

**FINAL AWARD DENYING COMPENSATION**  
(Reversing Award and Decision of Administrative Law Judge)

Injury No.: 07-024826

Employee: Keith Bacon  
Employer: City of St. Louis (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.<sup>1</sup> We have reviewed the evidence, read the briefs and considered the entire record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge (ALJ) dated September 16, 2010.

**Preliminaries**

Employee previously settled his claim against employer and proceeded to final hearing against the Second Injury Fund. The ALJ found that employee sustained 15% permanent partial disability (PPD) of his right hand as a result of the primary injury. In addition, the ALJ found that employee suffered the following preexisting disabilities: 1) 18.2% PPD of the body as a whole due to his previous injuries to his pelvis and lumbar spine; and 2) 12.5% PPD of the body as a whole due to his cervical spine condition.

The ALJ found that employee's primary injury combined in a synergistic fashion with his preexisting disabilities to result in a greater overall disability than the simple sum of the disabilities considered independently. The ALJ found that the synergistic liability is best represented by a load factor of 12.5%, which amounts to 18.63 weeks of compensation, or \$7,015.12.

The Second Injury Fund filed a timely Application for Review to the Commission. Therefore, the primary issue currently before the Commission is the nature and extent of any Second Injury Fund liability.

**Findings of Fact**

Employee has worked as an auto technician for 40 years with the City of St. Louis. Employee testified that on March 26, 2007, his right hand became caught in a wheel resulting in injury to his right middle finger and right ring finger. Employee testified that his middle finger was surgically repaired by Dr. David Brown. Employee settled his claim against employer for 15% permanent partial disability of the right hand.

Employee testified that prior to the primary injury, he was hit by a car at work, resulting in injury to his low back and right hip. Employee testified that he continues to experience pain while pulling tires and walking on concrete floors at work. He testified

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<sup>1</sup> Statutory references are to the Revised Statutes of Missouri 2006 unless otherwise indicated.

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that he uses Ibuprofen, does stretching exercises and uses the hot tub to alleviate his pain. Employee stated that he also had muscle relaxers prescribed for his low back by his primary care physician subsequent to his release from treatment. Employee settled this claim against employer in 2004 for 18.2% PPD of the body as a whole referable to his pelvis and lumbar areas.

Employee suffered a neck injury in 1995 as a result of being rear-ended in an automobile accident. Employee had physical therapy for this 1995 neck injury. He testified that this neck injury caused him pain if he had to look up for long periods of time. Employee also stated that his neck caused him pain when he had to carry heavy objects around the shop as well.

Employee testified that prior to the primary injury he worked without any permanent restrictions imposed by a physician.

During the June 22, 2010, final hearing before the ALJ, employee offered three exhibits into evidence (Exhibits A, B, and C). The Second Injury Fund objected to the reports of Dr. Schlafly and Dr. Volarich in Exhibit A on the grounds that they are hearsay because there was no deposition testimony taken to make their opinions admissible. Employee and the Second Injury Fund agreed to submit only the three stipulations for compromise settlement contained in Exhibit A for the ALJ's consideration. The ALJ stated during the hearing that the three stipulation documents would be the only pages he would consider in Exhibit A.

Exhibit B contains the certified records from BarnesCare. Said records document only the treatment of employee's primary work injury. Exhibit C contains the certified records of the Orthopedic Center of St. Louis, specifically the treatment rendered by Dr. Brown for employee's right hand injury of March 26, 2007. Dr. Brown surgically repaired employee's right middle finger on March 27, 2007.

### **Conclusions of Law**

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there has been previous disability." In order to trigger liability of the Second Injury Fund, employee must show the presence of an actual and measurable disability at the time the work injury is sustained and that work-related injury is of such seriousness as to constitute a hindrance or obstacle to employment or re-employment. *E. W. v. Kansas City, Missouri, School District*, 89 S.W.3d 527, 537 (Mo.App. W.D. 2002), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

Establishing preexisting disabilities is not the only burden for an employee asserting Second Injury Fund liability. To establish Second Injury Fund liability employee must also show either that (1) a preexisting partial disability combined with a disability from a subsequent injury to create permanent and total disability or (2) the two disabilities combined to result in a greater disability than that which would have resulted from the last injury by itself. *Gassen v. Lienbengood*, 134 S.W.3d 75, 79 (Mo.App. W.D. 2004), citing *Karoutzos v. Treasurer of State*, 55 S.W.3d 493, 498 (Mo.App. W.D. 2001).

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In this case, the ALJ concluded that employee's last injury combined with his preexisting disabilities to result in a greater disability than that which would have resulted from the last injury by itself. However, in arriving at this conclusion, the ALJ made findings of fact based upon the information contained in the reports of Drs. Schlafly and Volarich that he did not admit into evidence.

Absent the reports of Drs. Schlafly and Volarich, there is no expert opinion in evidence that the combination of preexisting disabilities and the disability from the primary injury combine to produce substantially greater overall disability than the simple sum. In fact, without their reports, there is no medical evidence of any kind documenting the injuries employee alleges he sustained prior to March 26, 2007. Employee's testimony addressed each injury separately, but did not discuss how they combined to potentially make him worse off.

Because the burden is on employee to prove all material elements of his claim, including Second Injury Fund liability, and because there is no evidence of how the primary injury combines with the alleged preexisting conditions, we find that employee has not met his burden of proving Second Injury Fund liability.

**Decision**

We hereby reverse the award and decision of the ALJ and find that employee's claim for PPD benefits against the Second Injury Fund is denied.

