No. 94-111529 are rendered moot.

### III. Nature & Extent of Permanent Disability

The injury of September 25, 1992, injury resulted in Mr. Vaughn suffering a chronic tendon tear, which caused him to undergo a tendon repair and debridement on February 7, 1995; and the surgery to repair the extensor tendon caused Mr. Vaughn to experience swelling in his forearm which resulted in him suffering radial tunnel syndrome, necessitating a surgical release of the radial nerve on March 7, 1996. Dr. O'Brien is of the opinion that this injury did not result in Mr. Vaughn suffering any residual permanent disability. Yet, Dr. Wadley opines that this injury caused Mr. Vaughn to sustain a permanent partial impairment of 46 percent referable to the right upper extremity.

Also, Mr. Vaughn indicates that, as a consequence of suffering this September 25, 1992, injury, he experienced pain in his right upper extremity and never became pain free. And, even with the two surgeries (February 7, 1995 and March 7, 1995) performed on his right arm, he continues to experience pain and difficulty in using his right arm. Notably, according to Mr. Vaughn, he no longer fishes because of his inability to cast with his right hand; and, he no longer depends on the use of his right arm in operating his motor vehicle. (Mr. Vaughn now utilizes mostly his left arm when driving his vehicle.) And, according to Mr. Vaughn's wife, Mr. Vaughn drops things while using his right arm.

After consideration and review of the evidence, including the testimonies of Mr. and Mrs. Vaughn, who I find to be credible, I find and conclude that, as a consequence of the accident, sustained by Mr. Vaughn on September 25, 1992, he sustained a permanent partial disability of 15 percent, referable to the right upper extremity at the 210-week level (31.5 weeks). Additionally, this injury resulted in Mr. Vaughn suffering scarring and disfigurement in the nature of 3.5 weeks.) This injury, considered alone, does not render Mr. Vaughn unemployable in the open and competitive labor market. Accordingly, the employer is ordered to pay to the employee, Ronald Vaughn, the sum of \$8,246.35, which represents 35 weeks of permanent partial disability and disfigurement. (35 weeks x \$235.61 = \$8,246.35)

### IV. Liability of Second Injury Fund

After consideration and review of the evidence, I find and conclude that the employee, Ronald Vaughn, did not sustain his burden of proof in establishing Second Injury Fund liability. The injury of September 25, 1992, considered alone and in combination with the preexisting disabilities, do not render Mr. Vaughn unemployable in the open and competitive labor market. Further, the evidence admitted at the hearing lacks any expert testimony or medical proof that, the injury and disability caused by the accident of September 25, 1992, combined with the preexisting permanent partial disability or disabilities, without consideration of subsequent deteriorating conditions, to cause Mr. Vaughn to suffer additional disability greater than the simple sum. In the context of this issue, Mr. Vaughn relies solely on the opinion of Dr. Wadley. Yet, Dr. Wadley does not provide medical opinion that would establish any such liability.

Notably, Dr. Wadley opines that the injury of September 25, 1992, caused Mr. Vaughn to sustain a permanent partial impairment of 46 percent referable to the right upper extremity. (Although Dr. Wadley does not identify the specific week level, one may reasonably assume she is referring to the 210-week level or 232-week level, which represents 96.6 or 106.72 weeks, and is equivalent to 24 to 26 percent to the body as a whole.) And, she opines that, at the time of this injury, Mr. Vaughn suffered from a permanent partial disability of 38 percent to the body as whole, referable to the lumbar discectomy and poliomyelitis syndrome. Additionally, Dr. Wadley opines that, at the time Mr. Vaughn presented to her for evaluation, he suffered from depression, which causes him to suffer a permanent partial impairment of 7 percent to the body as whole; he suffers from hypertension, which causes him to suffer a permanent partial impairment of 3 percent to the body as a whole; and he suffers from diabetes, which causes him to suffer a permanent partial impairment of 5 percent to the body as a whole. (The disabilities associated with depression, hypertension, and diabetes include both preexisting and subsequent deteriorating conditions, not causally related specifically to the September 25, 1992, injury.) Finally, Dr. Wadley opines that, at the time of Mr. Vaughn presented to her for evaluation, he suffered from a permanent total disability of 79 percent to the body as a whole.

Collectively, the aforementioned disabilities identified by Dr. Wadley do not necessarily combine to be greater than the simple sum, with the combining disabilities appearing to be 77 to 79 percent to the body as a whole. Further, even if this evidence might suggest a combination of disability in excess of the simple sum by 2 percent to the body as a whole, the combination of disabilities include consideration of subsequent deteriorating conditions. Dr. Wadley's opinion of Mr. Vaughn's overall disability includes not only the preexisting permanent partial disabilities (lumbar and polio) and the permanent partial disability attributed to the September 25, 1992, accident, but also other disabilities occurring subsequent to the accident of September 25, 1992, which is not appropriate for consideration of Second Injury Fund liability. Without medical opinion supporting Second Injury Fund liability, the claim against the Second Injury Fund must fail.

Accordingly, in light of the foregoing, the Claim for Compensation, as filed against the Second Injury Fund, is

denied.

The award is subject to modifications as provided by law.

An attorney's fee of 25 percent of the benefits ordered to be paid is hereby approved, and shall be a lien against the proceeds until paid. Interest as provided by law is applicable.

Date: February 9, 2005

Made by: /s/ L. Timothy Wilson  
L. Timothy Wilson  
Associate Administrative Law Judge  
Division of Workers' Compensation

A true copy: Attest:

/s/ Patricia "Pat" Secret  
Patricia "Pat" Secret  
Director  
Division of Workers' Compensation

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 94-111529

Employee: Ronald Vaughn  
Employer: Missouri Department of Public Safety  
Insurer: Central Accident Reporting Office  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: August 13, 1994  
Place and County of Accident: Stone County, 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 associate 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 associate administrative law judge dated February 9, 2005, and awards no compensation in the above-captioned case.

The award and decision of Associate Administrative Law Judge L. Timothy Wilson, issued February 9, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 22<sup>nd</sup> day of July 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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Attest: John J. Hickey, Member

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Secretary

## AWARD

Employee: Ronald E. Vaughn

Injury No. 94-111529

Dependents: N/A

Employer: Missouri Department of Public Safety

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

Additional Party: Second Injury Fund

Insurer: CARO

Hearing Date: August 30, 2004

Checked by: LTW/mp

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? no
2. Was the injury or occupational disease compensable under Chapter 287? no
3. Was there an accident or incident of occupational disease under the Law?
4. Date of accident or onset of occupational disease: August 13, 1994
5. State location where accident occurred or occupational disease was contracted: Stone 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? no
8. Did accident or occupational disease arise out of and in the course of the employment? N/A
9. Was claim for compensation filed within time required by Law? no
10. Was employer insured by above insurer? yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
During the course of his employment, Claimant bumped up against the rail of a dock, allegedly  
injuring his right elbow.
12. Did accident or occupational disease cause death? N/A Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: right elbow



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

Dependents: N/A

Employer: Missouri Department of Public Safety

Additional Party Second Injury Fund

Insurer: CARO

Checked by: LTW/mp

The above-referenced workers' compensation claim, which involved the consolidation of two workers' compensation cases, was heard before the undersigned Associate Administrative Law Judge on August 30, 2004.<sup>[2]</sup> The parties were afforded an opportunity to submit briefs, resulting in the record being completed and submitted to the undersigned on or about September 29, 2004.

