

**BEFORE THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT**

FILED

MAR 26 2012

LAURA ROY

CLERK, MISSOURI COURT OF APPEALS
EASTERN DISTRICT

**TREASURER OF THE STATE OF MISSOURI
CUSTODIAN OF THE SECOND INJURY FUND
ADDITIONAL PARTY/APPELLANT**

92867

FILED

OCT 2 2012

v.

**ERIC BUHLINGER
EMPLOYEE/RESPONDENT**

CLERK, SUPREME COURT

Case ED97864

**APPEAL FROM THE MISSOURI LABOR AND INDUSTRIAL RELATIONS
COMMISSION**

**BRIEF OF APPELLANT TREASURER, CUSTODIAN OF THE SECOND
INJURY FUND**

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**ATTORNEYS FOR THE TREASURER,
CUSTODIAN OF THE SECOND INJURY
FUND**

SCANNED

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JURISDICTIONAL STATEMENT

This is an appeal from a final award by the majority of the Missouri Labor and Industrial Relations Commission, issued on December 8, 2011. The Missouri Court of Appeals, Eastern District has jurisdiction over this claim, which arose out of St. Louis County, Missouri, pursuant to Missouri Revised Statutes 287.495.1.

The Commission Majority affirmed the Administrative Law Judge's award dated April 22, 2011, which granted permanent partial disability benefits to Employee.

The Treasurer, on behalf of the Second Injury Fund, filed his notice of appeal on December 29, 2011, stating that the Commission's inclusion of permanent partial disability benefits that fall below statutory threshold is contrary to Missouri Revised Statutes 287.220.1.

This case does not involve the validity of a treaty or statute of the United States, a statute or provision of the Constitution of this state, or title to any state office, nor is it a case in which the punishment of death has been imposed.

STATEMENT OF FACTS

Employee, Eric Buhlinger, was born in 1968 and is presently employed as a laborer and driver with Bryant Company, a commercial and residential roofing company. (Tr. 3-4). He works as a “ground man,” picking up trash and other debris, which he hauls to and throws in a truck. (Tr. 4). Employee is also responsible for climbing a ladder to the roof where he tears shingles off by chopping away at them with a shovel and bending over to rip them. (Tr. 4-5). However, Employee testified that the job also typically involves carrying 130-140 pound rolls of roofing up the ladder, which he does not do himself. (Tr. 5).

Prior to working at Bryant Company, Employee worked full-time for about two years, or seasons, at Sherrell Construction (“Employer”), a commercial trucking and asphalt concrete business that puts in roads, parking lots, and highways. (Tr. 6-7). He worked as a laborer, dump truck driver, loot man, and he occasionally ran equipment (Tr. 6). Employee testified that the job was physical and involved leveling rock and asphalt by pushing and pulling a shovel with weights of 60-70 pounds. (Tr. 7).

On August 4, 2008, Employee was injured while working, when he hit his head on the crossbar while working on a skid loader and lost consciousness for a few minutes. (Tr. 8). Employee testified that he woke with neck, back, and shoulder pain that felt like burning, and reported the injury to his supervisor. (Tr. 8-9). Employee worked the remainder of the day (Tr. 30).

Employee sought medical treatment that evening from Dr. Almiron, who gave him muscle relaxers and pain killers. (Tr. 9). Dr. Almiron placed Employee on restrictions,

and later taken off work because the Employer had no work within such restrictions. (Tr. 9-10).

Next, he saw Dr. Padda, who conducted an MRI, nerve conduction studies, approximately twenty sets of three shots each, and a radio frequency neurolysis surgery. (Tr. 10-11). Before the neurolysis, Employee complained of burning in the neck and numbness running from the left arm into the pinky, ring finger, and middle finger; after the neurolysis, Employee stated that he began using a cane and needed help getting out of bed. (Tr. 11-12).

Employee next saw Dr. Coyle at the recommendation of Employer's Workers' Compensation carrier for an MRI, EMG, nerve conduction test, and neck surgery, which occurred around July 6, 2009 at St. John's Mercy Medical Center. (Tr. 12-13). Employee testified that the surgery improved his neck, but he still had numbness in his arm and index fingers, though no particular restrictions were issued (Tr. 13).

Employee then saw Dr. Pruitt for the arm numbness and pain. Dr. Pruitt thought surgery could help but found it not mandatory; Employee declined surgery, because he thought he could get back to work and deal with the issues. (Tr. 13-14).

Employee incurred one work-related injury prior to the primary injury of August 4, 2008. Around 1990-1991, Employee was working as an iron worker, and incurred an injury to his left foot. (Tr. 23). Employee stated that because of the foot accident, he cannot wear tennis shoes but must wear boots to support his ankles with two pairs of socks and gel inserts for comfort. (Tr. 24). Employee stated that if he is on his foot too long it swells up, so he is unable to work factory jobs or any job where he is forced to

stand in one place. (Tr. 23-25, 27).

After the foot accident, Employee has worked exclusively in the asphalt business except to occasionally paint or work on cars. (Tr. 27). Employee stated that his symptoms are affected by the cold, and though they do not disturb his sleep, the symptoms are the worst in the morning. (Tr. 26-28). For his daily foot pain, Employee takes Aleve along with soaking and elevating his foot as needed. (Tr. 25-26, 28). He stated that he would miss work at Sherrell about once a month because of his foot pain, but he was never disciplined and never received special work accommodations. (Tr. 27-28, 34-35). While Employee testified that the injury did affect his daily life, he stated that he learned to work around the problems for twenty years. (Tr. 28-29). Employee had no other pre-existing disabilities.

