

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

Injury No.: 10-026623

Employee: Darrell Anderson  
Employer: City of Columbia (Settled)  
Insurer: Self-Insured (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds 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. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 19, 2016. The award and decision of Administrative Law Judge Robert J. Dierkes, issued May 19, 2016, is attached and incorporated by this reference.

The Commission further approves and affirms 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.

Given at Jefferson City, State of Missouri, this 14<sup>th</sup> day of September 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

## AWARD

Employee: **Darrell Anderson**

Injury No. **10-026623**

Dependents:

Employer: **City of Columbia (settled)**

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

Additional Party: **Second Injury Fund**

Insurer: **Self-Insured (settled)**

Hearing Date: **March 23, 2016**

Checked by: RJD/njp

### 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: **April 8, 2010.**
5. State location where accident occurred or occupational disease was contracted: **Boone 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: **Employee was in the process of removing a transmission from a truck; he was breaking a bolt loose when he injured his right shoulder.**
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 shoulder.**
14. Nature and extent of any permanent disability: **25% permanent partial disability of the right shoulder.**
15. Compensation paid to-date for temporary disability: **Unknown.**
16. Value necessary medical aid paid to date by employer/insurer? **Unknown.**
17. Value necessary medical aid not furnished by employer/insurer? **Unknown.**

Employee: **Darrell Anderson**

Injury No. **10-026623**

18. Employee's average weekly wages: **Sufficient for maximum compensation rate.**
19. Weekly compensation rate: **\$422.97.**
20. Method wages computation: **Stipulation.**

**COMPENSATION PAYABLE**

Second Injury Fund liability:

**16.4 weeks of permanent partial disability benefits.** **\$6,936.71**

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of **25%** of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

**Dean Christianson.**

Employee: **Darrell Anderson**

Injury No. **10-026623**

## **FINDINGS OF FACT AND RULINGS OF LAW**

Employee: **Darrell Anderson**

Injury No. **10-026623**

Dependents:

Employer: **City of Columbia (settled)**

Additional Party: **Second Injury Fund**

Insurer: **Self-Insured (settled)**

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 March 23, 2016, in Columbia for a final hearing to determine the liability of the Second Injury Fund. This case had previously been settled with Employer, City of Columbia. Claimant, Darrell Anderson, appeared personally and by counsel, Dean Christianson. The Treasurer of the State of Missouri, as custodian of the Second Injury Fund, appeared by Assistant Attorney General Erin Smith. The parties requested leave to file post-hearing briefs, which leave was granted, and the case was submitted on April 22, 2016.

The parties stipulated to the following:

1. On or about April 8, 2010, Claimant sustained an accident arising out of and in the course of his employment with City of Columbia. The accident occurred in Boone County, Missouri.
2. Claimant was an employee of Employer pursuant to Chapter 287 RSMo.
3. Venue is proper in Boone County.
4. Employer received proper notice of the claim.
5. Claimant filed the claim within the time allowed by law.
6. The average weekly wage at the date of injury was sufficient for the maximum compensation rate for permanent partial disability benefits of \$422.97.

The issue to be decided is the liability, if any, of the Second Injury Fund for permanent partial disability benefits.

### **EVIDENCE**

The evidence consisted of the testimony of Claimant, Darrell Anderson; the deposition testimony and narrative medical report of Dr. David Volarich; medical records; certified records

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of the Missouri Division of Workers' Compensation; the approved Stipulation of Compromise and Settlement between Claimant and the City of Columbia in Injury No. 10-026623.

## **DISCUSSION**

Claimant testified live. His testimony was credible.

Claimant was born on June 3, 1957. Claimant worked for City of Columbia (Employer) for over 25 years prior to his retirement in October 2015.

On April 8, 2010, Claimant was removing a transmission from a truck. As Claimant was in the process of breaking a bolt loose, he felt a pop in his right shoulder, immediately followed by a stinging sensation and pain. Claimant was treated conservatively with oral medications, physical therapy and injections. Claimant proceeded to surgery on March 30, 2011; Dr. Matthew Smith performed an arthroscopic repair of the subscapularis and supraspinatus, a biceps tenotomy, subacromial decompression, release of coracromial ligament, and partial acromioplasty. Claimant settled this case with Employer for 25% permanent partial disability of the right shoulder on August 21, 2014.

In 2004 Claimant was diagnosed with coronary artery disease and had a stent placed. Claimant has been on medication for his heart since 2004. Claimant testified that his heart condition was doing well before 2010 and that he did a lot of walking. The medical records indicate that, before the 4-8-2010 accident, Claimant's heart disease was stable, and that Claimant was denying chest pain. Claimant has complained of shortness of breath, but only within the last 18 months prior to the hearing. Dr. David Volarich testified that Claimant had a preexisting 20% permanent partial disability of the body as a whole due to the heart condition.

Claimant injured his left shoulder at work in March 2005. He was diagnosed with impingement syndrome and surgery was performed. Claimant settled that claim with Employer for 10% permanent partial disability of the left shoulder. Dr. David Volarich testified that Claimant had a preexisting 15% permanent partial disability of the left shoulder due to this condition.