In Injury Number 92-135488, the parties entered into a stipulation of facts. The stipulation is as follows:

- (1) On or about September 25, 1992, the Missouri Department of Public Safety was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully self-insured with the benefits being administered by and through CARO.
- (2) On the alleged injury date of September 25, 1992, Ronald E. Vaughn was an employee of the employer and was working under and subject to The Missouri Workers' Compensation Law.
- (3) On or about September 25, 1992, the employee sustained an accident which arose out of and in the course and scope of employment.
- (4) The above-referenced employment and accident occurred in Stone County, Missouri. The parties agree to venue lying in Springfield (Greene County), Missouri. Venue is proper.
- (5) The employee notified the employer of his injury as required by Section 287.420, RSMo.
- (6) At the time of the alleged accident, the employee's average weekly wage was \$566.54, which is sufficient to allow a compensation rate of \$377.69 for temporary total disability compensation, and a compensation rate of \$235.61 for permanent partial disability compensation.
- (7) The employee alleges that temporary disability benefits have not been provided to him. (The employee disputes the amount of temporary disability compensation and medical benefits paid by the employer, contending that certain benefits provided to him have been attributed by the employer to the 1994 file, but should be attributed to this file.)
- (8) The employer has provided medical treatment to the employee, having paid \$642.05 in medical expenses.

The sole issues to be resolved by hearing in Injury Number 92-135488 include:

- (1) Whether the Claim for Compensation was filed within the time prescribed by law?
- (2) Whether the accident of September 25, 1992, caused the injuries and disabilities for which benefits are now being claimed?
- (3) Whether the employee sustained any permanent disability as a consequence of the

alleged accident; and, if so, the nature and extent of the disability?

- (4) Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for payment of additional permanent partial disability compensation?

In Injury Number 94-111529, the parties entered into a stipulation of facts. The stipulation is as follows:

- (1) On or about August 13, 1994, the Missouri Department of Public Safety was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully self-insured with the benefits being administered by and through CARO.
- (2) On the alleged injury date of August 13, 1994, Ronald E. Vaughn was an employee of the employer and was working under and subject to The Missouri Workers' Compensation Law.
- (3) On or about August 13, 1994, the employee sustained an accident which arose out of and in the course and scope of employment.
- (4) The above-referenced employment and accident occurred in Stone County, Missouri. The parties agree to venue lying in Springfield (Greene County), Missouri. Venue is proper.
- (5) The employee notified the employer of his injury as required by Section 287.420, RSMo.
- (6) At the time of the alleged accident, the employee's average weekly wage was \$601.15, which is sufficient to allow a compensation rate of \$400.77 for temporary total disability compensation, and a compensation rate of \$249.48 for permanent partial disability compensation.
- (7) The employer alleges that temporary disability compensation have been paid in the amount of \$5,610.78, which represents 16 weeks of benefits, payable for the period of February 7, 1995, through May 16, 1995. (The employee contends that this temporary disability compensation is attributed to the injury suffered in Injury Number 92-1135488 and not to this file.)
- (8) The employer alleges that it provided medical treatment to the employee, having paid \$8,858.66 in medical expenses. (The employee contends that this medical treatment and the expenses incurred are attributed to the injury suffered in Injury Number 92-1135488 and not to this file.)

The sole issues to be resolved by hearing in Injury Number 94-111529 include:

- (1) Whether the Claim for Compensation was filed within the time prescribed by law?
- (2) Whether the accident of August 13, 1994, caused the injuries and disabilities for which benefits are now being claimed?
- (3) Whether the employee sustained any permanent disability as a consequence of the alleged accident; and, if so, the nature and extent of the disability?
- (4) Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for payment of additional permanent partial disability compensation?

### **EVIDENCE PRESENTED**

The employee, Ronald Vaughn, testified at the hearing in support of his claim. Also, the employee presented at the hearing of this case the testimony of his wife, Linda Vaughn. In addition, the employee offered for admission the following exhibits:

Exhibit A ..... Missouri State Water Patrol Retirement Card Issued for Ronald Vaughn

Exhibit B ..... Deposition of Patrick O'Brien, M.D.  
Exhibit C ..... Medical Records from Patrick O'Brien, M.D.  
Exhibit D ..... Deposition of Esther Wadley, D.O.  
Exhibit E ..... Medical Report from Esther Wadley, D.O.

The exhibits were received and admitted into evidence.

The employer presented at the hearing of this case the testimony of one witness – Rebecca Heet. Also, the employer offered for admission the following exhibits:

Exhibit 1 ..... Business Records of Central Accident Reporting Office within the Office of Administration Relative to Claim of Accident Dated September 25, 1992  
Exhibit 2 ..... Business Records of Central Accident Reporting Office within the Office of Administration Relative to Claim of Accident Dated August 13, 1994

The exhibits were received and admitted into evidence.

The Second Injury Fund did not present any witnesses or offer any evidence at the hearing of this case.

In addition, the parties identified several documents filed with the Division of Workers' Compensation which were made part of a single exhibit identified as the Legal File. The undersigned took official notice of the documents contained in the Legal File which include: Notice of Hearing; Answer of Second Injury Fund to Claim for Compensation (Injury No. 94-111529); Answer of Employer to Claim for Compensation (Injury No. 94-111529); Claim for Compensation (Injury No. 94-111529); Report of Injury (Injury No. 94-111529); Answer of Employer to Claim for Compensation (Injury No. 92-135488); Answer of Second Injury Fund to Claim for Compensation (Injury No. 92-135488); Claim for Compensation (Injury No. 92-135488); and Report of Injury (Injury No. 92-135488).

## DISCUSSION

The employee, Ronald Vaughn, is 63 years of age, having been born on November 16, 1941. Additionally, Mr. Vaughn is married and, having retired from the Missouri State Water Patrol, now resides with his wife in the state of Florida. Prior to moving to Florida, Mr. Vaughn resided in Branson, Missouri.

As a child, Mr. Vaughn suffered an illness in the nature of polio, which resulted in him having a shortened and weakened left upper extremity, and a shortened and weakened left lower extremity. Further, this illness caused him to limp and to be limited in the length and duration of his walking. Additionally, Mr. Vaughn experienced spasticity and diminished muscle mass; and he wore a brace to correct the "pigeon toe" effect in his left foot.