Employee testified that his current job with Bryant Company is physically about the same as his job at Sherrell, and he is on his feet about 8-12 hours a day at work. (Tr. 31, 34). Employee is currently working full duty with no physician restrictions on his hand or elbow. (Tr. 33-34). Employee testified that he declined a functional capacity evaluation to determine his restrictions because he did not want to place such restrictions on his resume and preferred to determine his own limitations. (Tr. 37).

Employee saw Dr. Mark Lichtenfeld at his attorney's request. Dr. Lichtenfeld's testimony did not include concussion as a "disability" nor did he testify that a concussion created a combined effect with Employee's work injury to create a greater disability than the simple sum. (Tr. 52-53, 70).

Employee settled his primary August 4, 2008 claim with the Employer for 27.5%

permanent partial disability (PPD) referable to the neck, 5% PPD referable to the concussion, and 5% PPD referable to the left elbow. Employee then proceeded in a hearing against the Second Injury Fund (Fund) only. Administrative Law Judge (ALJ) Cornelius Lane awarded Employee PPD benefits from the Fund. ALJ found the prior disability to the left foot to be at 17.5% PPD and calculated with Employee's primary injuries of 27.5% PPD to his body as a whole regarding his neck, 5% PPD to his body as a whole for concussion and 5% PPD to his left elbow. Administrative Law Judge Award P. 2, Appendix P. A5. The Labor Industrial Relations Commission (Commission) agreed with ALJ Lane's award. Commission Award P. 2, Appendix P. A3.

POINT RELIED ON

The Commission erred in including Employee's primary disabilities of 5% to his right elbow (10.5 weeks) and 5% to his body as a whole – concussion (20 weeks), in calculating the liability of the Fund because both of these disabilities fall below the statutory threshold, set forth in §287.220.1, in that the statute requires a disability to the body as a whole be at least 50 weeks, and a disability to a major extremity be at least 15% to qualify for Fund consideration, and Employee's disabilities met neither standard.

Cardwell v. Treasurer of the State of Missouri, 249 S.W.2d 902 (Mo. App. E.D. 2008)

ARGUMENT

Standard of Review

The Court's review in this case involves questions of law, and as such, the Commission's decision is given no deference, but instead this Court has *de novo* review. *Bunker v. Rural Elec. Co-op.*, 46 S.W.3d 641, 643 (Mo. App. W.D. 2001); *Endicott v. Display Technologies, Inc.*, 77 S.W.3d 612, 615 (Mo. banc 2002); *Walsh v. Treasurer of the State of Missouri*, 953 S.W.2d 636 (Mo. App. S.D. 1997).

Introduction

Under the Missouri Workers' Compensation Act, all permanent partial disabilities are compensated based on a percentage of disability which is then converted to a number of weeks by multiplying the percentage of disability by the number of weeks assigned to the whole body part. §287.190 RSMo. The Chapter sets forth a "Schedule of Losses," which lists the entire number of weeks assigned to different body parts. §287.190.1. However, if a person has a work injury that causes disability to a body part not specifically enumerated in the "Schedule of Losses," the disability is determined based on §287.190.3. This section allows for disability "for permanent injuries other than those specified in the schedule of losses." §287.190.3. That disability is based on a percentage of 400 weeks. This paragraph is intended to cover and include any and every kind of permanent injury other than those on the enumerated list. *Betz v. Columbia Telephone, Co.* 24 S.W.2d 224, 227 (Mo. 1930). These are the injuries that in the Workers' Compensation practice are commonly known and referred to as the "body as a whole" injuries.

“Body as a whole” is a term of art, used repeatedly in the day-to-day practice of Workers’ Compensation law as well as in Workers’ Compensation case law. And while there is no definition of “body as a whole” anywhere in the Workers’ Compensation statute, the term is actually well defined by case law. In *Carenza v. Vulcan-Cincinnati, Inc.*, 368 S.W.2d 507 (Mo. 1963), the Court stated “...extent of injury from the ‘catchall’ provision now in paragraph 3 of Section 287.190, i.e. body as a whole...” *Id at 514*. See also e.g., *Gordan v. Chevrolet-Shell Division of General Motors*, 269 S.W. 2d 163, 170 (Mo. 1954) (20 percent body as a whole for a low back injury); *Haggard v. Synder Construction Co.*, 479 S.W. 2d 142, 144 (Mo. 1972) (An injury to the neck, which is a non scheduled injury is properly expressed in terms of the body as a whole); *Farmer-Cummings v. Future Foam, Inc.*, 44 S.W.3d 830, 835 (Mo.App. W.D. 2001) (80 percent body as a whole as a result of asthma).

This same schedule and percentage formula is used in determining the extent of permanent partial disabilities when assessing the liability of the Fund. §287.220.1, §287.190. To qualify for Fund benefits, both a pre-existing and a compensable disability must meet certain thresholds. The Fund statute reads in part:

...If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent

partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities,...

§287.220.1 RSMo.

POINT

The Commission erred in including Employee’s primary disabilities of 5% to his right elbow (10.5 weeks) and 5% to his body as a whole – concussion (20 weeks), in calculating the liability of the Fund because both of these disabilities fall below the statutory threshold, set forth in §287.220.1, in that the statute requires a disability to the body as a whole be at least 50 weeks, and a disability to a major extremity be at least 15% to qualify for Fund consideration and Employee’s disabilities met neither standard.