Claimant is also alleging a preexisting permanent partial disability of the low back. Claimant advised Dr. Volarich that he had injections in his low back in 2004 and 2005. In 2007, Claimant's primary care physician noted a history of herniated lumbar disc. In March 2012, Claimant saw an orthopedic surgeon for his low back and radiating pain into his right lower extremity. A lumbar MRI performed in March 2012 revealed a right-sided L4-5 disc herniation. Surgery was performed on April 25, 2012. Dr. David Volarich testified that Claimant had a preexisting 20% permanent partial disability of the body as a whole due to the low back condition.

Regarding the potential liability of the Second Injury Fund for the combination of the preexisting disabilities due to the heart, left shoulder and low back, and the right shoulder disability occasioned by April 8, 2010 work accident, Dr. Volarich stated:

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The combination of his disabilities creates a substantially greater disability than the simple sum or total of each separate injury/illness, and a loading factor should be added.

I find that Claimant's preexisting heart condition, which required surgery, resulted in a disability of 12.5% of the body as a whole, and, as such, meets the threshold for Second Injury Fund liability for permanent partial disability benefits. While there is minimal evidence that the heart condition was a hindrance or obstacle to Claimant's employment with Employer between 2004 and April 8, 2010, I find that the heart condition constituted a hindrance or obstacle to reemployment in the event Claimant had become unemployed.

In *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. E.D. 1995), the court stated:

The Second Injury Fund statute recognizes that employers have a financial incentive to discriminate against individuals who have a condition which renders them more susceptible to a greater degree of disability compared to workers who have no such condition. That incentive to discriminate is precisely the same whether the condition has previously caused the employee to miss work or not. Many occupations can be ably performed by workers with one eye or one arm. In such cases, the condition may not cause the employee to miss any work or otherwise diminish his earning power. The condition becomes disabling only when combined with a further injury. It is the potential for those more serious combinations of injury and previous condition that gives rise to the employer's incentive to discriminate in the absence of a Second Injury Fund. Thus, a requirement that the condition be shown to have caused the employee to have missed work or suffer diminished earnings prior to the injury which combines with the condition to render the employee disabled is inconsistent with the purpose of the Fund. In many instances, the effect would be to deny the protection of the Fund to those most in need of it. If the Second Injury Fund is to fulfill its acknowledged purpose, the proper focus of the inquiry as to the nature of the prior disability is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition.

That is certainly the case here. If Claimant would have had to obtain new employment between 2004 and April 8, 2010, his heart condition would clearly have been a hindrance or obstacle to reemployment.

I find that Claimant's low back condition cannot be considered in determining the liability of the Second Injury Fund, as his low back condition had not reached maximum medical improvement until after the April 8, 2010 injury, i.e., after Claimant had recovered from the April 25, 2012 surgery. *Hoven v. Treasurer*, 414 S.W. 3d 676 (Mo. App. E.D. 2013); *Miller v. Treasurer*, 425 S.W.3d 218 (Mo. App. E.D. 2014).

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I find that Claimant's preexisting left shoulder condition constituted a preexisting permanent partial disability of 10% of the shoulder. While this preexisting disability (considered alone) does not meet the statutory threshold, it must also be considered in determining the liability of the Second Injury Fund.

This Court finds there must be a single preexisting permanent partial disability that meets the thresholds to trigger the fund's liability and there is no threshold requirement for the last injury. *Additionally, all preexisting injuries must be considered in calculating the amount of compensation for which the fund is liable.* (Italics not in original.) *Treasurer v. Witte*, 414 S.W. 3d 455, 467 (Mo. 2013).

### **FINDINGS OF FACT & RULINGS OF LAW**

Claimant has established a right to recover from the Second Injury Fund. A claimant in a worker's compensation proceeding has the burden of proving all elements of his claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 911 (Mo. App. E.D.2008). In order for a claimant to recover against the Fund, 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 RSMo. 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 employment or reemployment should she 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 record, 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 sustained a compensable last injury which resulted in permanent partial disability equivalent to 25% of the right shoulder (58 weeks).
2. As of the time the last injury was sustained, Claimant had a preexisting permanent partial disability due to a heart condition which meets the statutory threshold and is of such seriousness as to constitute a hindrance or obstacle to employment or reemployment, being 12.5% of the body as a whole (50 weeks).
3. As of the time the last injury was sustained, Claimant had a preexisting permanent partial disability to the left shoulder, being 10% of the left shoulder (23.2 weeks).

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4. The credible evidence establishes that the last injury, combined with the pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities, and that a 12.5% loading factor should be applied. The Second Injury Fund liability is calculated as follows: 58 weeks for last injury + 73.2 weeks for the preexisting injury = 131.2 weeks x 12.5% = 16.4 weeks of overall greater disability.

### **CONCLUSION**

The Second Injury Fund is liable to Claimant for \$6,936.71 in permanent partial disability benefits. Claimant's attorney, Dean Christianson, is allowed 25% of the benefits awarded herein as and for necessary attorney's fees, and the amount of such fees shall constitute a lien on those benefits.

Made by: /s/Robert J. Dierkes 5/19/16

Robert J. Dierkes  
Chief Administrative Law Judge  
*Division of Workers' Compensation*