Ronald Vaughn is a high-school graduate who has taken some college classes involving law enforcement. Also, subsequent to graduating from high school, during the period of 1960 to 1964, Mr. Vaughn served in the United States Air Force. Although Mr. Vaughn suffered from the effects of polio, the illness did not preclude him from serving in the military. Notably, according to Mr. Vaughn, the Air Force utilized a test which measured endurance and not speed; and he was able to pass this test.

Following his service in the military, and then working briefly for Chrysler, in or around 1965 Mr. Vaughn secured employment with the St. Louis Police Department, working in this employment during the period of 1965 to 1967. Again, according to Mr. Vaughn, although he suffered from polio, he was able to pass the physical test presented by the St. Louis Police Department because the test rewarded a person for endurance and not speed.

On or about July 1, 1968, Mr. Vaughn secured employment with the Missouri State Water Patrol. Mr. Vaughn noted that, in securing this employment, he had to pass a swimming test, but he did not have to concern himself with any running requirements. Upon engaging in this employment, the Water Patrol issued him a boat and trailer which he had to operate in and out of the water without assistance. Also, since the 1970s, Mr. Vaughn has worked for himself as a fishing guide, which has provided him with additional part-time income.

In or around 1971 or 1972, Mr. Vaughn suffered a work-related injury while engaged in his employment with the Water Patrol. This injury, which occurred while he was cleaning the boat assigned to him, caused him to suffer a disc herniation in his lumbar spine and resulted in him undergoing low back surgery. According to Mr. Vaughn, he experienced complications associated with the surgery in the nature of a staph infection, which resulted in him being off work five to six months. At the hearing Mr. Vaughn noted that he eventually settled the workers' compensation case associated with this injury, and he continues to experience problems with his low back. These problems include right lower extremity pain, with tingling into the toes; difficulty in stooping or bending over; difficulty with climbing or walking uphill; and varying difficulty in being able to sit continuously.

On or about September 25, 1992, Mr. Vaughn sustained a work-related injury while participating in annual strength

testing required by the Missouri State Water Patrol. The injury, which occurred as Mr. Vaughn was performing a bench press on an exercise machine, caused him to experience swelling and tenderness over the lateral epicondyle of his right upper extremity. According to Mr. Vaughn, as a consequence of this injury, he experienced pain in his right arm with tingling and numbness in the fingers of his right hand. In light of continuing symptoms, on or about October 20, 1992, Mr. Vaughn presented to Patrick O'Brien, who is an orthopedic surgeon for examination and evaluation. Notably, according to Mr. Vaughn, during the period of September 25, 1992, to October 20, 1992, he took some time off from work because of the pain he was experiencing in his right elbow.

At the time of presenting to Dr. O'Brien on October 20, 1992, Mr. Vaughn underwent an examination and evaluation which revealed Mr. Vaughn exhibiting full range of motion, but with swelling and "exquisite tenderness over his lateral epicondyle." Additionally, Dr. O'Brien noted that Mr. Vaughn exhibited increased pain with resisted dorsa flexion, and that Mr. Vaughn appeared to have "a slight defect in his extensor tendon." In light of his examination and evaluation of Mr. Vaughn, and taking into consideration that Mr. Vaughn was approximately one-month post injury, Dr. O'Brien recommended that Mr. Vaughn be treated conservatively with the hope of him healing on his own without surgical intervention. Also, Dr. O'Brien put Mr. Vaughn in a "Nirschl" brace and directed him to avoid gripping or lifting with his right arm. A follow-up examination was scheduled in three weeks.

On or about November 10, 1992, Mr. Vaughn returned to see Dr. O'Brien, continuing to exhibit some symptoms, but showing improvement. The medical entry of November 10, 1992, states:

Mr. Vaughn's elbow is still a little tender but it is much better. He can fully extend his elbow now. He does have a little tenderness about his lateral epicondyle. I recommend no weight lifting, at least, for another six weeks and then a gradual resumption and he will return if his symptoms get worse.

In light of the noted improvement, Dr. O'Brien effectively released Mr. Vaughn from treatment with his noting, "he will return if his symptoms get worse." Dr. O'Brien did not issue a disability rating for the injury of September 25, 1992.

Following the evaluation of November 10, 1992, Mr. Vaughn returned to work with the Missouri State Water Patrol. But he notes that he never became pain free, and he continued to experience some numbness and tingling in the right hand. Although Mr. Vaughn used the hand in his employment, he noted at the hearing that he was not able to pass the Water Patrol test, which eventually led to him filing an action against the Missouri State Water Patrol for discrimination. According to Mr. Vaughn, this claim of discrimination resulted in the parties entering into a settlement agreement; and he continued to engage in employment with the Water Patrol.

The employer, by and through CARO, provided Mr. Vaughn with medical care referenced above (examinations performed by Dr. O'Brien on October 20, 1992, and November 10, 1992), with payment dates of November 3, 1992 and November 23, 1992. The records of CARO indicate that, relative to Injury No. 92-135488, the employer did not provide Mr. Vaughn with any additional benefits that CARO believed were covered under Chapter 287, RSMo, and similarly did not make any additional payments on account of the injury. Subsequent to the evaluation of November 10, 1992, and continuing to August 1994, Mr. Vaughn did not obtain any medical treatment for his right elbow.

On or about August 13, 1994, Mr. Vaughn sustained an incident wherein he bumped up against the rail of a dock, injuring his right elbow. This injury, which arose out of and in the course of his employment, resulted in the employer referring Mr. Vaughn back to Dr. O'Brien. Thereafter, on August 19, 1994, Mr. Vaughn presented to Dr. O'Brien for an examination and evaluation. Relative to this examination, Dr. O'Brien makes the following notation:

Mr. Vaughn bumped his right elbow on something a week ago and has a lot of pain over the lateral epicondyle. He says that he also gets intermittent tingling in all of the fingers of his right hand. His exam shows: tenderness over the lateral epicondyle, increased a little bit with resisted dorsa flexion. He has a negative tincl sign. He says his phalens test makes the tingling go away. I think he likely has a contusion of his common extensor tendon. I put him in a tennis elbow brace and gave him some Naprosyn for two weeks and in two weeks if he is still symptomatic we will inject his lateral epicondyle.

Notably, in this examination there is no reference to this medical concern relating to the accident and injury of September 25, 1992.

In light of continuing pain with numbness and tingling and loss of full extension, Mr. Vaughn received additional medical treatment with Dr. O'Brien that included examinations and evaluations on September 12, 1994, and a surgical repair in the nature of a tendon repair and debridement on February 7, 1995. Thereafter, Dr. O'Brien provided Mr. Vaughn with follow-up treatment that included examination and evaluations on February 20, 1995; March 13, 1995; April 12, 1995; May 16, 1995; July 3, 1995; October 31, 1995; and November 8, 1995. During this period of follow-up treatment, Mr. Vaughn obtained varying modalities of conservative treatment that included prescription medication, braces, physical therapy, injections, and ultrasound. Through this treatment Mr. Vaughn's right upper extremity improved, but continued to cause him pain and give him "a lot of trouble," including numbness in his forearm and marked tenderness over his radial tunnel.