In a complete deviation from the applicable statute and without any basis from prior case law, the Commission held that the threshold requirements set out in §287.220.1 are used at the first step inquiry to determine if employee has sustained disabilities significant enough to implicate the Second Injury Fund. The Commission then held that, once such determination implicates the Second Injury Fund, *all* disabilities are considered in the calculation of Second Injury Fund liability. Such a change should be made by the legislature, not by the Commission – nor by the courts.

A. Until now, courts and the Commission read the thresholds in §287.220.1 in the alternative.

The statutory language at issue requires that a “subsequent compensable injury resulting in additional permanent partial disability, so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability.” §287.220.1. For many years, the Commission and the

courts have read the two phrases or tests that are divided by “or” as alternatives; to qualify, the injured worker must have either a “body as a whole” disability (as defined in the Introduction) at or above 50 weeks, OR a 15% disability to a major extremity; the 15% major extremity disability was an alternative to the 50 weeks threshold, not a subset.

In *Cardwell v. Treasurer of the State of Missouri*, 249 S.W.2d 902 (Mo. App. E.D. 2008), the Court affirmed the decision of the Commission awarding permanent partial disability benefits to Cardwell based upon a single pre-existing disability to his body as whole of 25% referable to his neck. *Cardwell*, 249 S.W.2d at 907. The Court affirmed the Commission’s holding, which excluded from the Fund calculation: Cardwell’s below threshold pre-existing disabilities of 10% to his right knee, 5% to his right shoulder, 7.5% to each wrist, 5% to the body as a whole for his low back and 2.5% to the body as a whole for his psychiatric condition. Both the Court and Commission excluded these below threshold disabilities without regard to whether employee had sustained other disabilities significant enough to implicate the Second Injury Fund. Using the Commission’s analysis in this *Buhlinger* case, the Commission and the Court in *Cardwell* then should have included all of Cardwell’s disabilities below statutory threshold because the sustained primary disability was significant enough to implicate the Second Injury Fund. The Court in *Cardwell* noted that the Commission excluded these pre-existing disabilities because it determined that they were not a hindrance or obstacle to employment, and because of the low amounts of disability attributable to those conditions. *Cardwell* 249 S.W.3d at 907. The Court specifically noted that “The Commission determined *each* injury did not meet the statutory threshold requirement.”

Cardwell, 249 S.W.3d at 908 (emphasis added).

Given the holding in *Cardwell*, the Commission is incorrect in its present statement that if employee has sustained disabilities significant enough to implicate the Second Injury Fund, all disabilities are considered in the calculation of Fund liability. Such decision has no basis in Missouri Workers' Compensation Law or in Missouri case law. The language in §287.220.1 sets forth the requirements required for subsequent compensable event to individually meet one of the statutory thresholds. Both the ALJ and Commission erred in failing to follow what the Commission and the Court of Appeals did in *Cardwell*.

B. The Commission departed from the established reading of the statute finding that Employee met the threshold requirement for Fund liability.

Using the traditional reading of § 287.220.1, the Commission would have reversed the Award of the ALJ, excluding from the Fund calculation the 5% disability to the elbow and the 5% disability for concussion. Instead, it found that these disabilities should be included in the Fund benefit calculations, simply because the Fund liability was implicated by Employee's 27.5% permanent partial disability (PPD) neck. Commission Award P. 2, Appendix P. A2.

After noting that the ALJ correctly considered all of employee's disabilities which included less than the threshold amounts, the Commission wrote:

The Second Injury Fund seems to be operating under a common misperception; to wit, that we must exclude from our calculation of Second Injury Fund liability any disability that does not individually meet one of the thresholds in §287.220.1

RSMo. This proposition has no support in the Missouri Workers' Compensation Law or in Missouri case law.

Commission Award p. 1, 2, Appendix P. A2, A3. In reality it is this holding by the Commission that lacks support.

The courts and Commission have consistently held that when evaluating a disability to see if it meets the thresholds of §287.220.1, each disability is evaluated singularly, not combined. The Commission and courts have given the "a" in the statute just prior to "disability" meaning, and have never combined several disabilities together or held that one disability implicates all other disabilities. There is absolutely no basis in case law for such opening of the door and it is the Commission which has deviated from long standing established law regarding the threshold requirements of §287.220.1.

The ALJ was incorrect in his award because he failed to exclude the below threshold disabilities of concussion and elbow. Section 287.220.1 does not allow for one disability to combine together with a litany of de minimus disabilities to implicate greater Fund liability. The statute states an employee must have "a pre-existing disability" that meets certain requirements, including the thresholds, and "a subsequent compensable injury resulting in additional permanent partial disability" that meets certain requirements, including the thresholds, to be considered for Fund liability. §287.220.1 *emphasis added*. With this ruling the Commission has failed to give meaning to the use of the word "a", which requires that each individual disability, not all disabilities, be considered to see if it meets the statutory criteria, including the thresholds. Furthermore, the Commission excluded entirely from its analysis for Fund liability if the disabilities

meet the other requirements of §287.220.1.

