

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

Injury No. 08-122529

Employee: Edmund Vogel
Employer: Anheuser Busch Companies, Inc. (Settled)
Insurer: Self-Insured (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Preliminaries

The parties asked the administrative law judge to resolve the following issues: (1) whether employee sustained a compensable occupational disease injury in the form of bilateral carpal tunnel syndrome, which arose out of and in the course of his employment; (2) the nature and extent of employer's liability for permanent partial disability benefits, if any; and (3) the nature and extent of Second Injury Fund liability for either permanent partial or permanent total disability benefits, if any.

The administrative law judge rendered the following determinations: (1) employee's work activities were the prevailing factor that caused right carpal tunnel syndrome and bilateral trigger fingers; (2) employee sustained a 15% permanent partial disability of the right wrist and a 5% permanent partial disability of the left wrist related to the 2008 injury to his hands; and (3) the Second Injury Fund is liable for 23.26 weeks of permanent partial disability benefits.

Employee filed a timely application for review with the Commission alleging the administrative law judge erred: (1) in not considering the medical evidence from the treating physician Dr. Kevin Smith; (2) in failing to give proper weight to the unopposed opinion from Dr. Dwight Woiteshek; (3) in failing to give proper weight to the unopposed vocational opinion of Vincent Stock; (4) in improperly discounting employee's testimony; and (5) in failing to find permanent partial disability referable to the left shoulder, cervical spine, lumbar spine, and left hip.

For the reasons stated below, we modify the award of the administrative law judge referable to the issue of Second Injury Fund liability.

Discussion

The administrative law judge's award sets forth the stipulations of the parties and the administrative law judge's findings of fact and conclusions of law referable to the

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numerous issues disputed at the hearing. We adopt and incorporate those findings and conclusions to the extent that they are not inconsistent with the modifications set forth in our award. Consequently, we make only those findings of fact and conclusions of law pertinent to our modifications herein.

Second Injury Fund liability

The administrative law judge determined that employee failed to meet his burden of proving that his primary injury combined with his preexisting conditions of ill-being to result in permanent total disability for purposes of § 287.220.1 RSMo. After careful consideration, we agree. Employee alleges that he is permanently and totally disabled, in part, because of significant limitations in his ability to endure prolonged sitting or standing as of December 1, 2008, the date of the primary injury. We are not persuaded. The record contains a November 4, 2008, treatment note memorializing an annual checkup with employee's primary care physician, Dr. Kevin Smith. On that date, Dr. Smith found that employee was a healthy adult male, noted employee was doing well following carpal tunnel surgery, did not identify (or even mention) any sitting or standing restrictions or limitations, and noted that employee wanted to canoe the Mississippi river after his retirement in December. Especially in light of this evidence, we are not persuaded by the opinions from employee's experts on the subject of permanent total disability, at least with regard to any Second Injury Fund liability.

We note, however, that despite finding and rating preexisting permanent partial disability referable to employee's cervical spine, lumbar spine, and left shoulder, the administrative law judge left these disabilities out of her calculation of Second Injury Fund liability based on a finding that these "were insufficient to trigger SIF liability." *Award*, page 14. But in the case of *Treasurer of Missouri-Custodian of the Second Injury Fund v. Witte*, 414 S.W.3d 455 (Mo. 2013), the Supreme Court of Missouri held that only one of employee's preexisting conditions of ill-being must satisfy the statutory thresholds under § 287.220.1 to trigger Second Injury Fund liability, and that once an employee makes such a showing, all disability referable to preexisting conditions must be included in calculating Second Injury Fund liability. *Id.* at 467. Accordingly, in order to give effect to this relevant and controlling case law, we must modify the administrative law judge's award with respect to her calculation of Second Injury Fund liability.