Also, during this period of treatment, Mr. Vaughn retired from his employment with the Missouri State Water Patrol. According to Mr. Vaughn, he retired from the Water Patrol because he was afraid of not being able to get a person out of the water in the event an emergency situation should arise. Subsequently, however, Mr. Vaughn worked for Stone County Sheriff's Office, patrolling the parks along Table Rock Lake, mostly at night. Additionally, Mr. Vaughn worked as a security guard for Stonebridge Development.

With continuing complaints of pain, and Dr. O'Brien diagnosing Mr. Vaughn with radial tunnel syndrome, Dr. O'Brien proceeded to treat Mr. Vaughn with radial tunnel decompression surgery of the right upper extremity on or about March 7, 1996. On April 9, 1996, Mr. Vaughn returned to see Dr. O'Brien, indicating that the surgery was successful. Relative to this examination, Dr. O'Brien notes the following medical entry:

Mr. Vaughn's arm looks great. He says that it does not hurt anymore. He is going to start going back to fishing and he will call me if he has trouble.

Following the examination and apparent release from treatment on April 9, 1996, Mr. O'Brien did not return to see Dr. O'Brien or secure other medical treatment for nearly one year. However, on or about March 25, 1997, Mr. Vaughn returned to see Dr. O'Brien, presenting with complaints of tenderness and pain in his right forearm. At the time of this March 25, 1997, examination, Dr. O'Brien propounds the following comment:

He has been doing some fishing and it bothers him. He has tenderness in his muscle. It is not particularly over the radial tunnel. He has no tenderness over his lateral epicondyle. I wanted to put some Ultrasound on it but instead he decided he was going to use heat and his wife is going to massage his forearm. We will examine him in 3 weeks.

Thereafter, Dr. O'Brien provided Mr. Vaughn with follow-up treatment, which included a prescription for physical therapy. In light of this prescription, Mr. Vaughn underwent physical therapy for approximately three months and returned to see Dr. O'Brien on June 4, 1997. At the time of the June 4, 1997, examination, and in noting that the physical therapy had helped Mr. Vaughn, Dr. O'Brien opines that Mr. Vaughn is at maximum medical improvement and he could be released from his medical care to return as needed. Additionally, at the time of this examination, and in releasing Mr. Vaughn from his care, Dr. O'Brien provided Mr. Vaughn with a prescription for Ultram to take symptomatically.

The records of CARO indicate that, relative to the medical care provided to Mr. Vaughn during the period of August 19, 1994, through June 4, 1997, the employer considered the medical care to be benefits covered under Chapter 287, RSMo, and related to the August 13, 1994 injury. Following the treatment he received on June 4, 1997, Mr. Vaughn has not received any additional treatment for his right upper extremity. And the last date of payment for the medical expenses he incurred during the period of August 19, 1994, through June 4, 1997, occurred on or about July 16, 1997.

At the evidentiary hearing of August 30, 2004, Mr. Vaughn testified that he is no longer working and has retired to the state of Florida. Mr. Vaughn noted that he quit his employment with the Sheriff's office and as a security guard because of safety concerns – concerns for both his personal safety and the safety of others. In describing his current condition, Mr. Vaughn indicated that his right arm continues to cause him pain and difficulty, which he attributes to the 1992 injury. In this regard, Mr. Vaughn indicates that his right arm never fully recovered from the 1992 injury. Similarly, Mr. Vaughn's wife noted that Mr. Vaughn experienced problems with his right arm continuously since the injury he sustained in 1992.

Also, in describing his overall medical condition, Mr. Vaughn noted that he suffers from a drop foot; and, without custom shoes, he limps. This condition causes instability, and necessitates use of a cane. Additionally, Mr. Vaughn notes that he suffers from asthma, which necessitates use of an inhaler; and he has diabetes, which he controls through medication in the form of pills. Further, Mr. Vaughn takes medication for his heart.

In light of the multiple medical conditions suffered by Mr. Vaughn, he is governed by limitations and restrictions, which impact his daily activity. According to Mr. Vaughn, he is no longer able to engage in golfing, bowling, or dancing. However, he is able to do some light gardening and to cut grass. Also, he is able to drive, but limits his driving to no more than two to three hours at a time before he stops and gets out of the vehicle. His activities commonly include: watching TV; painting ceramics; swimming; and going to garage sales.

Esther E. Wadley, D.O., who is a physician practicing in the specialty of \_\_\_\_\_ family and osteopathic manipulative medicine, testified by deposition on behalf of Mr. Vaughn. Dr. Wadley performed an independent medical examination of Mr. Vaughn on August 5, 2004. At the time of this examination, Dr. Wadley took a history from Mr. Vaughn, reviewed various medical records, and performed a physical examination of him. In light of his examination and evaluation of Mr. Vaughn, Dr. Wadley opined that, as a consequence of the work-related injury sustained by Mr. Vaughn in 1992, he suffers from the following conditions: common extensor tendon tear to the right forearm; radial nerve impingement to the right upper extremity; and depression. Dr. Wadley further opined that, as a consequence of this 1992 injury, Mr. Vaughn sustained a permanent impairment of 46 percent referable to the right upper extremity; and he suffered from a permanent partial disability of 7 percent to the body as a whole referable to the depression.

In evaluating Mr. Vaughn's overall medical condition and permanent disability, Dr. Wadley opined that, prior to the accident of 1992, Mr. Vaughn presented with a permanent partial disability of 38 percent referable to the right upper extremity. Additionally, Dr. Wadley opined that, as a consequence of the prior injury and surgery involving the low back, Mr. Vaughn presented with a permanent partial impairment of 15 percent to the body as a whole; as a consequence of the prior illness involving poliomyelitis syndrome, Mr. Vaughn presented with a permanent partial impairment of 23 percent to the body as a whole; as a consequence of the hypertension suffered by Mr. Vaughn, he presented with a permanent partial impairment of the 3 percent to the body as a whole; and, as a consequence of the diabetes, Mr. Vaughn presented with a permanent partial impairment of 5 percent to the body as a whole. Taking into consideration the multiple effects of the injuries and illnesses combining with one another, Dr. Wadley opined that Mr. Vaughn presented with a permanent disability of 79 percent to the body as a whole.