The Commission's current interpretation of §287.220.1 is a stark change from how not only the courts, but this very Commission interpreted the statute previously. It is the General Assembly, not the Commission that would be charged with changing the well-established law on this statute. The Supreme Court has held that long term, consistent judicial decisions must be given deference. "The Court's decision, however, has been followed these past 21 years; the judicial interpretation has become woven into the fabric of the statute, its interpretation has been incorporated into the director's taxation forms, the statutory provision has been left untouched by the General Assembly." *Medicine Shoppe Intern., Inc. v. Director of Revenue*, 156 S.W.3d 333, 333 (Mo. 2005). The holding of the Commission on this point should be reversed.

CONCLUSION

For the reasons stated above, the portion of Commission's Award granting permanent partial disability for below statutory threshold disabilities should be reversed.

Respectfully submitted:

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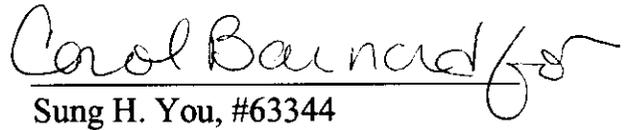
Certificate of Service and Compliance with Rule 84.06(b) and (c)

The undersigned certifies that on this Monday, March 26, 2012, one true and correct copy of the foregoing brief and one disk containing the brief were sent postage prepaid via the United Postal Service to:

Mr. Dean Christianson
Attorney at Law
Schuchat, Cook & Werner
1221 Locust Street, Suite 250
St. Louis, MO 63103

The undersigned further certifies that the brief complies with the page limitations contained in Rule 84.06(b), and that the brief contains 3137 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus free.


Sung H. You, #63344



JEREMIAH W. (JAY) NIXON
GOVERNOR

LABOR AND INDUSTRIAL RELATIONS COMMISSION

MISSOURI DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
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December 8, 2011

Mr. Eric Buhlinger
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Mr. Kevin Nelson
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Re: Injury No: 08-072563
Employee: Eric Buhlinger

Please find enclosed copy of Final Award which has been issued in the above-captioned case.

Under § 287.495 RSMo, any party has the right to appeal to the appellate court having jurisdiction. The Notice of Appeal must be filed with the Commission within thirty days of the date of the award. Unless such appeal is taken, this award becomes final and conclusive.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

By Pamela M. Hofmann
Pamela M. Hofmann, Secretary

dms

Enclosure

RECEIVED
DEC 09 2011
MO. ATTORNEY GENERAL
LABOR

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

Injury No.: 08-072563

Employee: Eric R. Buhlinger
Employer: Sherrell Construction, Inc. (Settled)
Insurer: Auto Owners Insurance Company (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. Having read the briefs, reviewed the evidence and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law by this supplemental opinion.

We offer this supplemental opinion to recite additional findings and to address the Second Injury Fund's argument that the administrative law judge erred by considering employee's concussion and elbow injury in his calculation of Second Injury Fund liability.

Findings

The administrative law judge found that, as a result of the primary injury, employee sustained permanent partial disabilities of 27½% of the body as a whole due to his cervical spine injuries; 5% of the body as a whole due to a concussion; and, 5% of the right elbow. We affirm these findings.

The administrative law judge found that as of the date of the primary injury, employee suffered a pre-existing permanent partial disability of 17½% at the level of the left ankle. We affirm.

Dr. Lichtenfeld described the physical restrictions he would impose for each disability and opined that employee's disabilities constituted hindrances or obstacles to employment. Dr. Lichtenfeld also opined that the disabilities from the primary injury combined with the preexisting ankle disability to result in greater disability than the simple sum of the disabilities. We find credible these opinions of Dr. Lichtenfeld.

The administrative law judge found that a 10% enhancement factor fairly represents the synergistic effect of the combination of the primary injury and the preexisting disabilities. We agree.

The administrative law judge included the following disabilities when calculating employee's overall disability.

27.5% of the body as a whole (400 week), cervical spine	=	110.00	weeks
5% of the body as a whole (400 week), concussion	=	20.00	weeks
5% at the right elbow (210 week)	=	10.50	weeks
17.5% of left ankle (155 week level)	=	27.12	weeks
Overall Disability	=	167.62	weeks

Employee: Eric R. Buhlinger

The administrative law judge then applied the 10% enhancement factor to the overall disability and awarded to employee 16.76 weeks of enhanced permanent partial disability from the Second Injury Fund.

Discussion

The Second Injury Fund argues that the administrative law judge erred by including the disability attributable to employee's concussion and right elbow in his enhanced permanent partial disability calculation because neither of these disabilities, standing alone, meets the thresholds set forth in § 287.220.1 RSMo. The Second Injury Fund's argument must fail.

The Second Injury Fund seems to be operating under a common misperception; to wit, that we must exclude from our calculation of Second Injury Fund liability any disability that does not individually meet one of the thresholds in § 287.220.1 RSMo. This proposition has no support in the Missouri Workers' Compensation Law or in Missouri case law.

The thresholds spelled out in § 287.220.1 are used at the first step of the Second Injury Fund Inquiry to determine if employee has sustained disabilities significant enough to implicate the Second Injury Fund. Once we have determined the Second Injury Fund is implicated, all disabilities are considered in the calculation of Second Injury Fund liability.

We conclude the administrative law judge correctly considered all of employee's disabilities when calculating the liability of the Second Injury Fund.

Award

We affirm the award of the administrative law judge, as supplemented herein.

We approve and affirm the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

The April 22, 2011, award and decision of Administrative Law Judge Cornelius T. Lane is attached and incorporated by this reference.