We defer to and adopt the administrative law judge's findings as to the extent of permanent partial disability referable to employee's cervical and lumbar spines, left shoulder, bilateral knees, and bilateral wrists, as well as her choice to assign a 15% loading factor. We additionally find employee's preexisting permanent partial disability referable to the left hip equal to 5% permanent partial disability of the body as a whole, and find that this condition was serious enough to amount to a hindrance or obstacle to employment or reemployment. Consequently, applying *Witte*, we calculate Second Injury Fund liability, as follows:

26.26 weeks (15% of the right wrist) + 8.75 weeks (5% of the left wrist) + 72 weeks (45% of the right knee) + 48 weeks (30% of the left knee) + 23.2 weeks (10% of the left shoulder) + 20 weeks (5% of the body as a whole referable to the cervical spine) + 20 weeks (5% of the body as a whole referable to the lumbar spine) + 20 weeks (5% of the body as a whole referable to the left hip) = 238.21 weeks x 15% loading factor = 35.73

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weeks x \$404.66 weekly compensation rate for permanent partial disability benefits = \$14,458.50.

We conclude the Second Injury Fund is liable for \$14,458.50 in permanent partial disability benefits.

Conclusion

We modify the award of the administrative law judge as to the issue of Second Injury Fund liability.

The Second Injury Fund is liable for \$14,458.50 in permanent partial disability benefits.

The award and decision of Administrative Law Judge Suzette Carlisle, issued December 15, 2014, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

The Commission approves and affirms the administrative law judge's allowance of an 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 17th day of June 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee:	Edmund Vogel	Injury No.: 08-122529
Dependents:	N/A	Before the
Employer:	Anheuser Busch Companies, Inc. (Settled)	Division of Workers' Compensation
Additional	Second Injury Fund	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Insurer:	Self-insured (Settled)	
Hearing Date:	September 15, 2014	Checked by: SC

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: December 1, 2008
5. State location where accident occurred or occupational disease was contracted: St. Louis City
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:
Claimant sustained injury to his bilateral hands from repetitive computer work.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Bilateral hands
14. Nature and extent of any permanent disability: 15% permanent partial disability of the right wrist and 5% permanent partial disability of the left wrist (Settled)
15. Compensation paid to-date for temporary disability: \$0
16. Value necessary medical aid paid to date by employer/insurer? \$0

Employee: Edmund Vogel

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- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Sufficient for the rates listed in number 19.
- 19. Weekly compensation rate: \$772.53/\$404.66
- 20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable: (Employer settled prior to hearing)

22. Second Injury Fund liability: Yes

23.26 weeks of permanent partial disability from Second Injury Fund	\$9,412.40
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TOTAL:	\$9,412.40
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23. Future requirements awarded:

Said payments to begin 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: Attorney Phillip Tatlow

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Edmund Vogel

Injury No.: 08-122529

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Anheuser Busch Companies, Inc.
(Settled)

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

Additional Second Injury Fund

Insurer: Self-insured (Settled)

PRELIMINARIES

The parties listed below appeared before the undersigned administrative law judge on September 15, 2014, for a hearing for a final award at the request of Edmund Vogel (“Claimant”) for permanent total disability (“PTD”) benefits from the Second Injury Fund (“SIF”). Claimant appeared for the hearing, testified, and was represented by Attorney Phillip Tatlow. The SIF appeared represented by Assistant Attorney General Kristin Frazier. The court reporter was Ms. Jennifer Jett. The record closed on September 15, 2014 after presentation of all the evidence.

Anheuser Busch Companies, Inc. (“Employer”), is self-insured, and settled their case with Claimant prior to the hearing for 15% permanent partial disability (“PPD”) of the right wrist, and 5% PPD of the left wrist, and did not participate in the hearing.

STIPULATIONS

At the hearing the parties stipulated to the following:

1. On December 1, 2008, Claimant was employed by Employer in St. Louis City;
2. Claimant and Employer operated under the Missouri Workers’ Compensation Law;¹
3. Employer’s liability was fully self-insured,²
4. Employer received proper notice of an injury,
5. A claim for compensation was timely filed,
6. Claimant’s average weekly wage was sufficient to result in the following benefit rates: \$772.53 for temporary total disability (“TTD”) and permanent total disability (“PTD”) and \$404.66 for PPD,

¹ Statutory references in this award are to Chapter 287 of the Revised Statutes of Missouri (2008 Supp) unless otherwise stated.

² All references to the Employer also refer to the insurer unless otherwise stated.

7. Employer paid no TTD or medical benefits,
8. Claimant reached maximum medical improvement on January 12, 2011.

ISSUES

At the hearing, the parties identified the following issues for disposition:

1. Did Claimant develop a compensable carpal tunnel syndrome (“CTS”) injury which arose out of and in the course of his employment?
2. If so, what is the nature and extent of SIF liability for PPD benefits, if any?
3. In the alternative, what is the nature and extent of SIF liability for PTD benefits, if any?

