

**EMPLOYEE'S PROPOSED
AWARD**

Employee: [REDACTED]

Injury No. [REDACTED]

Dependents: N/A

Employer: [REDACTED] (settled)

Insurer: [REDACTED]

Additional Party: Treasurer as Custodian of
Second Injury Fund

Hearing Date: [REDACTED]

Checked by:

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

PRELIMINARIES

The parties appeared before the undersigned administrative law judge on [REDACTED] for a final hearing to determine the liability of the Second Injury Fund in the matter of [REDACTED] ("Claimant"). Attorney, Brian Roskin, represented Claimant. Assistant Attorney General [REDACTED] represented the Second Injury Fund. The Employer, [REDACTED], and its Insurer, previously settled with Claimant and did not participate in the hearing.

The parties stipulated to the following:

1. On or about [REDACTED], Claimant sustained an accidental injury arising out of and in the course of employment that resulted in injury to Claimant's lumbar spine. The accident occurred in St. Louis County, MO. Claimant was an employee of Employer pursuant to Chapter 287 RSMo.
2. Venue is proper in Saint Louis.
3. Employer received proper notice of the claim.
4. Claimant filed the claim within the time allowed by law.
5. The average weekly wage at the date of injury was sufficient to qualify for rates of \$365.08 for temporary total disability (TTD), and \$365.08 for permanent partial disability (PPD).
6. Employer paid \$13,839.83 in TTD and medical expenses totaling \$28,851.34.

The issue to be determined is the nature and extent of the primary and pre-existing injuries and liability of the Second Injury Fund.

SUMMARY OF THE EVIDENCE

Only evidence necessary to support the award will be summarized. Any objections not expressly ruled on during the hearing or in this award are now overruled. To the extent there are marks of highlights contained in the exhibits, those markings were made prior to being made part of this records, and were not placed thereon by the Administrative Law Judge.

Exhibits

Claimant offered the following exhibits, which were received into evidence without objection:

- A. Dr. [REDACTED] CV
- B. Dr. [REDACTED] Report
- C. Dr. [REDACTED] deposition
- D. Records of [REDACTED]
- E. Records of [REDACTED]
- F. Records of [REDACTED]
- G. Records of [REDACTED]
- H. Records of [REDACTED] Hospital
- I. Certified records of [REDACTED]
- J. Certified records of Dr. [REDACTED]
- K. Certified records of [REDACTED]
- L. Records from the Division of Workers' Compensation
- M. Stipulation for compromise

The Second Injury Fund did not offer any additional exhibits.

Live Testimony

1. Claimant testified live. His testimony was credible.
2. On [REDACTED], Claimant sustained an accidental injury arising out of and in the course of employment that resulted in injury to Claimant's body as a whole at the level of the lumbosacral spine. The accidental injury occurred when Claimant fell 4-5 feet out of the back of a truck, landing on his buttocks. He experienced pain and burning in his lower back and experienced radicular pain into his buttocks and left leg. He eventually sought medical treatment.
3. Claimant received medical care as described in Claimants Exhibits. A MRI revealed a L5-S1 inferior sequestered disc fragment, moderate compression of the S1 root and a L4-5 central bulge. Surgery was performed at an earlier date than what was scheduled due to Claimant being in agonizing pain.

4. After the [REDACTED] accident and subsequent surgery, Claimant continued to experience pain in lower back and buttocks. Claimant was told to return to work, but to be smart about what he did. He was forced to ask people for help on regular tasks as he was placed on a restriction of lifting no more than 20 pounds. Claimant testified that he had a loss of strength, range of motion and usability that is exacerbated by activity, motion, and lifting.
5. The medical treatment received was medically necessary and reasonable.
6. Claimant and Employer settled the workers' compensation claim arising out of the accident for 21% of the body as a whole at the level of the lumbar spine.
7. Prior to the [REDACTED] date of injury, Claimant had the following disabling injuries or conditions:
 - a) Claimant told Dr. [REDACTED] that in [REDACTED] he injured his body as a whole at the level of the cervical spine. The condition was disabling and constituted a hindrance and obstacle to employment.
 - b) Claimant told Dr. [REDACTED] that in [REDACTED] and [REDACTED] he suffered from both right and left arm ulnar nerve compression that required an ulnar nerve transposition.
8. Claimant testified that his prior injury caused him to suffer from pain to his neck and head. Claimant continued to take prescription medicine up to and including the day of his [REDACTED] injury. If he were to miss a couple of days of his medicine he would experience loss of motion, pain, headaches and would be unable to perform many of the things he can normally.
9. Claimant testified that as a result of his prior injuries to his right and left arms that he has experienced a loss of strength, fine motor skills, range of motion and experiences pain and tenderness in both of his elbows.

Opinion Evidence

10. Dr. [REDACTED] (Exhibit B) examined Claimant, took a history, and issued a report. He found Claimant sustained an accident arising out of and in the course of employment that resulted in injury to Claimant. He provided the following ratings of permanent partial disability, which combined to create a substantially greater disability:

- a) With respect to the primary injury of 5/31/2006: 25% of the body as a whole at the level of the lumbosacral spine.
- b) With respect to the preexisting disabilities, which constituted a hindrance and obstacle to employment:
 - i. 15% of the body as a whole at the level of the cervical spine
 - ii. 30% of the right upper extremity at the level of the elbow.
 - iii. 30% of the left upper extremity at the level of the elbow.

FINDINGS OF FACT & RULINGS OF LAW

Nature and Extent of Claimant's PPD and liability of the SIF

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

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

1. Claimant's testimony, and other evidence supporting his claim, is credible.
2. Claimant sustained a compensable last injury which resulted in permanent partial disability equivalent to 21% of the body as a whole at the level of the lumbosacral spine. Dr. [REDACTED]'s opinion on the issue of primary PPD is credible.

3. As of the time the last injury was sustained, Claimant had the following preexisting permanent partial disabilities, which meet the statutory thresholds and were of such seriousness as to constitute a hindrance or obstacle to employment or re-employment:
 - a) 15% of the body as a whole at the level of the cervical spine (60 weeks).
 - b) 20% of the right upper extremity at the level of the elbow (42 weeks).
 - c) 20% of the left upper extremity at the level of the elbow (42 weeks).

4. The credible evidence establishes that the last injury, combined with the pre-existing permanent partial disabilities, causes 20% greater overall disability than the independent sum of the disabilities.

5. The Second Injury Fund liability is calculated as follows: 84 weeks for last injury + 144 weeks for preexisting injuries = 228 weeks x 20% = 45.6 weeks of overall greater disability.

CONCLUSION

The Second Injury Fund is liable to Claimant for \$16,237.25 in permanent partial disability benefits. Attorney for Claimant, [REDACTED], shall be entitled to an attorney fee of 25% of this award.

Made by: _____

[REDACTED]
*Administrative Law Judge
Division of Workers' Compensation*

This award is dated and attested to as of this _____ day of _____, [REDACTED].

[REDACTED]
Division of Workers' Compensation