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

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer
William F. Ringer, Chairman

Alice A. Bartlett
Alice A. Bartlett, Member

Curtis E. Chick
Curtis E. Chick, Jr., Member

Attest:

Pamela Hoffmann
Secretary

AWARD

Employee: Eric R. Buhlinger Injury No.: 08-072563
Dependents: N/A Before the
Employer: Sherrell Construction, Inc. (settled) Division of Workers'
Additional Party: Treasurer as Custodian of the Compensation
Second Injury Fund Department of Labor and Industrial
Insurer: Auto Owners Insurance Company (settled) Relations of Missouri
Jefferson City, Missouri
Hearing Date: March 2, 2011 Checked by: CTL:ms/pl

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: August 4, 2008
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 was operating a piece of equipment when it jerked and his head hit a bar on the equipment.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Head, neck, and left upper extremity
14. Nature and extent of any permanent disability: 27.5% permanent partial disability of the body as a whole with regard to the neck, 5% permanent partial disability with regard to the left elbow, and 5% permanent partial disability referable to the body as a whole with regard to concussion.
15. Compensation paid to-date for temporary disability: \$40,244.46
16. Value necessary medical aid paid to date by employer/insurer? \$90,112.40

Issued by DIVISION OF WORKERS' COMPENSATION

Employee: Eric R. Buhlinger

Injury No.: 08-072563

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$832.98
- 19. Weekly compensation rate: TTD/PPD 549.32/404.66
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

- 21. Amount of compensation payable by Employer/Insurer:

27.5% of the body as a whole referable to the neck
5% of the body as a whole referable to the concussion
5% of the left elbow
1 week disfigurement
(Previously settled)

TOTAL: \$57,259.39
(Previously settled)

- 22. Second Injury Fund liability: Yes

140.5 weeks as a result of the primary injury plus 27.12 weeks for the pre-existing injury for a total of 167.62 weeks times a 10% load factor, which amounts to 16.76 weeks time \$404.66 permanent partial disability, equals \$6782.10.

TOTAL: \$6,782.10

- 23. Future requirements awarded: N/A

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: Clare R. Behrle

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Eric R. Buhlinger	Injury No.: 08-072563
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	Sherrell Construction, Inc. (settled)	Department of Labor and Industrial Jefferson City, Missouri
Additional Party:	Treasurer as Custodian of the Second Injury Fund	
Insurer:	Auto Owners Insurance Company (settled)	Checked by: CTL: ms

PREFACE

A hearing was held in the above mentioned matter on March 2, 2011. The Claimant, Eric R. Buhlinger, was represented by Attorney Clare R. Behrle. Claimant's primary case had been previously settled with the Employer/Insurer and the hearing was held with the Second Injury Fund only who was represented by Assistant Attorney General David W. Morin.

EXHIBITS

The Claimant offered the following exhibits into evidence:

- Exhibit A: Deposition of Dr. Lichtenfeld with exhibits.
- Exhibit B: Medical records of Almiron Clinic, Inc.
- Exhibit C: Medical records of Midwest Spine Surgeons.
- Exhibit D: Medical records of Hampton MRI.
- Exhibit E: Medical records of Center for Intervential Pain Management.
- Exhibit F: Medical records of Select Physical Therapy.
- Exhibit G: Medical records of St. Louis Orthopedic.
- Exhibit H: Medical records of Neurological & Electrodiagnostic.
- Exhibit I: Medical records of Kershaw Health.
- Exhibit J: Stipulation for lump sum settlement.

The Claimant's exhibits were accepted into evidence.

The Second Injury Fund did not offer any exhibits into evidence.

The Court took judicial notice of the Court's file and there were no objections to any of the Claimant's exhibits.

STIPULATIONS

The parties stipulated the following:

1. Claimant sustained an injury arising out of and during his employment on August 4, 2008.
2. The Claimant had a compensable injury under the law of the State of Missouri.

ISSUE

What is the nature and extent of the permanent partial disability that the Claimant may be entitled to from the Second Injury Fund.

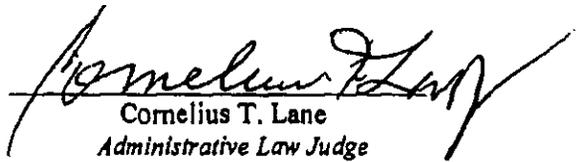
FINDINGS OF FACT

1. The Claimant at the time of the hearing testified that he was 43 years of age and had worked for the Employer, Sherrell Construction, Inc., for approximately two years and was injured on the job on August 4, 2008.
2. On August 4, 2008, Claimant while working on a skid loader stated that it bucked and he hit his head on a crossbar. As a result of that injury he lost consciousness. Claimant as a result of the injury sustained injuries to neck, back, and left elbow. Claimant as a result of his injuries received numerous medical treatments and on July 6, 2009, Dr. Coyle operated on the Claimant to repair a C7-T1 cervical disc herniation and a C6-7 cervical spondylosis and stenosis. After the operation Claimant said that he felt he got better but still has pain in the center of his back, in the back of his neck, and in his left arm.
3. Dr. Pruitt saw the Claimant and he diagnosed him as having cubital tunnel syndrome but the Claimant did not want to be operated on.
4. The Claimant testified very credibly as a result of his injury on August 4, 2008, he still has problems climbing up and down ladders and lifting and carrying various items. Also Claimant states he has difficulty in driving, lifting items, and weather also affects his pain. Many of the things the Claimant did before this injury of August 4, 2008, he can no longer do or do as well as he had in the past.
5. Dr. Lichtenfeld examined the Claimant on behalf of the Claimant's attorney and his deposition was entered into evidence.
6. Claimant settled his case of August 4, 2008, with the Employer and in accordance with the Stipulation which is part of the evidence in the case was settled for 27.5% of the body as a whole referable to the neck, 5% of the body as a whole for the concussion to the head, and 5% of the left elbow.
7. Claimant prior to his injury of August 4, 2008, injured his left foot and ankle in December of 1991 when he was working as an iron worker. Claimant testified that his foot was crushed by a piece of equipment and he underwent surgical "four compartment release of the left foot by Henry Approach" on December 12, 1991.
8. Claimant testified as a result of his foot injury that he was no longer able to climb steel beams, and could not continue working as an iron worker.

