

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

Injury No.: 06-087989

Employee: John Banaszek
Employer: McCarthy Brothers (Settled)
Insurer: Zurich American (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 section 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 section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated March 21, 2011. The award and decision of Administrative Law Judge Matthew D. Vacca, issued March 21, 2011, 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 12th day of August 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: John Banaszek

Injury No.: 06-087989

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: McCarthy Brothers (Settled)

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

Additional Party: Second Injury Fund

Insurer: Zurich American

Hearing Date: February 8, 2011

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: July 3, 2006
5. State location where accident occurred or occupational disease was contracted: St. Louis County
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: While moving concrete forms slipped in oil and fell injuring left upper extremity.
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: Left upper extremity
14. Nature and extent of any permanent disability: 60% left shoulder, 25% left elbow and 5% body as a whole
15. Compensation paid to-date for temporary disability: \$35,136.07
16. Value necessary medical aid paid to date by employer/insurer? \$102,874.74

Employee: John Banaszek

Injury No.: 06-087989

- 17. Value necessary medical aid not furnished by employer/insurer? -0-
- 18. Employee's average weekly wages: \$1,032.00
- 19. Weekly compensation rate: \$688.00/\$376.55
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

weeks of permanent partial disability from Employer	Previously settled
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22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:
 weekly differential (\$311.45) payable by SIF for 211.7 weeks beginning
 June 21, 2008 and, thereafter, \$688.00 for Claimant's lifetime

TOTAL:	*
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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: John Larsen

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	John Banaszek	Injury No.:	06-087989
Dependents:	N/A	Before the	
Employer:	McCarthy Brothers (Settled)	Division of Workers'	Compensation
Additional Party:	Second Injury Fund	Department of Labor and Industrial	Relations of Missouri
		Jefferson City, Missouri	
Insurer:	Zurich American	Checked by:	MDV

ISSUES

The only issues to be decided herein are the nature and extent of permanent disability and liability of the Second Injury Fund.

FINDINGS OF FACT AND RULINGS OF LAW

1. Employee is a 52-year-old high school graduate who has worked his entire adult life as a welder and/or as a laborer.
2. Employer injured his non-dominant left upper extremity working for McCarthy Brothers Construction Company on or about July 3, 2006, when he slipped on an oily surface and fell.
3. As a result of injuries sustained on July 3, 2006, Employee underwent five surgical procedures referable to his left rotator cuff, biceps and ulnar nerve.
4. As of March 26, 2008, the date of his last surgery, Claimant was diagnosed with an irreparable, massive recurrent rotator cuff tear.
5. Claimant was released from active care referable to his left upper extremity on June 20, 2008.
6. As a result of the work-related injuries to his left upper extremity, Claimant remains in constant pain. He has hardly any strength in his left shoulder and cannot raise his left upper arm above shoulder level. He continues to experience discomfort referable to his left elbow, and pressure on the left elbow causes his ring and little fingers to go to sleep. Claimant takes Vicodin daily, and a muscle relaxer as needed, to control these symptoms.
7. In approximately 1975, Claimant sustained fractures involving his left hand and wrist which required surgery. Although x-rays demonstrate deformity and fusion of the third, fourth, and fifth metacarpals, and although range of motion of the left

wrist is significantly limited, Claimant denied that this injury caused any significant problems at work.

