

FINAL AWARD ALLOWING COMPENSATION

Injury No.: 07-005962

Employee: Clifford Wachter
Employer: Boeing Company (Settled)
Insurer: Indemnity Insurance Company of North America (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.¹ We have reviewed the evidence and considered the whole record and we find that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law, except as modified herein. Pursuant to § 286.090 RSMo, we issue this final award and decision affirming the June 27, 2012, award and decision of the administrative law judge, as modified herein. 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.

The administrative law judge awarded permanent partial disability in this matter. Employee filed an application for review alleging that the administrative law judge did not incorporate some of the parties' stipulations into his calculation of Second Injury Fund liability. Employee alleges the administrative law judge's omissions resulted in an understatement of Second Injury Fund liability. We agree.

The parties stipulated that employee had multiple preexisting disabilities. The parties agreed that the following pre-existing disabilities combine synergistically with employee's primary injury in a manner that enhances employee's overall disability by 10%.

<u>Disability</u>	<u>Comp Weeks</u>
12.5% body as a whole	50.000
27.5% right knee	44.000
Total preexisting weeks at 10% load	<u>94.000</u>

The parties agreed that the following pre-existing disabilities combine synergistically with employee's primary injury in a manner that enhances employee's overall disability by 15%.

<u>Disability</u>	<u>Comp Weeks</u>
22.5% right wrist	39.375
22.5% left wrist	39.375
22.5% right elbow	47.250
32.0% right shoulder	74.240
Total preexisting weeks at 15% load	<u>200.240</u>

Employee's preexisting disabilities represent 294.24 weeks of permanent partial disability.² Employee's primary injury resulted in 105 weeks of permanent partial disability. The simple sum of all of employee's disabilities is 399.24 weeks.

¹ Statutory references are to the Revised Statutes of Missouri 2006, unless otherwise indicated.

² 94 weeks + 200.24 weeks = 294.24 weeks.

Employee: Clifford Wachter

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The preexisting disabilities in the instant case combine synergistically with the disability from the primary injury in different degrees. Thirty-two percent of the preexisting disabilities enhance employee's overall disability by 10% over the simple sum.³ Sixty-eight percent of the disabilities enhance employee's overall disability by 15% over the simple sum.⁴ To apply a load factor to the simple sum of *all* disabilities we use the weighted average of the load factors, which is calculated as follows:

$$\begin{aligned} \text{Weighted Average} &= (.32 \times .10) + (.68 \times .15) \\ &= .032 + .102 \\ &= .134 \text{ or } 13.4\% \end{aligned}$$

Multiplying the simple sum of all disabilities by the weighted average of the load factors results in 53.5 weeks of enhanced disability that are attributable to the synergistic effect of the primary injury in combination with the preexisting disabilities.⁵

The parties agree employee's permanent partial disability compensation rate is \$376.55. The Second Injury Fund owes permanent partial disability benefits to employee in the amount of \$20,145.43, and we modify the administrative law judge's award accordingly.⁶

In all other respects, we affirm the administrative law judge's award, including his approval of attorney's fees in the amount of 25% of the compensation awarded and his allowance of a lien on the compensation for such fees.

Any past due compensation shall bear interest as provided by law.

The award and decision of Administrative Law Judge Cornelius T. Lane issued June 27, 2012, is attached and incorporated by this reference except to the extent modified herein.

Given at Jefferson City, State of Missouri, this 17th day of May 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T
Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

³ $94 \div 294.24 = .32.$

⁴ $200.24 \div 294.24 = .68.$

⁵ $399.24 \text{ weeks} \times .134 = 53.5 \text{ weeks}.$

⁶ $53.5 \text{ weeks} \times \$376.55 = \$20,145.43.$

AWARD

Employee: Clifford Wachter

Injury No.: 07-005962

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Boeing Company

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

Additional Party: Second Injury Fund

Insurer: Indemnity Insurance Company of North America

Hearing Date: March 27, 2012

Checked by: CTL

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: January 29, 2007
5. State location where accident occurred or occupational disease was contracted: St. Louis County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant sustained injury to his right and left elbows as a result of occupational disease.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Right and left elbows
14. Nature and extent of any permanent disability: 25% permanent partial disability of the left elbow and 25% permanent partial disability of the right elbow
15. Compensation paid to-date for temporary disability: \$2,156.64
16. Value necessary medical aid paid to date by employer/insurer? \$23,619.14

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- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: N/A
- 19. Weekly compensation rate: \$718.87 TTD/\$376.55 PPD
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:	Previously settled
22. Second Injury Fund liability:	
a. 27.56 weeks of permanent partial disability at the rate of \$376.55 for	\$10,377.71
b. 14.82 weeks of permanent partial disability at the rate of \$376.55 per week for an additional liability of	\$5,580.47
TOTAL:	\$15,958.18

23. Future requirements awarded: None

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: Dan Walkenhorst and Ellen Morgan

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Clifford Wachter	Injury No.:	07-005962
Dependents:	N/A	Before the	
Employer:	Boeing Company	Division of Workers'	Compensation
Additional Party:	Second Injury Fund	Department of Labor and Industrial	Relations of Missouri
		Jefferson City, Missouri	
Insurer:	Indemnity Insurance Company of North America	Checked by:	CTL

PREFACE

The Claimant, Clifford Wachter, was represented by Attorneys Daniel Walkenhorst and Ellen Morgan. Claimant’s primary claim against the Employer/Insurer was previously settled. The Claimant’s case was against the Second Injury Fund only. The Second Injury Fund was represented by Assistant Attorney General Kristin Frazier.