RULINGS OF LAW

1. I find that the Claimant as a result of his injury of August 4, 2008, sustained permanent partial disability of 27.5% of the body as a whole referable to the neck, 5% of the body as a whole for concussion, and 5% of the left elbow. This is in accordance with the Claimant's settlement against his Employer for the injury of August 4, 2008.
2. With regards to Claimant's previous injury to his left foot I feel Claimant has an injury of 17.5% permanent partial disability of the left ankle. Thus as a result of the primary injury of August 4, 2008, his injury to his neck, concussion, and left elbow it would amount to 140.5 weeks of permanent partial disability. With regard to the pre-existing injury to the Claimant's left foot and ankle 17.5% of permanent partial disability at the ankle, which I determine is fair, and which amounts to 27.12 weeks of permanent partial disability.
3. The Second Injury Fund liability then is calculated as 140.5 weeks for the last injury, plus, 27.12 weeks for the pre-existing injury for a total of 167.62 weeks times a 10% load factor which amounts to 16.76 weeks times \$404.66 permanent partial disability equals \$6,782.10.
4. The Second Injury Fund is to pay the Claimant \$6,782.10 for his permanent partial disability.

Date: April 22, 2011

Made by: 
 Cornelius T. Lane
 Administrative Law Judge
 Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson

Division of Workers' Compensation

Missouri Revised Statutes

Chapter 287
Workers' Compensation Law
Section 287.190

August 28, 2011

Permanent partial disability, amount to be paid--permanent partial disability defined--permanent total and partial total disability require certification by physician on compensability--award reduced when.

287.190. 1. For permanent partial disability, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with sections 287.170 and 287.180, respectively, the employer shall pay to the employee compensation computed at the weekly rate of compensation in effect under subsection 5 of this section on the date of the injury for which compensation is being made, which compensation shall be allowed for loss by severance, total loss of use, or proportionate loss of use of one or more of the members mentioned in the schedule of losses.

SCHEDULE OF LOSSES

Weeks

(1) Loss of arm at shoulder 232 (2) Loss of arm between shoulder and elbow 222 (3) Loss of arm at elbow joint 210 (4) Loss of arm between elbow and wrist 200 (5) Loss of hand at the wrist joint 175 (6) Loss of thumb at proximal joint 60 (7) Loss of thumb at distal joint 45 (8) Loss of index finger at proximal joint 45 (9) Loss of index finger at second joint 35 (10) Loss of index finger at distal joint 30 (11) Loss of either the middle or ring finger

at the proximal joint 35 (12) Loss of either the middle or ring finger

at second joint 30 (13) Loss of either the middle or ring finger

at the distal joint 26 (14) Loss of little finger at proximal joint 22 (15) Loss of little finger at second joint 20 (16) Loss of little finger at distal joint 16 (17) Loss of one leg at the hip joint or so

near thereto as to preclude the use of

artificial limb 207 (18) Loss of one leg at or above the knee,

where the stump remains sufficient

to permit the use of artificial limb 160 (19) Loss of one leg at or above ankle

and below knee joint 155 (20) Loss of one foot in tarsus 150 (21) Loss of one foot in metatarsus 110 (22) Loss of great toe of one foot at

proximal joint 40 (23) Loss of great toe of one foot at distal joint 22 (24) Loss of any other toe at proximal joint 14 (25)

Loss of any other toe at second joint 10 (26) Loss of any other toe at distal joint 8 (27) Complete deafness of both ears 180 (28) Complete deafness of one ear, the