Also, in light of the multiple injuries and illnesses suffered by Mr. Vaughn, Dr. Wadley is of the opinion that Mr. Vaughn is governed by significant limitations and restrictions. In addressing this concern, Dr. Wadley propounds the following comments:

He [Mr. Vaughn] will be restricted from activities that would require reaching on a repetitive basis for less than 1/3 of a day. The patient will be unable to do activities because of muscle loss and contractures in the left upper extremity from his Post-Poliomyelitis syndrome. He also is unable to reach with his right upper extremity secondary to injuries and multiple surgeries, which has caused subsequent nerve damage and decreased muscular tone. The patient [Mr. Vaughn] will be restricted from any activities that require balance, climbing, squatting, lifting from floor to waist, or waist to head. The patient will be restricted to walking even ground for only a distance of less than forty feet. The patient will be restricted to sitting less than one hour. The patient will be restricted to standing for less than fifteen minutes. The patient needs allowances to lie down for one hour at least once during a day. The patient will be restricted from the use of any pedals or levers with his lower extremities secondary with his radiculopathy in his right leg from the herniated disc. He will be restricted from use of pedals and levers with his left leg because of his Post-Poliomyelitis syndrome and contractures along with decreased muscle tone. The patient will be restricted from operating controls or levers with his upper extremities on the left because of his Post-Poliomyelitis syndrome and on the right because of his muscle surgeries with decreased muscle tone and nerve damage.

Notably, in rendering her opinions of permanent disability or impairment, Dr. Wadley failed to give consideration and attention to the events and conditions, which reference a work-related injury occurring to Mr. Vaughn on August 13, 1994, and which relate to Injury No. 94-111529. In this regard the medical report of Dr. Wadley identifies a medical history provided to her, but the history is void of any reference or consideration to the 1994 incident. Nor does Dr. Wadley identify or recognize the discontinuation of treatment and lack of symptoms attributable to the right elbow for the period of November 10, 1992, to August 1994. Similarly, Dr. Wadley does not reference or identify the recurrence of pain in the right upper extremity and the initiation of renewed pain in the right upper extremity following the August 13, 1994, incident. Further, on cross-examination Dr. Wadley acknowledges that Mr. Vaughn did not inform her of having sustained the second injury to his right arm on August 13, 1994; and she was unaware of the fact that both surgeries to Mr. Vaughn's right arm occurred after the August 13, 1994, incident.

Robert Patrick O'Brien, M.D., whom is a physician practicing in the specialty of orthopedic surgery, and who provided treatment for Mr. Vaughn's right upper extremity, testified by deposition. In light of his examinations and treatment of Mr. Vaughn, and after taking into consideration his review of medical records and applicable medical history, Dr. O'Brien opined that, as a consequence of the injury sustained by Mr. Vaughn on September 25, 1992, which involved weight lifting while participating in annual strength testing, Mr. Vaughn sustained an injury in the nature of right lateral epicondylitis. Dr. O'Brien further opined that, the September 25, 1992 injury resulted in Mr. Vaughn suffering a chronic tendon tear which caused him to undergo a tendon repair and debridement on February 7, 1995; and the surgery to repair the extensor tendon caused Mr. Vaughn to experience swelling in his forearm, which resulted in him suffering radial tunnel syndrome, necessitating a surgical release of the radial nerve on March 7, 1996.

In addressing the medical causal relationship existing between the two surgeries and the September 25, 1992 injury, as compared to the August 13, 1994 injury, Dr. O'Brien propounds in pertinent part the following testimony:

Q. And Doctor, do you have an opinion to a reasonable degree of medical certainty as to whether or not the lateral epicondylitis that you treated him for in October and November 1992, whether that had ever healed prior to August 19, 1994?

\* \* \*

A. With his history of bumping his elbow and causing it to hurt as it did, I believe that there is a high likelihood that the tendon had never completely reconstituted. I wouldn't have expected a bump by itself to cause the findings that I encountered at the time that we repaired his tendon.

Q. And when you say a high likelihood, would that be to a reasonable degree of medical certainty?

A. Yes.

\* \* \*

Q. And could you describe that operation [tendon repair and debridement on February 7, 1995]?

A. A small longitudinal incision was made over the lateral epicondyle and for about two centimeters distally the common extensor tendon was identified and, in fact, had an area of degeneration on its under surface where there had been a chronic tear. The area of degeneration was excised and the tendon was repaired.

Q. And did you look at the tissue that you removed?

A. Yes.

Q. And did it appear to you to have been something that had been in existence for quite some period of time --

A. Yes.

Q. -- the damaged tissue?

A. Yes, it looked like it had -- he had had a chronic tendon tear in that area.

Q. And is that why you state that your opinion to a reasonable degree of medical certainty was that the October 1992 injury or the injury that you saw him for on October 20<sup>th</sup> of '92, had never fully healed?

A. Yes.

\* \* \*

Q. Okay. And do you have an opinion to a reasonable degree of medical certainty whether the radial nerve release that you performed on March 7 of 1996 was caused by the initial injury that you saw Mr. Vaughn for on October 20<sup>th</sup> of 1992?

A. Mr. Vaughn had complained -- to answer your question directly. I think that his radial tunnel syndrome was aggravated by his surgery to repair his extensor tendon, which in turn was likely caused by his initial injury in '92. He felt all along his forearm was tight and felt swollen and swelling in a forearm can initiate symptoms of radial tunnel syndrome if you're anatomically predisposed to that. And my supposition, on the basis of what he told me, was that that was the case.

Q. And you say supposition, supposition about what?

A. That his swelling in his forearm that had been produced by his original injury initiated his radial tunnel syndrome.

\* \* \*

Q. And is it your opinion to a reasonable degree of medical certainty that the surgical procedure you performed on March 7 of '96 to release the radial nerve was necessitated by the reaction to the first surgical procedure you performed on him?

A. Yes.

Q. And that the first surgical procedure you performed on him was caused by the injury for which you saw him on October 20<sup>th</sup> of '92?

A. Yes.

Finally, in considering the nature and extent of disability to Mr. Vaughn's right upper extremity, relative to the injury of September 25, 1992, and the incident of August 13, 1994, Dr. O'Brien opined that Mr. Vaughn did not sustain any residual permanent disability. Relative to this concern, Dr. O'Brien propounded the following testimony,

Q. Okay. Did you ever rate Mr. Vaughn's right arm?

A. I believe I did. I felt that on the basis of his previous surgeries and the result that he had obtained that he didn't have any permanent disability secondary to his previous injuries.

## FINDINGS AND CONCLUSIONS

The fundamental purpose of The Workers' Compensation Law for the State of Missouri is to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment. The law is to be broadly and liberally interpreted and is intended to extend its benefits to the largest possible class. Any question as to the right of an employee to compensation must be resolved in favor of the injured employee. *Cherry v. Powdered Coatings*, 897 S.W. 2d 664 (Mo.App., E.D. 1995); *Wolfgeher v. Wagner Cartage Services, Inc.*, 646 S.W.2d 781, 783 (Mo.Banc 1983). Yet, a liberal construction cannot be applied in order to excuse an element lacking in the claim. *Johnson v. City of Kirksville*, 855 S.W.2d 396 (Mo.App., W.D. 1993).