EXHIBITS

Claimant’s Exhibits 1 through 14 were offered and received into evidence with no objection from SIF. SIF’s Exhibit I was offered and admitted for pages 57, 77, 78, 93, and 132 without objection from Claimant. Any notations contained in the exhibits were present when admitted, and were not placed there by the undersigned administrative law judge. Any objections made during deposition or at the hearing but not ruled on during the hearing or in this award are now overruled.

FINDINGS OF FACT

All evidence was reviewed but only evidence which supports this award is summarized below.

Background

At the time of the hearing, Claimant was unemployed, married and he lived with his spouse, daughter Megan, and two grandchildren.

After Claimant graduated from high school, he went to college and majored in mechanical engineering while he worked. Claimant scheduled production for Prestolite Automotive, where he worked in an office. For several years Claimant worked as an industrial engineering manager for a food firm in Cleveland, Ohio, and he worked two summers pounding spikes for the railroad. Claimant missed graduation from college by five credit hours.

In 1981, Claimant was five hours short of obtaining a mechanical engineering degree when Employer hired him as an industrial engineer. While working for Employer, he earned up to 50 hours of professional training each year from professional organizations.

Preexisting disability

During the 1980s, Claimant injured his **knee** playing sports.³ Later Claimant required knee surgery after being hit by a motor vehicle while riding a bike. Dr. Pipes ordered a knee brace for use with travel, and he performed surgery on both knees. Today, Dr. Kevin Smith, Claimant's primary care physician, continues to treat both knees.

Dr. Tessier's records dated December 7, 1999 stated Claimant had seven knee surgeries between 1971 and 1986. Dr. Tessier performed right knee arthroscopic surgery on March 13, 2000. Claimant stopped traveling for work because he had discomfort with standing, sitting, squatting, and walking. A **right total knee** replacement was performed in December 2005, and a right knee revision surgery took place on June 29, 2006.

Dr. Tessier's 2007 records referred to Claimant's prior **left ACL reconstruction** and meniscectomy (referenced on a 2003 MRI). Dr. Tessier recommended reconstructive surgery but Claimant refused, and opted for an injection. Claimant reported **back** and **neck** discomfort, hand and finger numbness, and lack of concentration. Claimant received conservative treatment for the low back and neck.

In 2008, Claimant reported **left shoulder** discomfort and a history of working out with weights several days per week. Examination revealed positive impingement. Dr. Tessier diagnosed bursitis, injected Claimant's left shoulder, and limited arm movement during workouts to below shoulder level.

On November 25, 2009, Dr. Forget prescribed an MRI which revealed **disc bulges from L2 through S1** and foraminal narrowing, and spondylosis with slight cord impingement at **C5-6**, mild disc bulge at **C3-4**, foraminal stenosis and narrowing. Motion degraded quality of the scan. Dr. Forget planned to follow up with Claimant after the MRI but there are no additional medical records in evidence.

The primary injury

Employer hired Claimant in 1981 as an industrial engineer, and he traveled 50% of the time to study labor force efficiencies at 12 breweries. He followed workers through the plant, observed their work activity during a shift, collected data, compiled and summarized data by hand, and determined how jobs should be performed.

In the early 1980s, Claimant became part of a team that evaluated the effectiveness of personal computers in the work place. Claimant became the in-house expert on computer usage and data acquisition. Initially, Claimant typed computer reports 30% to 50% of the work day. The amount of typing increased between the 1980s and his retirement in 2008.

During Claimant's last five years of work for Employer, he stopped traveling because he had trouble standing and sitting. He could no longer squat or walk long distances. Claimant's back

³ It is not clear from the medical records which knee was injured. However, based on later treatment it was probably the right knee.

and neck caused discomfort, and his hands and fingers went numb. Claimant developed problems with concentration.

For five years before retirement, Claimant worked on the computer 8 to 10 hours per day as an operations staff manager. On a daily basis he typed reports for three to four major projects, or one continuing project, and he communicated results to senior management. Claimant testified he spent 100 percent of his day gathering information on the computer before he retired. Claimant often skipped lunch to work on projects. By the time Claimant retired, he had difficulty working by mid afternoon because of bilateral hand pain and numbness.