other being normal 49 (29) Complete loss of the sight of one eye 140

2. If the disability suffered in any of items (1) through (29) of the schedule of losses is total by reason of severance or complete loss of use thereof the number of weeks of compensation allowed in the schedule for such disability shall be increased by ten percent.
3. For permanent injuries other than those specified in the schedule of losses, the compensation shall be paid for such periods as are proportionate to the relation which the other injury bears to the injuries above specified, but no period shall exceed four hundred weeks, at the rates fixed in subsection 1. The other injuries shall include permanent injuries causing a loss of earning power. For the permanent partial loss of the use of an arm, hand, thumb, finger, leg, foot, toe or phalange, compensation shall be paid for the proportionate loss of the use of the arm, hand, thumb, finger, leg, foot, toe or phalange, as provided in the schedule of losses.
4. If an employee is seriously and permanently disfigured about the head, neck, hands or arms, the division or commission may allow such additional sum for the compensation on account thereof as it may deem just, but the sum shall not exceed forty weeks of compensation. If both the employer and employee agree, the administrative law judge may utilize a photograph of the disfigurement in determining the amount of such additional sum.
5. The amount of compensation to be paid under subsection 1 of this section shall be computed as follows:
 - (1) For all injuries occurring on or after September 28, 1983, but before August 28, 1990, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the employee's average weekly earnings as of the date of the injury; provided that the weekly compensation paid under this subdivision shall not exceed an amount equal to forty-five percent of the state average weekly wage, as such wage is determined by the division of employment security, as of the July first immediately preceding the date of injury;
 - (2) For all injuries occurring on or after September 28, 1981, the weekly compensation shall in no event be less than forty dollars per week;
 - (3) For all injuries occurring on or after August 28, 1990, but before August 28, 1991, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the employee's average weekly earnings as of the date of the injury; provided that the weekly compensation paid under this subdivision shall not exceed an amount equal to fifty percent of the state average weekly wage;
 - (4) For all injuries occurring on or after August 28, 1991, but before August 28, 1992, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the employee's average weekly earnings as of the date of the injury; provided that the weekly compensation paid under this subdivision shall not exceed an amount equal to fifty-two percent of the state average weekly wage;
 - (5) For all injuries occurring on or after August 28, 1992, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the employee's average weekly earnings as of the date of the injury; provided that the weekly compensation paid under this subdivision shall not exceed an amount equal to fifty-five percent of the state average weekly wage.
6. (1) "Permanent partial disability" means a disability that is permanent in nature and partial in degree, and when payment therefor has been made in accordance with a settlement approved either by an administrative law judge or by the labor and industrial relations commission, a rating established by medical finding, certified by a physician, and approved by an administrative law judge or legal advisor, or an award by an administrative law judge or the commission,

the percentage of disability shall be conclusively presumed to continue undiminished whenever a subsequent injury to the same member or same part of the body also results in permanent partial disability for which compensation under this chapter may be due; provided, however, the presumption shall apply only to compensable injuries which may occur after August 29, 1959.

(2) Permanent partial disability or permanent total disability shall be demonstrated and certified by a physician. Medical opinions addressing compensability and disability shall be stated within a reasonable degree of medical certainty. In determining compensability and disability, where inconsistent or conflicting medical opinions exist, objective medical findings shall prevail over subjective medical findings. Objective medical findings are those findings demonstrable on physical examination or by appropriate tests or diagnostic procedures.

(3) Any award of compensation shall be reduced by an amount proportional to the permanent partial disability determined to be a preexisting disease or condition or attributed to the natural process of aging sufficient to cause or prolong the disability or need of treatment.

(RSMo 1939 § 3705, A.L. 1947 V. II p. 438, A.L. 1951 p. 620, A.L. 1953 p. 530, A.L. 1955 p. 588, A.L. 1957 p. 560, A.L. 1959 S.B. 167, A.L. 1961 p. 423, A.L. 1965 pp. 397, 414, A.L. 1967 p. 384, A.L. 1969 p. 393, A.L. 1971 H.B. 25 & 364, A.L. 1974 S.B. 417, A.L. 1975 H.B. 196, A.L. 1978 H.B. 1260, A.L. 1979 H.B. 496, A.L. 1980 H.B. 1396, A.L. 1981 H.B. 324, A.L. 1983 H.B. 243 & 260, A.L. 1990 S.B. 751, A.L. 1998 H.B. 1237, et al., A.L. 2005 S.B. 1 & 130)

Prior revision: 1929 § 3315

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Missouri General Assembly

Missouri Revised Statutes

Chapter 287 Workers' Compensation Law Section 287.220

August 28, 2011

Compensation and payment of compensation for disability—second injury fund created, services covered, actuarial studies required—failure of employer to insure, penalty—records open to public, when—concurrent employers, effect.

287.220. 1. All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for. If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury or a major extremity injury shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the "Second Injury Fund" hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in section 287.141. Maintenance of the second injury fund shall be as provided by section 287.710. The state treasurer shall be the custodian of the second injury fund which shall be deposited the same as are state funds and any interest accruing thereon shall be added thereto. The fund shall be subject to audit the same as state funds and accounts and shall be protected by the general bond given by the state treasurer. Upon the requisition of the director of the division of workers' compensation, warrants on the state treasurer for the payment of all amounts payable for

compensation and benefits out of the second injury fund shall be issued.

2. In all cases in which a recovery against the second injury fund is sought for permanent partial disability, permanent total disability, or death, the state treasurer as custodian thereof shall be named as a party, and shall be entitled to defend against the claim. The state treasurer, with the advice and consent of the attorney general of Missouri, may enter into compromise settlements as contemplated by section 287.390, or agreed statements of fact that would affect the second injury fund. All awards for permanent partial disability, permanent total disability, or death affecting the second injury fund shall be subject to the provisions of this chapter governing review and appeal. For all claims filed against the second injury fund on or after July 1, 1994, the attorney general shall use assistant attorneys general except in circumstances where an actual or potential conflict of interest exists, to provide legal services as may be required in all claims made for recovery against the fund. Any legal expenses incurred by the attorney general's office in the handling of such claims, including, but not limited to, medical examination fees, expert witness fees, court reporter expenses, travel costs, and related legal expenses shall be paid by the fund. Effective July 1, 1993, the payment of such legal expenses shall be contingent upon annual appropriations made by the general assembly, from the fund, to the attorney general's office for this specific purpose.