The award and decision of Administrative Law Judge Matthew D. Vacca, issued September 16, 2010, is attached hereto for reference.

Given at Jefferson City, State of Missouri, this 12<sup>th</sup> day of April 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

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Secretary

Employee: Keith Bacon

**DISSENTING OPINION**

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be affirmed. Therefore, I adopt the decision of the administrative law judge, in its entirety, as my decision in this matter.

Because the Commission majority has decided otherwise, I respectfully dissent.

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John J. Hickey, Member

# AWARD

Employee: Keith Bacon

Injury No.: 07-024826

Dependents: N/A

Before the  
**Division of Workers'  
Compensation**

Employer: City of St. Louis (settled)

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

Additional Party: Second Injury Fund

Insurer: Self-Insured

Hearing Date: June 22, 2010

Checked by: MDV

## 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: March 26, 2007
5. State location where accident occurred or occupational disease was contracted: St. Louis City
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant crushed hand while working on brakes.
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 upper extremity
14. Nature and extent of any permanent disability: 15% Right upper extremity at 175 week level
15. Compensation paid to-date for temporary disability: \$4,888.00
16. Value necessary medical aid paid to date by employer/insurer? \$13,884.41

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17. Value necessary medical aid not furnished by employer/insurer? 0

18. Employee's average weekly wages: \$933.00

19. Weekly compensation rate: \$622.00/\$376.55

20. Method wages computation: Agreed

**COMPENSATION PAYABLE**

21. Amount of compensation payable: (Settled)

22. Second Injury Fund liability: Yes

18.63 weeks of permanent partial disability from Second Injury Fund

TOTAL: \$7,015.12

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: Robert Lenze

## **FINDINGS OF FACT and RULINGS OF LAW**

Employee:	Keith Bacon	Injury No.:	07-024826
Dependents:	N/A		Before the
Employer:	City of St. Louis (settled)		<b>Division of Workers' Compensation</b>
Additional Party:	Second Injury Fund		Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Insurer:	Self-Insured	Checked by:	MDV

### **PRELIMINARY MATTERS**

The primary injury herein was settled on September 1, 2009, in a compromise lump sum settlement signed by Judge Landolt. The only issue presented for resolution by way of this hearing is the liability of the Second Injury Fund for any synergistic permanent partial disability.

### **FINDINGS OF FACT**

1. Claimant is a mechanic having worked for the City of St. Louis and the police department for the last 40 years.
2. Claimant injured his neck in 1995 and 1996 following whiplash injuries arising out of two motor vehicle accidents. He was treated by Dr. Vitale, a chiropractor, in 1995 and 1996 for neck and low back complaints and was treated at BarnesCare in 1996 and 1998 for cervical strain injuries. X-rays indicated mild degenerative changes and loss of height at the vertebral body of C6.
3. Dr. Schlafly rated Claimant's prior cervical neck injury at 12.5% of the body as a whole.
4. On November 25, 2005, Claimant was struck by a car in the parking lot of his employment. Claimant was hit by a police car and knocked over the vehicle. Claimant was taken to the Barnes-Jewish Emergency Room where x-rays were obtained and a subsequent bone scan and CT revealed fractures of the pelvis on the right side.
5. Dr. Volarich described a pubic ramus fracture with right hip pain, lumbar syndrome and cervical syndrome with right knee contusion.
6. Claimant settled this injury with the Employer for an 18.2% permanent partial disability of the body as a whole referable to the pelvis and lumbar spine and settled with the Second Injury Fund for a synergistic disability based on a 12.5% permanent partial disability referable to the cervical spine for the previous whiplash injuries.

7. In the primary injury under consideration here, Claimant was at work on March 26, 2007, when he was inspecting brakes on a vehicle and his right hand was crushed while pushing on the wheel.

8. He jammed the right long finger with a near complete amputation at the fingertip and took off the fingernail. Claimant was sent to BarnesCare where he was diagnosed with an open fracture of the distal phalanx of the right long finger, partial amputation of the fingertip and was sent to Dr. Brown, a plastic surgeon, the same day.

9. Dr. Brown found a nail bed injury with open displaced fracture of the distal phalanx and performed surgery the next day on March 27, 2007. He performed nail bed and soft tissue repair of the right long finger with open reduction and internal fixation of the distal phalanx for treatment of a near complete amputation. Claimant settled that claim with his Employer for 15% of the right hand.

Claimant seeks to combine that 15% right hand injury with the prior 18.2% body as a whole pelvic and right hip injury and 12.5% body as a whole prior cervical injury.

### **FINDINGS OF FACT**

1. Claimant sustained a 15% permanent partial disability of the right hand as a result of the injury on March 26, 2007.
2. Claimant suffered an 18.2% body as a whole permanent partial disability as a result of the injury to his pelvis and lumbar spine.
3. Claimant suffered a preexisting 12.5% permanent partial disability of the cervical spine for a series of whiplashes and injuries to the cervical area causing degenerative arthritis.

These three injuries are combining in a synergistic fashion which is greater than that simple sum total of the injury. This synergistic disability is best represented by a loading factor of .125.

Therefore, Claimant is entitled to a payment from the Second Injury Fund of 18.63 weeks of permanent partial disability at the permanent partial disability compensation rate of \$376.55 for a total of \$7,015.12.

Date: \_\_\_\_\_ Made by: \_\_\_\_\_

MATTHEW D. VACCA  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest

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Naomi Pearson  
*Division of Workers' Compensation*