Claimant chose his medical providers and received bilateral injections. Dr. Tessier performed a right carpal tunnel release.

To relieve residual complaints, Dr. Strege provided trigger point injections which Claimant testified were unsuccessful. Dr. Strege recommended bilateral hand surgery, but Claimant refused additional treatment. Prior to retirement, Claimant testified his work performance decreased because of bilateral wrist complaints. Claimant testified he could not work on the computer during his last month of employment.

Claimant notified Employer of the injury but did not file a claim until after he retired on December 1, 2008. Claimant settled the case for 15% PPD of the right wrist and 5% PPD of the left wrist.

Claimant is right handed. Now, Claimant limits his computer use and hand writing due to hand complaints. He has pain and numbness in both hands. Claimant does not tie his shoes, he drops items, and he cannot pick up a case of water. On the left hand, Claimant has several fingers that trigger.

He takes Celebrex daily for arthritis and up to 12 Extra Strength Tylenol tablets for bilateral hand pain, numbness, limited mobility and weakness, and left hand trigger fingers. Dr. Smith recommended Claimant take narcotic medication but he declined for fear of becoming addicted.

He no longer camps, coaches, swims, canoes, performs household chores, or supports his grandchildren's activities.

Claimant testified he cannot work because of the combination of injuries to his neck, back, shoulder and both wrists. On a typical day, Claimant takes several naps up to two hours because of pain and the medication makes him tired. Before Claimant retired, he had problems with his neck, back and knees which limited his ability to work.⁴

Medical treatment – primary injury

In 2008, Claimant sought treatment for right hand pain and numbness and reported use of a computer mouse eight hours per day. EMG nerve conduction studies revealed moderate right

⁴ However, during Claimant's deposition, he denied any problems performing his job duties before he developed wrist and hand problems.

carpal tunnel syndrome (“CTS”).⁵ John E. Tessier, M.D., performed right carpal tunnel surgery in September 2008. On October 13, 2008, Claimant reported improvement from numbness and tingling, and Dr. Tessier released Claimant to follow up as needed.

In March 2009, Dr. Strege diagnosed bilateral flexor tenosynovitis of the middle and ring fingers, and injected the trigger fingers. Claimant refused surgery to relieve trigger finger locking.

X-rays of Claimant’s bilateral wrists on October 11, 2010 revealed early degenerative changes. Dr. Tessier diagnosed bilateral wrist osteoarthritis and bilateral trigger fingers of the middle and ring fingers.

Expert medical opinion

Dwight Woiteshek, M.D., a board certified orthopedic surgeon, performed an independent medical examination on January 12, 2011, reviewed medical records, wrote a report, and testified at the request of Claimant’s attorney.

Examination revealed decreased range of motion of the cervical spine in all planes, positive tests for straight leg raise and pelvic rock, decreased range of motion of the lumbar spine and left shoulder, and several positive left shoulder tests, left shoulder weakness, positive Phalen’s test for both wrists, triggering in the ring and long finger of the left hand, and decreased reflexes in the left and right ankles. Claimant had fluid and mistracking in the right and left knees, and limited range of motion in both knees and the left hip.

Dr. Woiteshek concluded Claimant’s work activities were the prevailing factor that caused bilateral CTS and trigger finger to Claimant’s middle and ring fingers on both hands.

For the primary injury, Dr. Woiteshek diagnosed right CTS with trigger fingers to the middle and ring fingers on the right side, and left CTS (non operated) and trigger finger to the middle and ring finger. Dr. Woiteshek opined Claimant had achieved maximum medical improvement (“MMI”), and rated 40% PPD of the right wrist, and 30% PPD of the left wrist for the work injuries.

For the preexisting injuries, Dr. Woiteshek concluded Claimant’s prior right and left knee injuries “significantly” impacted his daily activities. Dr. Woiteshek diagnosed right total knee replacement and revision, severe osteoarthritis of the left knee, internal derangement of the left shoulder, spondylosis of the cervical spine, non operated, lumbar disc bulges from L2 through S1, left hip pain due to overcompensation for bilateral knee pain, and morbid obesity.