3. If more than one injury in the same employment causes concurrent temporary disabilities, compensation shall be payable only for the longest and largest paying disability.

4. If more than one injury in the same employment causes concurrent and consecutive permanent partial disability, compensation payments for each subsequent disability shall not begin until the end of the compensation period of the prior disability.

5. If an employer fails to insure or self-insure as required in section 287.280, funds from the second injury fund may be withdrawn to cover the fair, reasonable, and necessary expenses to cure and relieve the effects of the injury or disability of an injured employee in the employ of an uninsured employer, or in the case of death of an employee in the employ of an uninsured employer, funds from the second injury fund may be withdrawn to cover fair, reasonable, and necessary expenses in the manner required in sections 287.240 and 287.241. In defense of claims arising under this subsection, the treasurer of the state of Missouri, as custodian of the second injury fund, shall have the same defenses to such claims as would the uninsured employer. Any funds received by the employee or the employee's dependents, through civil or other action, must go towards reimbursement of the second injury fund, for all payments made to the employee, the employee's dependents, or paid on the employee's behalf, from the second injury fund pursuant to this subsection. The office of the attorney general of the state of Missouri shall bring suit in the circuit court of the county in which the accident occurred against any employer not covered by this chapter as required in section 287.280.

6. Every three years the second injury fund shall have an actuarial study made to determine the solvency of the fund, appropriate funding level of the fund, and forecasted expenditures from the fund. The first actuarial study shall be completed prior to July 1, 1988. The expenses of such actuarial studies shall be paid out of the fund for the support of the division of workers' compensation.

7. The director of the division of workers' compensation shall maintain the financial data and records concerning the fund for the support of the division of workers' compensation and the second injury fund. The division shall also compile and report data on claims made pursuant to subsection 9 of this section. The attorney general shall provide all necessary information to the division for this purpose.

8. All claims for fees and expenses filed against the second injury fund and all records pertaining thereto shall be open to the public.

9. Any employee who at the time a compensable work-related injury is sustained is employed by more than one employer, the employer for whom the employee was working when the injury was sustained shall be responsible for

wage loss benefits applicable only to the earnings in that employer's employment and the injured employee shall be entitled to file a claim against the second injury fund for any additional wage loss benefits attributed to loss of earnings from the employment or employments where the injury did not occur, up to the maximum weekly benefit less those benefits paid by the employer in whose employment the employee sustained the injury. The employee shall be entitled to a total benefit based on the total average weekly wage of such employee computed according to subsection 8 of section 287.250. The employee shall not be entitled to a greater rate of compensation than allowed by law on the date of the injury. The employer for whom the employee was working where the injury was sustained shall be responsible for all medical costs incurred in regard to that injury.

(RSMo 1939 § 3707, A.L. 1943 p. 1068, A.L. 1945 p. 1996, A.L. 1951 p. 617, A.L. 1953 p. 524, A.L. 1955 p. 590, A.L. 1980 H.B. 1396, A.L. 1981 H.B. 324, A.L. 1982 H.B. 1605, A.L. 1987 H.B. 564, A.L. 1992 H.B. 975, A.L. 1993 S.B. 251, A.L. 1998 H.B. 1237, et al.)

Prior revision: 1929 § 3317

(2004) Defense by uninsured employer of having fewer than five employees is also available to the Second Injury Fund. *Higgins v. Treasurer of the State of Missouri*, 140 S.W.3d 94 (Mo.App.W.D.).

(2006) Subsection 4 of section does not apply to compensation payments by the Second Injury Fund. *Honer v. Treasurer of State of Missouri*, 192 S.W.3d 526 (Mo.App.E.D.).

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Missouri General Assembly

Missouri Revised Statutes

Chapter 287 Workers' Compensation Law Section 287.495

August 28, 2011

Final award conclusive unless an appeal is taken—grounds for setting aside—disputes governed by this section, claims arising on or after August 13, 1980.

287.495. 1. The final award of the commission shall be conclusive and binding unless either party to the dispute shall, within thirty days from the date of the final award, appeal the award to the appellate court. The appellate court shall have jurisdiction to review all decisions of the commission pursuant to this chapter where the division has original jurisdiction over the case. Venue as established by subsection 2 of section 287.640 shall determine the appellate court which hears the appeal. Such appeal may be taken by filing notice of appeal with the commission, whereupon the commission shall, under its certificate, return to the court all documents and papers on file in the matter, together with a transcript of the evidence, the findings and award, which shall thereupon become the record of the cause. Upon appeal no additional evidence shall be heard and, in the absence of fraud, the findings of fact made by the commission within its powers shall be conclusive and binding. The court, on appeal, shall review only questions of law and may modify, reverse, remand for rehearing, or set aside the award upon any of the following grounds and no other:

- (1) That the commission acted without or in excess of its powers;
 - (2) That the award was procured by fraud;
 - (3) That the facts found by the commission do not support the award;
 - (4) That there was not sufficient competent evidence in the record to warrant the making of the award.
2. The provisions of this section shall apply to all disputes based on claims arising on or after August 13, 1980.

(L. 1980 H.B. 1396, A.L. 1998 H.B. 1237, et al.)

(2003) A reviewing court is not required to view evidence and all reasonable inferences therefrom in light most favorable to Labor and Industrial Relations Commission award. *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo.banc).

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