8. In approximately 1988, Claimant sustained a laceration of his left index finger resulting in significant loss of range of motion and cold sensitivity that was a hindrance at work.
9. In approximately 2004, Claimant sustained work-related injuries to his dominant right hand when he fell off a scaffold. Although Claimant received no treatment for this injury prior to July 3, 2006, and did not file a claim for compensation, the dorsal aspect of his right hand is visibly deformed. Claimant testified credibly that, as a result of this injury, he has significant discomfort, decreased grip strength, and had a great deal of difficulty working with vibratory equipment.
10. Claimant sustained fractures involving his right ankle in approximately 1977 requiring open reduction and internal fixation. As a result, he would experience soreness after being on his feet all day at work, but this injury does not appear to have resulted in any significant hindrance or obstacle to employment.
11. With regard to his orthopedic injuries and disabilities, Claimant offered medical testimony of Dr. David Volarich. Dr. Volarich examined Claimant on three separate occasions at the request of Claimant's attorney.
12. Dr. Volarich documented and described multiple fractures and deformities regarding Claimant's upper extremities, and right lower extremity, as noted previously. Dr. Volarich rated Claimant's disabilities resulting from the July 3, 2006 work injury at 75% of the left shoulder and 35% of the left elbow. Dr. Volarich identified and rated pre-existing, permanent disabilities referable to Claimant's upper extremities and right ankle. He testified that Claimant's work-related and pre-existing disabilities constituted a hindrance or obstacle to employment and that they combined synergistically.
13. Dr. Volarich deferred to a vocational expert with regard to Claimant's employability but opined that, if no job is available within his restrictions, Claimant would be considered permanently and totally disabled due to the combination of his work-related and pre-existing injuries and disabilities.
14. Claimant also offered medical evidence and testimony regarding psychiatric problems.
15. Medical records from Claimant's family physician, Dr. Mahadevan, document psychiatric treatment beginning in 2005 for symptoms of irritability, anxiety, and hand tremors. Leading up to July 3, 2006, and thereafter until Claimant's medical insurance ran out, Dr. Mahadevan treated these symptoms with increasingly powerful anti-anxiety and anti-depressant medications.

16. Claimant identified symptoms of hand tremors as the reason he quit work as a welder and began working as a laborer.
17. Claimant offered the psychiatric testimony of Dr. Adam Sky, who examined and evaluated Claimant at the request of Claimant's attorney on July 9, 2009. Dr. Sky noted Claimant's prior history of psychiatric treatment and the post-injury use of increasingly "heavy-duty" anti-depressants and sedatives. Dr. Sky further noted ongoing symptoms of a major depressive disorder, including fatigue, frustration, depressed mood, and anxiety, as of the date of his examination. He rated Claimant's psychiatric disability at 35% of the body as a whole, apportioning 15% pre-existing and 20% due to Claimant's work injury. Dr. Sky identified Claimant's psychiatric disabilities as constituting a hindrance to employment.
18. Dr. Sky specifically testified Claimant would have difficulty working in a stressful environment and/or in jobs wherein he would have to deal with the public.
19. Claimant offered the expert vocational testimony of Mr. Tim Lalk, who evaluated the Claimant at the request of his attorney on November 19, 2008 and who, thereafter, reviewed Claimant's psychiatric evaluation. Testing performed by Mr. Lalk demonstrated that Claimant possesses fifth to sixth grade reading skills and, as a result, has limited rehabilitation potential. Mr. Lalk testified that Claimant's work injury in and of itself would preclude a return to any work Claimant has performed in the past, but would not render Claimant unemployable. Mr. Lalk concluded that Claimant has been rendered unemployable due to the combination of physical injuries he sustained July 3, 2006 and psychiatric symptoms and limitations identified and described by Dr. Sky.
20. Claimant testified in a credible and straightforward manner.
21. The Second Injury Fund offered no evidence or testimony to impeach or rebut Claimant's testimony, the expert medical testimony of Dr. Volarich and Dr. Sky, and/or the expert vocational testimony of Mr. Lalk. Claimant settled his claim with the employer and insurer based on disability ratings of 60% of the left shoulder, 25% of the left elbow, and 5% of the body as a whole based on aggravation of psychiatric symptoms – a total of 211.7 weeks of benefits. Although not dispositive, the levels of disability set forth in the settlement are reasonable.

CONCLUSIONS OF LAW

1. Claimant sustained 60% permanent partial disability of the left shoulder, 25% of the left elbow and 5% body as a whole for psychiatric injury, all as a result of the primary injury.

- 2. A unanimity of expert medical and vocational testimony establishes that Claimant is unemployable in the open labor market.
- 3. Claimant has not been rendered permanently and totally disabled due to the last accident alone or as the result of a post-injury worsening of any pre-existing disability unrelated to Claimant's July 3, 2006 work injury.
- 4. Claimant is permanently and totally disabled, and liability therefore rests with the Second Injury Fund.
- 5. The parties stipulated Claimant reached MMI as of June 20, 2008.

CONCLUSION

Claimant is entitled to receive from the Second Injury Fund a differential benefit in the amount of \$311.45 per week for a period of 211.7 weeks beginning June 21, 2008 and, thereafter, the sum of \$688.00 per week for life.

Date: _____

Made by: _____

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

A true copy: Attest:

Naomi Pearson

Division of Workers' Compensation