Dr. Woiteshek opined Claimant’s preexisting conditions were a hindrance or obstacle to his employment or reemployment, and he rated the following disability: 45% PPD of the right knee, 30% PPD of the left knee, 25% PPD of the left shoulder, 25% PPD of the cervical spine, 20% PPD of the lumbar spine, and 15% PPD of the left hip.

⁵ The medical records in evidence contain no evidence of a left carpal tunnel diagnosis or nerve conduction test results.

Dr. Woiteshek further opined the combination of Claimant's "repetitious traumatic injuries" (bilateral CTS), combined with his preexisting disabilities to create more disability than their simple sum and a loading factor should be added.

Dr. Woiteshek concluded Claimant was PTD as a result of his primary injuries and preexisting medical conditions.

Expert vocational evidence

Mr. Vincent Stock, a vocational rehabilitation counselor with England & Company, interviewed Claimant on August 18, 2011, wrote a report, and testified at the request of Claimant's attorney.⁶ Claimant informed Mr. Stock that he goes to the gym to work out for an hour every day. Mr. Stock noted Claimant did not miss work, and found Claimant's work to be "so good that he could probably do it for half a day and still be able to maintain his job."⁷

Mr. Stock testified he based his conclusions on Claimant's history that his jobs were hand intensive. He did not explore the 10 jobs Claimant reported to find out what type of computer work he performed. Instead, Mr. Stock defined "labor intensive work" as Claimant doing what he needed to do to get the job done. Also, Mr. Stock relied on Claimant's history of 13 knee surgeries, but only reviewed records for two right knee surgeries and one left knee surgery. Mr. Stock also concluded Claimant could not work based on Claimant's statement that he could not maintain full-time employment because of physical limitations to his knees, numb hands, and trigger fingers.

In addition, Mr. Stock testified Claimant gave a history of full time unrestricted work as a manager leading up to September 2008, with no missed no time from work.

Mr. Stock did not perform vocational testing because Claimant's academic skills would not hinder him from working. Mr. Stock found Claimant to be "a bright man" and he was confident Claimant's scores would be great in reading, math and spelling.

Mr. Stock testified he reviewed the Dictionary of Occupational Titles, treatises or other books to form an opinion, however, none of the works are listed in his report.

Mr. Stock testified Claimant's ability to work "is significantly impacted by the diagnosis of bilateral CTS, and his resultant limitations combined with the trigger finger difficulties." Mr. Stock concluded CTS prevents Claimant from performing hand-intensive activities.

Mr. Stock further testified Claimant's preexisting disabilities are also significant factors that cause him to be unable to work. Mr. Stock characterized Claimant's residual ability to work as less than sedentary.

⁶ Mr. Stock testified he was a certified rehabilitation counselor in 1981, but his license was inactive when he interviewed Claimant in 2011, however, his "experience as a voc rehab counselor is maintained by continuing to do cases like this (case)." Mr. Stock's psychological license is up to date.

⁷ Mr. Stock testified he learned about the type of computer work Claimant performed after he wrote his report. After Mr. Stock wrote his report he also learned that Claimant stopped work after a half day due to hand pain.

Mr. Stock concluded Claimant had a “significant interference and impediment to employment,” because he did not believe there were any jobs Claimant could perform because he is not “capable of maintaining or handling a full time job without unreasonable accommodations on the part of the employer.”

Based upon a reasonable degree of vocational certainty, Mr. Stock concluded Claimant was “totally and permanently disabled on a combination of his preexisting and primary injury.”

Mr. Stock testified he adopted Claimant’s belief that he cannot work a full day due to significant limitations and no transferable skills. Mr. Stock further testified Claimant’s computer skills are not transferable because he said he cannot sit or stand for more than a few minutes because of pain to his neck, knees, and hand numbness.⁸

Mr. Stock testified Claimant is bright and could use his computer skills with another employer, but he did not attempt to find employment for Claimant.