The party claiming benefits under The Workers' Compensation Law for the State of Missouri bears the burden of proving all material elements of his or her claim. *Duncan v. Springfield R-12 School District*, 897 S.W.2d 108, 114 (Mo.App. S.D. 1995), citing *Meilves v. Morris*, 442 S.W.2d 335, 339 (Mo. 1968); *Brufflat v. Mister Guy, Inc.* 933 S.W.2d 829, 835 (Mo.App. W.D. 1996); and *Decker v. Square D Co.* 974 S.W.2d 667, 670 (Mo.App. W.D. 1998). Where several events, only one being compensable, contribute to the alleged disability, it is the claimant's burden to prove the nature and extent of disability attributable to the job-related injury.

Yet, the claimant need not establish the elements of the case on the basis of absolute certainty. It is sufficient if the claimant shows them to be a reasonable probability. "Probable", for the purpose of determining whether a worker's compensation claimant has shown the elements of a case by reasonable probability, means founded on reason and experience, which inclines the mind to believe but leaves room for doubt. See, *Cook v. St. Mary's Hospital*, 939 S.W.2d 934 (Mo.App., W.D. 1997); *White v. Henderson Implement Co.*, 879 S.W.2d 575, 577 (Mo.App., W.D. 1994); and *Downing v. Williamette Industries, Inc.*, 895 S.W.2d 650 (Mo.App., W.D. 1995). All doubts must be resolved in favor of the employee and in favor of coverage. *Johnson v. City of Kirksville*, 855 S.W.2d 396, 398 (Mo.App. W.D. 1993).

### I.

#### Nature of Injury or Injuries

The employee contends that on September 25, 1992, he sustained a work-related injury involving the lateral epicondyle of his right upper extremity; and this injury resulted in him suffering a chronic tendon tear that caused him to undergo a tendon repair and debridement on February 7, 1992. Further, the employee contends, the surgery of February 7, 1992, caused him to experience swelling in his right forearm which resulted in him suffering radial tunnel syndrome, necessitating a surgical release of the radial nerve on March 7, 1996. Notably, in asserting this claim of injury, the employee acknowledges that he sustained a second work-related incident on August 13, 1994, which involved an injury to his right elbow. The employee, however, asserts that the August 13, 1994, incident involved a minimal injury that resulted in no residual permanent disability; and, the August 13, 1994, incident is not causally related to the two surgeries and the resulting permanent disability attributable to his right upper extremity.

The employer and Second Injury Fund dispute the contentions of the employee. Although conceding that the employee sustained two separate work-related injuries (September 25, 1992 and August 13, 1994), the employer and Second Injury Fund suggest that the accident of September 25, 1992, involved a minimal injury for which the employee received only two examinations, and was then released from medical care without any permanent restrictions. Further, asserting that the employee worked during the period of November 10, 1992, to August 1994 without obtaining any medical treatment for his right upper extremity, the employer and Second Injury Fund suggest that the two surgeries provided to Mr. Vaughn in 1995 and 1996 relate to the accident of August 13, 1994, which represents a separate and intervening event unrelated to the accident of September 25, 1992.

The adjudication of this issue is not without difficulty. The evidence is supportive of a finding that Mr. Vaughn suffered two separate and distinct work-related incidents involving his right upper extremity, with the first incident occurring on September 25, 1992, and the second incident occurring on August 13, 1994. And, the facts presented by the parties could conceivably support the contention of either party. Notably, following the accident of September 25, 1992, Mr. Vaughn treated with Dr. O'Brien, but received only two evaluations before being released from medical care without permanent restrictions on or about October 20, 1992. Yet, at the time of this October 20, 1992, examination, Dr. O'Brien did not specifically issue an opinion that Mr. Vaughn had reached maximum medical improvement, and did not issue a disability rating or an opinion of no disability. Also, following the examination of October 20, 1992, Mr. Vaughn returned to work performing full duties in his employment as a water patrol officer, and for approximately one year did not obtain any medical treatment for his right upper extremity. Yet, according to Mr. Vaughn, he never became pain free; and he continued to experience some numbness and tingling in his right hand. Additionally, Mr. Vaughn suffers from multiple preexisting medical conditions, together with subsequent occurring medical conditions, which complicate an understanding and an assessment of Mr. Vaughn's medical condition.

Notwithstanding the aforementioned difficulty, the adjudication of this issue may be readily resolved in light of medical opinion. The contention of the employee is supported by medical opinion, while the contentions of the employer and Second Injury Fund are without the benefit of any medical or expert opinion. Although I do not find Dr. Wadley to be competent to address this issue, as she rendered her opinion without consideration of all the relevant and pertinent facts, the medical opinions of Dr. O'Brien are supportive of the contentions of the employee. Seeking to address specifically this issue, Dr. O'Brien opined that, the September 25, 1992, injury resulted in Mr. Vaughn suffering a chronic tendon tear, which caused him to undergo a tendon repair and debridement on February 7, 1995; and the surgery to repair the extensor tendon caused Mr. Vaughn to experience swelling in his forearm, which resulted in him suffering radial tunnel syndrome, necessitating a surgical release of the radial nerve on March 7, 1996. Additionally, the opinion of Dr. O'Brien is supported by his physical observation of the right upper extremity, which he had occasion to observe during the surgeries, which evidenced a chronic (and not acute) tear that could not be attributed to the type of bumping incident described in the August 13, 1994, claim of injury. There is no medical or expert opinion challenging or disputing the testimony and opinion of Dr. O'Brien.

Accordingly, after consideration and review of the evidence, I find and conclude that the employee, Ronald Vaughn, sustained two separate and distinct work-related incidents involving his right upper extremity, with the first incident occurring on September 25, 1992, and the second incident occurring on August 13, 1994. In both instances Mr. Vaughn sustained an injury by accident that arose out of and in the course of his employment. Further, in light of the testimony and opinion of Dr. O'Brien, who is the treating physician selected by the employer and who I find to be credible, I find and conclude that the September 25, 1992, injury resulted in Mr. Vaughn suffering a chronic tendon tear, which caused him to undergo a tendon repair and debridement on February 7, 1995; and the surgery to repair the extensor tendon caused Mr. Vaughn to experience swelling in his forearm which resulted in him suffering radial tunnel syndrome, necessitating a surgical release of the radial nerve on March 7, 1996. Additionally, in light of the testimony and opinion of Dr. O'Brien, I find and conclude that the August 13, 1994, accident did not cause Mr. Vaughn to sustain any permanent injury or necessitate receipt of the aforementioned medical care.

## II. Statute of Limitations

An initial question that must be addressed is whether the filing of the Claim for Compensation by Mr. Vaughn occurred within the statutory period of limitations, which is being asserted by the employer and Second Injury Fund as an affirmative defense. The period of limitations, which governs the timely filing of a Claim for Compensation, differs according to whether the claim was filed against the employer / insurer, or against the Second Injury Fund.