STIPULATIONS

1. On or about January 29, 2007, Claimant sustained injury to his right and left elbows from the onset of an occupational disease arising out of and in the course of his employment as a sheet metal worker. The accident occurred in St. Louis County, Missouri.
2. Claimant was an employee of Employer pursuant to Chapter 287 RSMo.
3. Venue is proper in St. Louis County, Missouri.
4. Employer received proper notice of the claim.
5. Claimant filed the claim within the time allowed by law.
6. The average weekly wage on the date of the injury was sufficient to qualify for rates of \$718.87 for temporary total disability and \$376.55 for permanent partial disability.
7. Employer paid \$2,156.64 for TTD and \$23,619.14 in medical expenses.
8. The Second Injury Fund and the Claimant stipulated to the admission of Dr. Poetz’s September 25, 2008 report into evidence without a deposition.
9. The parties agree that if the primary injury is found to be compensable on the Second Injury Fund, then any permanent partial disability arising out of the primary claim result in 25% permanent partial disability of the left elbow and 25% permanent partial disability of the right elbow.

10. The parties stipulate that the preexisting disabilities are:
 - a. 12.5% of the low back, body as a whole;
 - b. 27.5% of the right knee;
 - c. 22.5% of the right wrist;
 - d. 22.5% of the left wrist;
 - e. 15% of the right elbow; and
 - f. 32% of the right shoulder.

11. The parties stipulate that if there is a finding in favor of the Claimant against the Second Injury Fund on the basis that the prior and preexisting injuries and disabilities are obstacles to Claimant's employment, the parties stipulate that the preexisting injuries to the Claimant's left and right wrists will be represented by a 15% load factor and a 10% load factor for the other prior injuries and disabilities.

ISSUES

Whether Claimant's injury of January 29, 2007, to his left and right elbows as a result of occupational disease is compensable against the Second Injury Fund.

EXHIBITS

The Claimant offered into evidence Exhibits A through KK, which were introduced into evidence without any objection from the Second Injury Fund. The Claimant's list of exhibits is attached and part of the Court record.

The Second Injury Fund did not offer any exhibits.

FINDINGS OF FACT

1. Claimant testified very credibly. With regard to the claim of January 29, 2007, he stated he has been employed for a long period of time with the Employer and had duties including riveting, drilling, hammering, lifting steel plates and performing overhead assembly work which resulted in sensitivity of his elbows, numbness, tingling in both hands, etc.
2. Claimant's compensable occupational disease of January 29, 2007, resulted in permanent partial disability of 25% of the left elbow and 25% of the right elbow.
3. Prior to Claimant's primary injury of January 29, 2007, he had preexisting permanent partial disability as stipulated by the parties which constituted a hindrance or obstacle to Claimant's employment or re-employment and those prior disabilities are as follows:
 - a. 12.5% of the low back with a load factor of 10%,
 - b. 27.5% of the right knee with a load factor of 10%,
 - c. 22.5% of the right wrist with a load factor of 15%,
 - d. 22.5% of the left wrist with a load factor of 15%,

- e. 32% of the right shoulder with a load factor of 10%.

Thus, the Second Injury Fund liability is 25% permanent partial disability of the left elbow and 25% permanent partial disability of the right elbow which amounts to 105 weeks; and 22.5% permanent partial disability of the Claimant's right wrist and 22.5% permanent partial disability of the left wrist which amounts to 78.74 weeks of permanent partial disability. Thus, regarding the primary injury and Claimant's preexisting injuries amounts to 183.74 weeks with a 15% load factor for a total of 27.56 weeks at a permanent partial disability rate of \$376.55 per week for a total of \$10,377.71.

- 4. With regard to the Claimant's other preexisting injuries and disabilities:
 - a. 12.5% of the body as a whole related to the low back which amounts to 50 weeks,
 - b. 15% permanent partial disability of the right knee which amounts to 24 weeks, and
 - c. 32% permanent partial disability of the right shoulder for a total of 74.24 weeks
 - d. Thus, Second Injury Fund liability for the above 4a., 4b., and 4c. amounts to 148.24 weeks with a load factor of 10% amounts to 14.82 weeks of permanent partial disability at the rate of \$376.55 per week for additional liability of \$5,580.47.
- 5. Thus, the Second Injury Fund liability is \$15,958.18.

Made by: _____
CORNELIUS T. LANE
Administrative Law Judge
Division of Workers' Compensation