From a psychological perspective, Mr. Stock made the following DSM IV diagnoses:

Axis I – General anxiety disorder with depressed mood

Axis II – no diagnosis

Axis III – Total right knee replacement. Osteoarthritis of left knee, no surgery, overuse syndrome bilateral upper extremities, right CTS and release, left carpal tunnel syndrome, GERD, hypertension, hiatal hernia, hyperlipidemia, spondylosis of the cervical spine, bulging disc of the lumbar spine, left hip pain

Axis IV – occupational problems

Axis V – Current GAF 65

FINDINGS OF FACT and RULINGS OF LAW

After careful consideration of the entire record, Claimant’s demeanor during the hearing, competent and substantial evidence presented, and the applicable law of the State of Missouri, I make the following findings:

Claimant sustained an occupational disease injury

Claimant alleged he suffered an occupational disease injury in the form of bilateral CTS, which arose out of and in the course of his employment due to repetitive computer work. SIF denies liability, and contends if Claimant developed CTS it was caused by the last injury alone.

Section 287.067.1-3 states:

1. An “**occupational disease**” is a disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an

⁸ Mr. Stock testified he relied on Dr. Smith’s conclusion that Claimant could only sit for 15 minutes at a time. However, on cross-examination, Mr. Stock admitted he had not seen Dr. Smith’s conclusion when he wrote his report, but on redirect, Mr. Stock testified Dr. Smith’s records helped him form an opinion.

occupational disease as defined in this section. The disease need not be foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

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

A Claimant must establish, generally through expert testimony, the probability that the claimed occupational disease was caused by conditions in the work place. *Selby v. Trans World Airlines, Inc.*, 831 S.W.2d 221, 223 (Mo. App. 1992).⁹ "Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 329 (Mo. App. 1986). Claimant must prove “a direct causal connection between the conditions under which the work is performed and the occupational disease.” *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo. App. 1992).

In a workers’ compensation proceeding, the employee has the burden to prove by a preponderance of credible evidence all material elements of his claim, including SIF liability. *Meilves v. Morris*, 422 S.W.2d 335, 339 (Mo. 1968). Section 287.808 requires claimants to establish the proposition is more likely to be true than not true.

I find Claimant’s testimony to be generally credible. I further find Claimant met his burden to show he sustained a compensable occupational disease injury. For years Claimant wrote reports by hand. Later, he evaluated the effectiveness of computers through written reports using his right hand. Once computers were installed, Claimant typed 30% to 50% of the time with both hands, and used a mouse with his right hand. For the last five years of Claimant’s career, he used the computer 100% of the time and worked from 7:00 a.m. until tasks were completed, often without taking a lunch break.

⁹ Overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 230 (Mo. banc 2003). No further reference will be made in this award to the *Hampton* case.

Dr. Tessier diagnosed right CTS and Dr. Strege diagnosed flexor tenosynovitis of the left middle and ring fingers. I find Dr. Woiteshek's opinion is credible that Claimant's work activities were the prevailing factor that caused right CTS, and trigger finger to both middle and ring fingers. Based upon credible testimony by Claimant, Dr. Tessier and Dr. Woiteshek, I find Claimant's work activities were the prevailing factor that caused right CTS and bilateral trigger fingers.

Claimant has disability from the last injury

Claimant asserts he is PTD from the combination of the 2008 injuries to his hands and his preexisting disabilities. SIF contends if Claimant is PTD it is due to the last injury alone.

In deciding whether SIF has any liability, the first determination is the degree of disability from the last injury considered alone. Section 287.220.1, and *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo.App.2000). If the last injury rendered Claimant permanently and totally disabled, SIF has no liability and Employer is responsible for the entire amount of compensation. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo.2003). I find Claimant sustained disability from the September 2008 injury to his hands.

Prior to the hearing, Claimant settled the primary injury with Employer for 15% PPD of the right wrist and 5% PPD of the left wrist. I find the evidence supports this level of disability. Dr. Tessier diagnosed and treated Claimant for right CTS, and Dr. Strege diagnosed and treated Claimant for flexor tenosynovitis of the ring and middle fingers of both hands. Claimant testified he has bilateral hand pain, numbness, limited mobility and weakness, and left hand trigger fingers. Dr. Woiteshek rated 40% PPD of the right wrist and 30% PPD of the left wrist.¹⁰

Based on credible testimony by Claimant and Drs. Tessier and Strege, I find Claimant sustained 15% PPD of the right wrist and 5% PPD of the left wrist related to the 2008 injury to his hands.