In a proceeding against the employer or insurer, the Claim for Compensation must be filed within two years, or possibly three years, of the date of injury or death, or the last payment made under the workers' compensation act on account of the injury or death. In a proceeding against the Second Injury Fund, however, the Claim for Compensation must be filed within two years of the date of the injury, or within one year of the filing of the claim against the employer or insurer under Chapter 287, RSMo. *See*, Section 287.430, RSMo. Further, in evaluating the timely filing of a claim against the employer or insurer, consideration must be given to whether the applicable period of limitations is two or three years, which necessitates consideration of Sections 287.380 and 287.430, RSMo.

Section 287.430, RSMo, in pertinent part, states as follows:

Except for a claim for recovery filed against the second injury fund, no proceedings for compensation under this Chapter shall be maintained unless a claim therefore is filed with the division within two years after the date of injury or death, or the last payment made under this chapter on account of the injury or death, *except that if the report of the injury or the death is not filed by the employer as required by section 287.380*, the claim for compensation may be filed within three years after the date of injury, death, or last payment made under this chapter on account of the injury or death. ... A claim against the second injury fund shall be filed within two years after the date of the injury or within one year after a claim is filed against an employer or insurer pursuant to this chapter, whichever is later. ... [Emphasis added.]

Section 287.380, RSMo, in pertinent part, states:

Every employer or his insurer in this state, whether he has accepted or rejected the provisions of this chapter, shall *within 10 days* after knowledge of an accident resulting in personal injury to any employee notify the division [Division of Workers' Compensation] thereof, and shall, *within one month* from the date of filing of the original notification of injury, file with the division under such rules and regulations and in such form and detail as the division may

require, a full and complete report of every injury ... [Emphasis added.]

A plain reading of Sections 287.380 and 287.430, RSMo indicates that, in order for an employer or insurer to avoid the application of the three year period of limitations, the employer / insurer must satisfy minimally two requirements. First, within 10 days of receiving knowledge of an accident resulting in personal injury to an employee, the employer / insurer must notify the division of the sustaining of an accident by its employee. Secondly, within one month from the date of filing of the original notification of injury, the employer / insurer must file with the Division of Workers' Compensation a full and complete report of injury.

A.  
(Injury No. 92-135488)

The Report of Injury (Form 1) prescribed by the Division of Workers' Compensation and utilized by the employer in this case states that the form serves as both the notice and the report of injury referred to in Section 287.380, RSMo. Additionally, this report of injury appears to have been prepared by the employer on October 2, 1992, and submitted to Central Accident Reporting Office (CARO) on October 8, 1992. Thereafter, the report of injury was submitted to and filed with the Division of Workers' Compensation on or about October 28, 1992. No other notice or report of injury appears to have been filed with the Division of Workers' Compensation.

In light of the foregoing, the employer did not comply with the requirements set forth in Section 287.380, RSMo. Although the employer filed the Report of Injury within one month of being notified of the injury sustained by Mr. Vaughn, the employer did not notify the Division of Workers' Compensation of the injury sustained by Mr. Vaughn within 10 days of being notified of the injury. At the latest the employer received notification of the September 25, 1992, injury on October 2, 1992, but did not notify the Division of Workers' Compensation of this injury until October 28, 1992, which is beyond the 10-day requirement of Section 287.380, RSMo. Accordingly, the applicable period of limitation for the filing of the claim against the employer is three years – three years from the date of injury or the date of last payment made under the workers' compensation act on account of the injury.

The filing of the Claim for Compensation by Mr. Vaughn in Injury No. 92-135488 occurred on May 28, 1996, which is more than three years after the date of injury. Thus, in order for the Claim for Compensation to be considered timely filed, the claim must have been filed within three years of the last date of payment made under the workers' compensation act on account of the injury. The employer argues that this date is November 23, 1992; and, therefore, Mr. Vaughn did not timely file the Claim for Compensation.

The records of CARO support the employer's contention that the last date of payment for medical care, which they attributed to Injury No. 92-135488, was November 23, 1992. However, the evidence is supportive of a finding that the employer provided Mr. Vaughn with additional treatment for the injury he sustained in Injury No. 92-135488 after November 23, 1992; but the employer simply erred in not reporting the treatment as being for this injury. Instead, the employer reported incorrectly that the treatment and expenses incurred for the September 25, 1992, injury was for the injury Mr. Vaughn sustained in Injury No. 94-111529. The injury of September 25, 1992, injury resulted in Mr. Vaughn suffering a chronic tendon tear, which caused him to undergo a tendon repair and debridement on February 7, 1995; and the surgery to repair the extensor tendon caused Mr. Vaughn to experience swelling in his forearm, which resulted in him suffering radial tunnel syndrome, necessitating a surgical release of the radial nerve on March 7, 1996. The employer, through CARO, provided Mr. Vaughn with this medical care under Chapter 287, RSMo; and the last date of payment for the medical expenses incurred during the period occurred on or about July 16, 1997.

Therefore, in light of the Claim for Compensation (in Injury No. 92-135488) being filed against the employer on May 28, 1996, which is less than three years (and two years) from the date of the last payment made under Chapter 287, RSMo, on account of the injury, the Claim for Compensation filed against the employer was timely filed and is not barred by the statute of limitations. Similarly, in light of the timely filing of the claim against the employer, and in light of the Claim for Compensation (in Injury No. 92-135488) being filed against the Second Injury Fund on May 28, 1996, which is less than one year from filing of the claim against the employer, the Claim for Compensation filed against the Second Injury Fund was timely filed and is not barred by the statute of limitations.

B.  
(Injury No. 94-111529)

In Injury No. 94-111529, the employee sustained an injury on August 13, 1994, but did not notify the employer of this injury until on or about August 17, 1994. Thereafter, the employer referred Mr. Vaughn to Dr. O'Brien for a medical evaluation which occurred on August 19, 1994. (The employer paid for this treatment on January 27, 1995.) Additionally, on or about August 23, 1994, the employer, through CARO, prepared the Report of Injury, which appears to have been submitted to and filed with the Division of Workers' Compensation on or about September 7, 1994. No other notice or

report of injury appears to have been filed with the Division of Workers' Compensation.

In light of the foregoing, the employer did not comply with the requirements set forth in Section 287.380, RSMo. Although the employer filed the Report of Injury within one month of being notified of the injury sustained by Mr. Vaughn, the employer did not notify the Division of Workers' Compensation of the injury sustained by Mr. Vaughn within 10 days of being notified of the injury. The employer received notification of the August 13, 1994, injury on August 17, 1994, but did not notify the Division of Workers' Compensation of this injury until September 7, 1994, which is beyond the 10-day requirement of Section 287.380, RSMo. Accordingly, the applicable period of limitation for the filing of the claim against the employer is three years – three years from the date of injury or the date of last payment made under the workers' compensation act on account of the injury.