Claimant's preexisting disabilities was a hindrance or obstacle to his employment

To obtain compensation from SIF, Claimant must have permanent disability that predates the compensable work-related injury which is of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployable. *Messex v. Sachs Electric Company*, 989 S.W.2d (Mo.App. 1997). I find Claimant met his burden.

Based on credible testimony by Claimant and Dr. Woiteshek, I find Claimant's preexisting disabilities to both knees, left shoulder, and cervical and lumbar spine were a hindrance or obstacle to his employment or reemployment.

Claimant testified that prior to the 2008 injuries to his hand he had a total of 14 surgeries to both knees, including two right total knee replacements and several arthroscopic surgeries to the left knee. He stopped traveling for work because of difficulty with walking, climbing, and

¹⁰ Based on a clinical examination Dr. Woiteshek determined Claimant had left CTS, "reasonably confirmed without surgery," However, Dr. Woiteshek did not recommend treatment for the left hand.

discomfort to his cervical and lumbar spines while sitting for long periods. Before September 2008, Dr. Tessier injected Claimant's left shoulder and limited weight lifting to shoulder level.

Claimant is not PTD from the last injury and preexisting disabilities

To be entitled to permanent total disability benefits from SIF, the workers' compensation claimant must prove that the last injury, combined with his pre-existing permanent partial disabilities, result in permanent total disability. *Michael v. Treasurer*, 334 S.W.3d 654 (Mo. App. 2011). The critical question in determining whether a workers' compensation claimant is permanently and totally disabled is whether, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition. *Radar v. Werner Enterprises, Inc.* 360 S.W.3d 285 (Mo. App. 2012). I find Claimant did not meet his burden.

287.020 6. defines "total disability" as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. Any employment means any reasonable or normal employment or occupation; it is not necessary that the employee be completely inactive or inert in order to meet this statutory definition. *Kowalski v. M-G Metals and Sales, Inc.* 631 S.W.2d 919, 922 (Mo. App. 1982) (Citations omitted).

In *Keener v. Wilcox Electric, Inc.*, 884 S.W. 2d 744, 747 (Mo. App. 1994) (overruled on other grounds by *Hampton*, 121 S.W.3d), the court found the appellant's ability to shop, walk, perform housework, run errands, drive, go out for dinner, travel, visit the hairdresser and clean her car were indications she was not PTD although she had not returned to work.

I find Claimant's testimony is not credible that he cannot work because of injuries to his bilateral knees, hands, neck, low back, and left shoulder. Prior to Claimant's retirement, he worked full time with no physician-imposed restrictions, and did not miss work. The record contains no evidence that Claimant was reprimanded or terminated for failure to perform his duties; he voluntarily left his employment.

Dr. Tessier returned Claimant to work full duty after the right carpal tunnel release. I find Dr. Woiteshek's opinion is not persuasive that Claimant is PTD. Dr. Woiteshek is not a vocational expert and he did not impose any restrictions on Claimant's activities from the primary or preexisting medical conditions.

Mr. Stock is the only vocational expert in this case, but I do not find his opinion persuasive that Claimant is PTD. Mr. Stock's vocational rehabilitation license had expired when he interviewed Claimant in 2011. Also, Mr. Stock relied on Dr. Woiteshek's opinion which has been found to be incredible. In order for Claimant to work half time, Mr. Stock testified Claimant should be able to lie down as needed, work 20 minutes at a time, and take breaks as needed. However, the record contains no medical restrictions to support Mr. Stock's conclusion.

Additionally, Mr. Stock gave conflicting opinions about Claimant's ability to transfer his computer skills to another employer. For example, Mr. Stock testified Claimant could use his computer skills with another employer, but he did not attempt to find alternate employment, even

though Dr. Woiteshek imposed no medical restrictions. Also, Mr. Stock testified Claimant had no transferable computer skills because he could not sit more than 15 minutes, based on Dr. Smith's reports. However, on cross examination, Mr. Stock testified he did not have Dr. Smith's report when he reached that conclusion. Additionally, Dr. Woiteshek reviewed Dr. Smith's records but did not impose a sitting restriction.