The filing of the Claim for Compensation by Mr. Vaughn in Injury No. 94-111529 occurred on July 12, 2000, which is more than three years after the date of injury; and, the Claim for Compensation filed by Mr. Vaughn in Injury No. 94-111529 occurred more than three years after January 27, 1995, the date of last payment made under the workers' compensation act on account of the injury. Accordingly, the Claim for Compensation filed against the employer in Injury No. 94-111529 was not timely filed, and is barred by the statute of limitations. Similarly, the Claim for Compensation filed against the Second Injury Fund was not timely filed, and is barred by the statute of limitations. The Claim for Compensation filed against both the employer and the Second Injury Fund in Injury No. 94-111529 is denied. All other issues presented in Injury No. 94-111529 are rendered moot.

### III.

#### Nature & Extent of Permanent Disability

The injury of September 25, 1992, injury resulted in Mr. Vaughn suffering a chronic tendon tear, which caused him to undergo a tendon repair and debridement on February 7, 1995; and the surgery to repair the extensor tendon caused Mr. Vaughn to experience swelling in his forearm which resulted in him suffering radial tunnel syndrome, necessitating a surgical release of the radial nerve on March 7, 1996. Dr. O'Brien is of the opinion that this injury did not result in Mr. Vaughn suffering any residual permanent disability. Yet, Dr. Wadley opines that this injury caused Mr. Vaughn to sustain a permanent partial impairment of 46 percent referable to the right upper extremity.

Also, Mr. Vaughn indicates that, as a consequence of suffering this September 25, 1992, injury, he experienced pain in his right upper extremity and never became pain free. And, even with the two surgeries (February 7, 1995 and March 7, 1995) performed on his right arm, he continues to experience pain and difficulty in using his right arm. Notably, according to Mr. Vaughn, he no longer fishes because of his inability to cast with his right hand; and, he no longer depends on the use of his right arm in operating his motor vehicle. (Mr. Vaughn now utilizes mostly his left arm when driving his vehicle.) And, according to Mr. Vaughn's wife, Mr. Vaughn drops things while using his right arm.

After consideration and review of the evidence, including the testimonies of Mr. and Mrs. Vaughn, who I find to be credible, I find and conclude that, as a consequence of the accident, sustained by Mr. Vaughn on September 25, 1992, he sustained a permanent partial disability of 15 percent, referable to the right upper extremity at the 210-week level (31.5 weeks). Additionally, this injury resulted in Mr. Vaughn suffering scarring and disfigurement in the nature of 3.5 weeks.) This injury, considered alone, does not render Mr. Vaughn unemployable in the open and competitive labor market. Accordingly, the employer is ordered to pay to the employee, Ronald Vaughn, the sum of \$8,246.35, which represents 35 weeks of permanent partial disability and disfigurement. ( $35 \text{ weeks} \times \$235.61 = \$8,246.35$ )

### IV.

#### Liability of Second Injury Fund

After consideration and review of the evidence, I find and conclude that the employee, Ronald Vaughn, did not sustain his burden of proof in establishing Second Injury Fund liability. The injury of September 25, 1992, considered alone and in combination with the preexisting disabilities, do not render Mr. Vaughn unemployable in the open and competitive labor market. Further, the evidence admitted at the hearing lacks any expert testimony or medical proof that, the injury and disability caused by the accident of September 25, 1992, combined with the preexisting permanent partial disability or disabilities, without consideration of subsequent deteriorating conditions, to cause Mr. Vaughn to suffer additional disability greater than the simple sum. In the context of this issue, Mr. Vaughn relies solely on the opinion of Dr. Wadley. Yet, Dr. Wadley does not provide medical opinion that would establish any such liability.

Notably, Dr. Wadley opines that the injury of September 25, 1992, caused Mr. Vaughn to sustain a permanent partial impairment of 46 percent referable to the right upper extremity. (Although Dr. Wadley does not identify the specific week level, one may reasonably assume she is referring to the 210-week level or 232-week level, which represents 96.6 or 106.72 weeks, and is equivalent to 24 to 26 percent to the body as a whole.) And, she opines that, at the time of this injury, Mr. Vaughn suffered from a permanent partial disability of 38 percent to the body as whole, referable to the lumbar discectomy and poliomyelitis syndrome. Additionally, Dr. Wadley opines that, at the time Mr. Vaughn presented to her for evaluation,

he suffered from depression, which causes him to suffer a permanent partial impairment of 7 percent to the body as whole; he suffers from hypertension, which causes him to suffer a permanent partial impairment of 3 percent to the body as a whole; and he suffers from diabetes, which causes him to suffer a permanent partial impairment of 5 percent to the body as a whole. (The disabilities associated with depression, hypertension, and diabetes include both preexisting and subsequent deteriorating conditions, not causally related specifically to the September 25, 1992, injury.) Finally, Dr. Wadley opines that, at the time of Mr. Vaughn presented to her for evaluation, he suffered from a permanent total disability of 79 percent to the body as a whole.

Collectively, the aforementioned disabilities identified by Dr. Wadley do not necessarily combine to be greater than the simple sum, with the combining disabilities appearing to be 77 to 79 percent to the body as a whole. Further, even if this evidence might suggest a combination of disability in excess of the simple sum by 2 percent to the body as a whole, the combination of disabilities include consideration of subsequent deteriorating conditions. Dr. Wadley's opinion of Mr. Vaughn's overall disability includes not only the preexisting permanent partial disabilities (lumbar and polio) and the permanent partial disability attributed to the September 25, 1992, accident, but also other disabilities occurring subsequent to the accident of September 25, 1992, which is not appropriate for consideration of Second Injury Fund liability. Without medical opinion supporting Second Injury Fund liability, the claim against the Second Injury Fund must fail.

Accordingly, in light of the foregoing, the Claim for Compensation, as filed against the Second Injury Fund, is denied.

The award is subject to modifications as provided by law.

An attorney's fee of 25 percent of the benefits ordered to be paid is hereby approved, and shall be a lien against the proceeds until paid. Interest as provided by law is applicable.

Date: February 9, 2005

Made by: /s/ L. Timothy Wilson  
L. Timothy Wilson  
*Associate Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

/s/ Patricia "Pat" Secret  
Patricia "Pat" Secret  
*Director*  
*Division of Workers' Compensation*

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[1] The two workers' compensation cases involve Injury Nos. 92-135488 and 94-111529. The employee does not seek any benefits under Injury Number 94-111529, asserting that this claim of injury did not cause him to suffer any permanent disability. The employee further alleges that the payment of temporary total disability compensation and medical care by the employer is causally related to the claim of injury in Injury 92-135488 and should have been attributable to this 1992 injury, although the employer attributes the payment of benefits to the claim of injury in Injury Number 940111529

[2] The two workers' compensation cases involve Injury Nos. 92-135488 and 94-111529. The employee does not seek any benefits under Injury Number 94-111529, asserting that this claim of injury did not cause him to suffer any permanent disability. The employee further alleges that the payment of temporary total disability compensation and medical care by the employer is causally related to the claim of injury in Injury 92-135488 and should have been attributable to this 1992 injury, although the employer attributes the payment of benefits to the claim of injury in Injury Number 940111529