Further, Mr. Stock testified he adopted Claimant's opinion that he could not work because of a combination of his problems. Mr. Stock also testified he reviewed the Dictionary of Occupational Titles, treatises and other books to form his opinion; however, there is no mention of these resources in his report. He did not know the type of computer work Claimant performed or how much Claimant typed. Mr. Stock defined Claimant's "labor intensive work" as doing what needed to be done to get the job done.

In addition, Mr. Stock testified Claimant was so "bright" he would not pose a problem for another employer, and Claimant's work was "so good that he could probably do it for half a day and still be able to maintain his job."¹¹ In fact, Claimant did maintain his job until he chose to retire.

Also, Claimant told Mr. Stock he works out at the gym everyday for an hour and eats out with his wife three times a week. He meets others socially once a month. Claimant goes to the grocery store three to four times per week. Claimant can shower, dress himself, manage his finances, and drive. Mr. Stock found Claimant's memory to be intact despite Claimant's misgivings.

Based on less than persuasive testimony by Dr. Woiteshek and Mr. Stock, and Claimant about his ability to work, I find Claimant did not meet his burden to prove he is PTD as a result of his primary and preexisting disabilities.

SIF is liable for PPD benefits

Once a determination is made that a claimant is not PTD, the inquiry turns to what degree, if any, an individual is permanently partially disabled for purposes of SIF liability. *Leutzinger v. Treasurer of the State of Missouri*, 895 S.W.2d 591, 593 (Mo. App. 1995).

Disabilities from the last injury do not need to meet a certain threshold to trigger SIF liability, but the statute does require that an individual preexisting permanent partial disability meets the thresholds. *Treasurer of State-Custodian of Second Injury Fund v. Witte*, 414 S.W.3d 455, 469 (Mo. 2013).

To trigger SIF liability, Section 287.220.1 requires:

A claimant to have "a preexisting permanent partial disability ... of such seriousness as to constitute a hindrance or obstacle to employment." *Id.* The preexisting disability also must, "if a body as a whole injury, equal a minimum of fifty weeks of compensation or, if a major extremity injury only, equal a minimum

¹¹ Mr. Stock testified he learned about the type of computer work Claimant performed after he wrote his report. He also learned that before Claimant retired he stopped work after a half day due to hand pain.

of fifteen percent permanent partial disability.” *Treasurer of State-Custodian of Second Injury Fund v. Witte*, 414 S.W.3d 455, 462 (Mo. 2013).

Additionally, the preexisting disability and the disability from the last injury must combine in a way so that the degree of disability from the combined disabilities is “an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability.”

Finally, the combination of the preexisting disability and the disability from the last injury must be “substantially greater than that which would have resulted from the last injury, considered alone and of itself.” *Id.*

The SIF is only liable for the degree of the combined disability that exceeds the numerical sum of the preexisting disabilities and the disability from the last injury. This excess for which the fund is liable is referred to as the synergistic effect of the combined disabilities. *Id.* at 467. (*Citations omitted*)

[T]he extent and percentage of disability is within the special province of the [fact finder] to determine. *Taylor v. Labor Pros L.L.C.*, 392 S.W.3d 39, 45 (Mo.App. 2013). “The [fact finder] may consider all the evidence, including the testimony of the employee, and draw all reasonable inferences in arriving at the percentage of disability.” *Id.*

I previously found Claimant’s preexisting disabilities constituted a hindrance or obstacle to employment and combined to create more disability than the last injury alone. I further find Claimant sustained 45% PPD of the right knee, 30% PPD of the left knee, 10% PPD of the left shoulder, 5% PPD of the cervical spine and 5% PPD of the lumbar spine.

I find Claimant’s preexisting bilateral knee disabilities trigger SIF liability. I find a 15% loading factor should apply to both knees as described below:

Injuries	Percentage of Disability	Weeks	Load	Total
Right wrist	15%	26.26	15%	3.94
Left wrist	5%	8.75	15%	1.32
Right knee	45%	72.00	15%	10.80
Left knee	30%	48.00	15%	7.20
TOTALS	N/A	N/A	N/A	23.26

I further find Claimant’s disability to his cervical and lumbar spine, left shoulder, and left hip were insufficient to trigger SIF liability.

CONCLUSION

Claimant sustained an occupational disease injury. SIF is liable for permanent partial disability benefits. The award is subject to a lien in favor of Claimant's attorney for legal services rendered.

Made by: _____

Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation