

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

Injury No.: 09-012515

Employee: Lloyd Bessard
Employer: Alberici Constructors, Inc. (Settled)
Insurer: U S F & G (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.¹ We have reviewed the evidence and briefs, heard oral argument, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the April 25, 2012, award and decision of the administrative law judge (ALJ). We adopt the findings, conclusions, decision, and award of the ALJ to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

The Second Injury Fund filed an Application for Review challenging, among other things, the ALJ's determination that the Second Injury Fund's liability shall begin on February 23, 2009, the date of the work injury. The Second Injury Fund argues that because the employer paid temporary total disability benefits from February 23, 2009, through November 20, 2009, no Second Injury Fund liability should accrue until after November 20, 2009. Employee concedes this point in his brief.

We agree with the Second Injury Fund and employee and find that permanent disability benefits do not accrue during a period of temporary total disability. The award should be modified to reflect the same.

Award

We modify the award of the ALJ and find that as a result of the primary injury, employee sustained 42% permanent partial disability of the body as a whole. We further find that employee is permanently and totally disabled due to the combination of the disability from the primary injury with his preexisting disabilities.

Beginning November 21, 2009, employer shall pay employee 168 weeks² of permanent partial disability benefits. During said 168 weeks, the Second Injury Fund shall pay to employee \$355.22, the difference between employee's PTD rate and his PPD rate.³ Thereafter, the Second Injury Fund shall pay to employee \$759.88 for the remainder of employee's life, or until modified by law.

With respect to all other issues, we adopt and affirm the ALJ's award.

¹ Statutory references are to the Revised Statutes of Missouri 2008 unless otherwise indicated.

² 168 weeks = .42 x 400 weeks.

³ \$759.88 - \$404.66.

Employee: Lloyd Bessard

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The award and decision of Administrative Law Judge Cornelius T. Lane, issued April 25, 2012, is attached hereto and incorporated herein to the extent it is not inconsistent with this decision and award.

The Commission further approves and affirms the ALJ's allowance of attorney's fee as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 7th day of February 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T
Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Lloyd Bessard

Injury No.: 09-012515

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Alberici Constructors, Inc. (Settled)

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

Additional Party: Second Injury Fund

Insurer: USF & G

Hearing Date: January 30, 2012

Checked by: CDL

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: February 23, 2009
5. State location where accident occurred or occupational disease was contracted: St. Louis, 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 struck in the head by a shore post.
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: Neck
14. Nature and extent of any permanent disability: \$42% permanent partial disability body as a whole, regarding cervical spine and permanent total disability against the Second Injury Fund for the primary injuries and pre-existing injuries and disabilities.
15. Compensation paid to-date for temporary disability: \$32,104.71
16. Value necessary medical aid paid to date by employer/insurer? \$59,905.61

Employee: Lloyd Bessard

Injury No.: 09-012515

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: N/A
- 19. Weekly compensation rate: \$759.88/\$404.66
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

- 21. Amount of compensation payable: Settled
- 22. Second Injury Fund liability: Payments of \$355.22 for 168 Weeks from February 23, 2009 through May 13, 2012 and then \$759.88 per week for the rest of Claimant's life.

weeks of permanent partial disability from Second Injury Fund

TOTAL: N/A

- 23. Future requirements awarded:

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: Todd Muchnick

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Lloyd Bessard

Injury No.: 09-012515

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Alberici Constructors, Inc. (Settled)

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

Additional Party: Second Injury Fund

Insurer: USF & G

Checked by: CDL

PREFACE

A hearing was held in the above mention matter on January 30, 2012. Claimant’s primary injury against the Employer/Insurer was previously settled. The hearing in this matter is against the Second Injury Fund only. Claimant Lloyd Bessard was represented by attorney Todd Muchnick. Second Injury Fund was represented by Assistant Attorney General Sam You.

STIPULATIONS

Compensation rates are \$759.88 for temporary total disability and \$404.66 for permanent partial disability.

Employer paid \$20,516.76 in temporary total disability for 27 weeks, from February 23, 2009 to August 31, 2009. Employer paid additional sum of \$11,587.95 in temporary total benefits from August 31, 2009 to November 20, 2009.

ISSUES

The nature and extent, if any, of the Second Injury Fund liability.

EXHIBITS

Claimant offered the following exhibits that were accepted into evidence without objection, Exhibits A through N13. Second Injury Fund Exhibits were accepted without objection, Exhibits 1 through 5.

FINDINGS OF FACT

Claimant at the time of hearing was 52 years old. Claimant was a high school graduate; he played minor league baseball for the Boston Red Sox. Claimant started working for Alberici Constructors Inc. in the year 2000 as a laborer, worked until his last day in February 23, 2009.

Claimant stated in his testimony that he was a laborer, and for the Employer and he did demolition type of work and other construction type of work in which he operated jack hammers, hammers, shoveling, digging ditches, removing materials, breaking materials up, etc.

On February 23, 2009, Claimant while working for the Employer, Claimant was struck on the back of his head and neck by a shore post resulting in injuries to his cervical spine and causing what was later diagnosed as central cord syndrome. As a result of the injury Claimant stated he had transitioned quadripareisis.

Claimant was taken to St. Louis University Hospital for care. Claimant was diagnosed with closed head trauma and central cord syndrome. Claimant was at the hospital from February 23, 2009 until February 26, 2009.

Claimant was referred to St. John Mercy Hospital, where claimant was seen by Dr. Martin Wice. From all the evidence Dr. Wice diagnosed Claimant with central cord syndrome, upper extremity dysenteric pain and close head trauma as a result of injury on February 23, 2009.

Claimant was sent to Dr. James Coyle on March 10, 2009 for evaluation and the doctor diagnosed Claimant with central cord syndrome and cervical spinal stenosis. Dr. Coyle had Claimant wear a cervical collar and gave physical therapy. Dr. Coyle in his records thought Claimant could potentially be a candidate for an anterior cervical fusion.

Claimant went back to see Dr. Wice on May 9, 2009, provided trigger point injections and Dr. Wice thought that Claimant should have some nerve conduction test with regard to his bilateral hand. In the records it was also noted that Claimant's complaint with regards to the hands that were prior to the February 23, 2009 injury.

Dr. Rotman performed right carpal tunnel decompression on November 20, 2009 and left carpal tunnel release on December 4, 2009.

The claimant was still having problems with his neck and was sent to see Dr. David Kennedy on April 1, 2010. Dr. Kennedy diagnosed Claimant with central cord syndrome with severe spinal canal stenosis, and he found that Claimant had spinal stenosis produced by disk herniations which was a result of Claimant's injury of February 23, 2009.

On October 4, 2010, Claimant went to Dr. Thomas Musich for an independent medical evaluation. Dr. Musich felt that the Claimant had an increased risk for additional surgical complaints and if he suffers any additional cervical spine trauma he felt that Claimant was a candidate for surgical intervention. Dr. Musich was of the opinion that for Claimant's neck

problems were the result of his injury from February 23, 2009, that the Claimant had 60% permanent partial disability the body as a whole because of the neck problems.

Ms. Delores Gonzales, an independent vocational expert, saw Claimant on September 10, 2010 and she was the opinion that Claimant's medical problems prevent him from performing his past jobs or any job in the open labor market.

Claimant has stated he still has problems with his neck, problems with his elbows, and Claimant testified that he attempted to return to work and did so for eight days in December 2009. Claimant was laid off and has not worked since.

Claimant has a prior following a pre existing disabilities before the injury of February 23, 2009 as follows:

- a. Right shoulder injury in 1980 from playing baseball on a minor league team resulting in surgery to the right shoulder.
- b. Right knee injury in 1980 while playing baseball sliding into second base and underwent surgical procedure.
- c. Knee injury in late 1980's when Claimant was coming down a ladder while working and injured the right knee which required arthroscopic surgery.
- d. Claimant while working at Best Buy in December 1999, Claimant had a sprained left knee, which he settled with employer for 10% permanent partial disability of the knee.
- e. In April 2003, Claimant was working for Forest Park for Subsurface Constructors twisted his knee which required surgery with Dr. Charles Mannis. Claimant's left knee injury while working for the Employer resulted in 30% permanent partial disability of the knee in his settlement of his worker's compensation case.
- f. In June 2004, Claimant was working on a construction job on Highway 70 when Claimant tripped sustaining a left knee injury which resulted in a 22.5% permanent partial disability of his left knee in his settlement of his workers' compensation case.
- g. Elbow and wrists injury prior to the February 23, 2009 work accident, because the type of work Claimant did for the Employer, Claimant developed left cubital tunnel syndrome and bilateral carpal tunnel syndrome. Claimant was seen by Dr. Mitchell Rotman who performed right carpal tunnel decompression on November 20, 2009 and left carpal tunnel release and ulnar nerve transposition on December 4, 2009. The injuries were settled with the Employer Alberici Construction Company for 32.5% permanent partial disability of the left elbow and 25% of the right elbow with a 10% loading factor.

Claimant had a problem with the right shoulder before the injury of February 23, 2009. The right shoulder has limited range of motion. Claimant's right shoulder injury prevented him from doing

any overhead work. Claimant had to trade work with other co-workers if the work required him to use his shoulder. Claimant used over the counter analgesics and anti-inflammatories for his problems.

Claimant's problems with his right and left knees prior to the February 23, 2009, causing problems with climbing and squatting and doing work.

Claimant had suffered with pain and discomfort in both his wrists and hands. Claimant's employer relieved him from doing any jackhammer because of his problems.

Claimant was examined by Dr. Thomas Musich on October 4, 2010 and testified that Claimant suffered permanent partial disability of 60% of the Body as a Whole with regards to the neck injury of February 23, 2009.

Claimant had permanent partial disability prior to the injury of February 23, 2009, to the right shoulder 65% and to the right knee 50% permanent partial disability and to the left knee 50% permanent partial disability.

Dr. Musich also opined that Claimant suffered 25% of the left elbow and 30% of both wrists.

Dr. Kennedy in his testimony felt that Claimant was unable to work because of his primary injury and pre-existing injuries, and disabilities.

Ms. Gonzalez, a vocational rehabilitation counselor examined the Claimant and with the opinion stated that Claimant is not capable of working in the open labor market as a result of his primary injury as well as the pre-existing injuries.

RULINGS OF LAW

1. On the base of all the evidence Claimant is found to be permanent total disabled resulting in primary injury of February 23, 2009 and pre-existing disabilities and injuries.
2. Second Injury Fund is liable for permanent total disability benefits to be paid to the Claimant in the amount of \$355.22 for 168 weeks beginning February 23, 2009 through May 13, 2012 and then \$759.88 per week for the rest of Claimant's life.

Made by: _____
 CORNELIUS T. LANE
Administrative Law Judge
Division of Workers' Compensation

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

Injury No.: 09-062364

Employee: Lloyd Bessard
Employer: Alberici Constructors, Inc. (Settled)
Insurer: U S F & G (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.¹ We have reviewed the evidence and briefs, heard oral argument, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the April 25, 2012, award and decision of the administrative law judge (ALJ). We adopt the findings, conclusions, decision, and award of the ALJ to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Preliminaries

Employee developed bilateral carpal tunnel and left cubital tunnel syndromes as a result of his work activities as a union laborer for employer. Employee settled his claims against employer based upon approximate permanent partial disabilities of 32.5% permanent partial disability of the left elbow, 25% permanent partial disability of the right elbow, a 10% multiplicity load, and 4 weeks for disfigurement. Employee proceeded to final hearing of his claim against the Second Injury Fund.

The ALJ awarded 76.16 weeks of permanent partial disability against the Second Injury Fund; however, the ALJ failed to include how he came to this conclusion. At the end of the award, the ALJ simply listed the aforementioned settlement figures for the primary injury, and then listed Dr. Musich's opined ratings for employee's preexisting conditions. Without any affirmative findings, we can only assume that the 76.16 weeks of Second Injury Fund liability represents some percentage of the synergistic disability, which is greater than the simple sum of employee's separate primary and preexisting disabilities.

The Second Injury Fund appealed to the Commission alleging that the ALJ erred in finding that employee's bilateral carpal tunnel and left cubital tunnel syndromes qualify as "subsequent compensable injur[ies]" for purposes of triggering Second Injury Fund liability under § 287.220.1 RSMo. The Second Injury Fund also argues that the permanent partial disability award against the Second Injury Fund was excessive and not supported by competent and substantial evidence.

¹ Statutory references are to the Revised Statutes of Missouri 2008 unless otherwise indicated.

Employee: Lloyd Bessard

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Findings of Fact

The findings of fact and stipulations of the parties were accurately recounted in the award of the ALJ and, to the extent they are not inconsistent with the findings listed below, they are incorporated and adopted by the Commission herein.

We find that employee's settlement with employer accurately reflects the permanent partial disability employee sustained as a result of his work-related upper extremity conditions. Therefore, we find that as a result of the primary injury employee sustained 32.5% permanent partial disability of the left elbow, 25% permanent partial disability of the right elbow, and a 10% multiplicity load. We further find that the 4 weeks for disfigurement was appropriate.

With respect to employee's preexisting disabilities, we find Dr. Musich's uncontradicted ratings most persuasive. Therefore, we find that at the time of the primary injury, employee suffered from 65% preexisting permanent partial disability of his right shoulder, 50% preexisting permanent partial disability of his left knee, and 50% permanent partial disability of his right knee.

Finally, we find that employee's primary injury disabilities and preexisting disabilities combine synergistically to produce a greater overall disability than their simple sum. Specifically, we find, based upon the competent and substantial evidence, that employee's primary and preexisting disabilities combine synergistically to create enhanced permanent partial disability of 15%. We find the Second Injury Fund liable for this 15% of enhanced permanent partial disability.

Discussion

Occupational Disease is Subsequent Compensable Injury

The Second Injury Fund initially argues that employee's bilateral carpal tunnel and left cubital tunnel syndromes do not qualify as "subsequent compensable injur[ies]" for purposes of triggering Second Injury Fund liability under § 287.220.1 RSMo, because "injury" as defined in § 287.020.3 RSMo excludes occupational diseases.

With respect to this argument, we point out that we have addressed and rejected an identical argument from the Fund in a number of prior decisions. See, e.g., *Kathleen Peters*, Injury No. 07-114673 (LIRC, March 8, 2012); *Kelly Kirkpatrick*, Injury No. 09-071622 (LIRC, March 8, 2012); *Stephen Green*, Injury No. 07-129027 (LIRC, March 8, 2012); *Michelle Kitson*, Injury No. 09-000988 (LIRC March 8, 2012); *Gloria Stiers*, Injury No. 08-095300 (LIRC March 8, 2012); and *Kevin Hundelt*, Injury No. 09-044470 (LIRC April 16, 2012). The parties are referred to those decisions for our analysis and reasoning pertinent to this argument from the Fund.

We also note that the Western and Eastern Districts of the Missouri Court of Appeals have recently affirmed decisions from the Commission rejecting the same argument advanced by the Fund herein. See *Treasurer of Mo. v. Stiers*, WD75101 (Oct. 9, 2012), and *Peters v. Treasurer of Mo. As Custodian of Second Injury Fund*, ED98300 (Nov. 6, 2012).

Employee: Lloyd Bessard

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For the foregoing reasons, we affirm the ALJ's award finding employee's bilateral carpal and left cubital tunnel syndromes qualify as subsequent compensable injuries for purposes of triggering Second Injury Fund liability.

Nature and Extent of Second Injury Fund Liability

The Second Injury Fund next argues that the permanent partial disability award against the Second Injury Fund was excessive and not supported by competent and substantial evidence. Specifically, the Second Injury Fund argues that the ALJ erred in finding higher percentages of disability for employee's preexisting conditions than the percentages of disability employee had previously settled said claims for with the Second Injury Fund. The Second Injury Fund argues that employee is bound by the percentages of disability included in the prior stipulations and was barred from re-litigating these percentages against the Second Injury Fund under *Conley v. Treasurer of the State of Missouri*, 999 S.W.2d 269 (Mo. App. 1999).²

The percentages of disability the Second Injury Fund takes issue with concern those found for employee's right shoulder and both knees. In a prior stipulation involving a 2004 left knee injury, the parties agreed that employee had a 25% permanent partial disability of the right shoulder, 30% permanent partial disability of the left knee, and 25% permanent partial disability of the right knee. However, in this case, the ALJ appeared to rely on the opinions of Dr. Musich in concluding that employee's preexisting disabilities amounted to 65% permanent partial disability of the right shoulder, 50% permanent partial disability of the left knee, and 50% permanent partial disability of the right knee.

The Second Injury Fund is incorrect in stating that employee is bound to the percentages of disability agreed to in a prior settlement.

The general rule in Missouri is that evidence of a settlement agreement is not admissible absent a clear and cogent reason. *Newman v. Ford Motor Co.*, 975 S.W.2d 147, 149 (Mo. banc 1998). In *Conley*, the court decided that the ALJ had clear and cogent reasons for admitting a settlement agreement. The settlement agreement was relevant to the issue of the percentage of disability sustained as a result of the primary work injury.

With all due respect to the *Conley* court, the proposition that the employee would be allowed to re-litigate his claim and collaterally attack the prior "award" absent him being bound to the previously agreed upon percentages is contrary to existing Missouri law regarding collateral estoppels. Although a settlement is enforceable in the same manner as an award, a settlement under § 287.390 RSMo is distinguishable from an award under § 287.460. An award issued under § 287.460 RSMo is a decision on the merits. The settlement of a claim is not a decision on the merits. A claim resolved by settlement was never litigated so the Second Injury Fund trial would not be a re-litigation of the claim.

² Overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003).

Employee: Lloyd Bessard

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When evaluating preexisting disabilities for purposes of determining Second Injury Fund liability, it is necessary to determine the amount of preexisting disability the employee suffers from at the precise time of the primary injury. While a prior settlement regarding the same body parts between employee and the Second Injury Fund relevant evidence as to the issue of the percentage of disability existing at the time of the primary injury, it does not account for possible increases in disability to said body parts suffered between the time of the prior settlement and the primary injury.

Dr. Musich performed an independent medical evaluation and concluded that at the time of the primary injury employee's preexisting disabilities amounted to 65% permanent partial disability of the right shoulder, 50% permanent partial disability of the right knee, and 50% permanent partial disability of the left knee. In addition, employee credibly testified as to his numerous physical limitations he worked with as a result of his prior right shoulder and knee conditions. We find, based upon the record as a whole, Dr. Musich's preexisting disability opinions are fully supported by competent and substantial evidence and, therefore, we adopt the same.

Multiplicity and Disfigurement Included in SIF Liability Calculation

The Second Injury Fund also argues that to the extent the ALJ included the 10% multiplicity and 4 weeks of disfigurement for the primary injury in his calculations for Second Injury Fund liability, that portion of the award should be modified.

First of all, it is unclear from the award whether the ALJ included or excluded the multiplicity and disfigurement amounts in his calculation of Second Injury Fund liability. Secondly, the Second Injury Fund is incorrect in asserting that the 10% multiplicity should be excluded from the calculation. The only case the Second Injury Fund cited in support of this argument was *Pierson v. Treasurer of the State of Missouri*, 126 S.W.3d 386 (Mo. 2004). However, *Pierson* involved a completely different situation in which the court held that the loss of use premium found in § 287.190.2 RSMo only applies to the liability of an employer and not the Second Injury Fund. Here, we are dealing with a 10% multiplicity factor due to the combined effect of the primary injury affecting both of employee's upper extremities. This case does not involve a "severance or complete loss of use" of a body part as contemplated by § 287.190.2 RSMo and included in the facts of *Pierson*.

The 10% multiplicity is a factual finding and is part of the total disability attributable to the primary injury. The multiplicity combines synergistically with employee's preexisting disabilities just as the 32.5% permanent partial disability of the left elbow and 25% permanent partial disability of the right elbow do. Therefore, we find that the multiplicity is properly included in the Second Injury Fund liability calculation.

While we find that the multiplicity added for employee's combined upper extremity disabilities is properly included in the Second Injury Fund liability calculation, we find that disfigurement should be excluded. Disfigurement is not classified as a "disability" anywhere in Chapter 287 and, therefore, does not combine synergistically with employee's preexisting disabilities as provided in § 287.220 RSMo for purposes of calculating Second Injury Fund liability. For the foregoing reasons, we find that

Employee: Lloyd Bessard

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employee's 4 weeks of disfigurement should be excluded from the Second Injury Fund liability calculation.

Award

We modify the award of the ALJ and find that employee's primary injury disabilities (32.5% PPD of the left elbow, or 68.25 weeks; 25% PPD of the right elbow, or 52.5 weeks; and 10% multiplicity, or 12.075 weeks) combine with his preexisting disabilities (65% PPD of the right shoulder, or 150.8 weeks; 50% PPD of the right knee, or 80 weeks; and 50% PPD of the left knee, or 80 weeks) to result in a permanent partial disability enhancement of 15% above the simple arithmetic sum of the separate disabilities, or 66.5 weeks of benefits ($= .15 * (68.25 + 52.5 + 12.075 + 150.8 + 80 + 80)$).

The Second Injury Fund is liable for employee's 66.5 weeks of enhanced permanent partial disability benefits, or \$26,909.89 ($= 66.5 \text{ weeks} * \404.66).

The award and decision of Administrative Law Judge Cornelius T. Lane issued April 25, 2012, is attached and incorporated to the extent it is not inconsistent with the findings listed herein.

The Commission further approves and affirms the ALJ's allowance of attorney's fee as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 7th day of February 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Lloyd Bessard

Injury No.: 09-062364

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Alberici Constructors, Inc (Settled)

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

Additional Party: Second Injury Fund

Insurer: USF&G

Hearing Date: January 30, 2012

Checked by: CDL

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: June 1, 2009
5. State location where accident occurred or occupational disease was contracted: St. Louis City, 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 working on construction site with repetitive use of both upper extremities causing bilateral upper extremity injuries.
12. Did accident or occupational disease cause death? N/A Date of death?
13. Part(s) of body injured by accident or occupational disease: Bilateral upper extremities
14. Nature and extent of any permanent disability: permanent partial disability against the Employer settled for 32.5% at the left elbow, 25% at the right elbow, a 10% multiplicity load and 4 weeks disfigurement.
15. Compensation paid to-date for temporary disability: \$7,285.30, representing 10 weeks
16. Value necessary medical aid paid to date by employer/insurer? \$24,532.18

Employee: Lloyd Bessard

Injury No.: 09-062364

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$1,139.83
- 19. Weekly compensation rate: \$759.88/\$404.66
- 20. Method wages computation: Stipulation and testimony

COMPENSATION PAYABLE

- 21. Amount of compensation payable: Settled against employer
- 22. Second Injury Fund liability:
 - 76.16 weeks of permanent partial disability from Second Injury Fund \$404.21 per week
- TOTAL: \$30,818.91
- 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: Todd I Muchnick

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Lloyd Bessard	Injury No.:	09-062364
Dependents:	N/A		
Employer:	Alberici Constructors, Inc (Settled)		Before the Division of Workers' Compensation
Additional Party:	Second Injury Fund		Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Insurer:	USF&G	Checked by:	CDL

PREFACE

A hearing was heard in the above mentioned matter on January 30, 2012. This case was also heard with 09-012515 with a date of injury February 23, 2009. Injury number 09-062364 was made as the injury date of June 1, 2009, however the occupational disease pre dated the injury of February 23, 2009. Injury number 09-0062364 was made as the injury date of June 1, 2009, however the occupational disease pre dated the injury of February 23, 2009. Injury number 09-062364 was settled by the Claimant with the Employer for 32.5% of the left elbow, 25% of the right elbow with a 10% multiplicity load and four weeks of disfigurement. Claimant at the time of the hearing was represented by Attorney Todd Muchnick and the Second Injury Fund was represented by Assistant Attorney General Sam You.

ISSUES

The nature and extent if any of the Second Injury Fund.

EXHIBITS

1. Employee’s Exhibits A through N were admitted into evidence.
2. Second Injury Fund Exhibits L through V were admitted into evidence without objection.

STIPULATIONS

The applicable compensation rates are \$759.88 for temporary total disability and \$404.66 for permanent partial disability.

The parties stipulated that Employer paid \$7,285.30 in TTD benefits representing 10 weeks which started in November 20, 2009 for the injuries Claimant sustained to his upper extremities.

FINDINGS OF FACTS

1. Claimant was a 52 year old male at the time of the hearing. Claimant obtained a high school education. After playing minor league baseball for the Boston Red Sox in the early eighties, Claimant began his career as a laborer which lasted until the date of his most recent injury on February 23, 2009.
2. The applicable compensation rates are \$759.88 for temporary total disability and \$404.66 for permanent partial disability.
3. Prior to February 23, 2009, while working for Alberici, Claimant's job duties included breaking concrete floors for 10 hours a day with a 90 pound jackhammer. Claimant's employer had to remove him from the jackhammer work because his hands were hurting. Claimant testified he would tape his hands with duct tape to ease the effects of the constant vibration and pain and discomfort. He was also doing other hand intensive tasks as a union laborer. The repetitive work caused pain and discomfort in his hands.
4. Claimant testified that on February 23, 2009, while in the course and scope of his employments, he was struck on the back of his head and neck by a shore post, causing severe injury to his cervical spine, causing temporary paralysis and a later diagnosis of central cord syndrome, (this injury is injury no. 09-012515). Claimant has not worked since February 23, 2009, except for an unsuccessful attempt at eight days of sedentary work in early September 2009.
5. During Claimant's rehabilitation from the central cord syndrome, and because of continuing neurological symptoms to both upper extremities, an EMG/NCV was administered on June 1, 2009. The nerve conduction studies demonstrated bilateral carpal tunnel, right greater than left, along with lefts cubital tunnel syndrome.
6. Claimant came under the care of Dr. Mitchell Rotman who opined that the Claimants work as a union laborer was the prevailing cause of his upper extremity injuries. Right carpal tunnel decompression was performed on November 20, 2009. Left endoscopic carpal tunnel release and ulnar nerve transposition was performed December 4, 2009. Bother surgeries were performed by Dr. Mitchell Rotman. Claimant settled the claim for bilateral upper extremities for 32.5% of the left elbow, 25% of the right elbow with a 10% loading factor and four weeks of disability. (Exhibit L).
7. Prior to Claimant's work accident of February 23, 2009, and the degeneration of his upper extremity injuries, Claimant has pre-existing disabilities to his right shoulder and both knees. These disabilities were industrially disabling and caused a hindrance to his ability to work. The prior claims and disabilities are as follows:

- a. Right shoulder injury 1980, Claimant injured his right shoulder in 1980 while playing baseball for the Boston Red Sox minor league team. The injury required two surgeries and ended his baseball career. One surgery was a reconstruction with internal fixation.
 - b. Right knee injury, Claimant injured his right knee in approximately 1980 while sliding into second base playing professional baseball. The injury resulted in a surgical procedure.
 - c. Right knee, claimant injured his right knee in 1988 or 1989 when he was descending a ladder and fell while working for Landy Services. The injury required arthroscopic surgery.
 - d. Left knee injury, Claimant injured his left knee in December 1999, while working at Best Buy. The injury was a "bad sprain." The injury resulted in a 10% permanent partial disability settlement. (Exhibit N11, P928)
 - e. Left knee injury, Claimant injured his left knee in April 2003 when he was working in Forest Park for Subsurface Constructors. While using an auger, Claimant's leg became stuck in the mud causing a twisting injury which required surgery by Dr. Charles Mannis. The injury resulted in a 30% permanent partial disability settlement. (Exhibit N11 P956). The Second Injury Fund agreed on a settlement of 25% of the left knee (P947).
 - f. Left injury, in June 2004, Claimant was working on a construction job on Highway 70 when a passing truck caused a cable to trip him resulting in a left knee injury. The injury necessitated a second surgery on the left knee, resulting in a 22.5% permanent partial disability settlement. (Exhibit N11, P982). The Second Injury Fund agreed on a settlement of 25% of the right shoulder with a 10% load, 25% of the right knee with a 15% load. (P975).
8. Right shoulder, Claimant credibly testified about the problems he experienced with his right prior to the February 23, 2009 injury and workplace exposure that resulted in a bilateral upper extremity occupational disease diagnosis. Claimant had very limited range of motion. The shoulder injury has prevented him from using his arm for any overhead work. Claimant had to swap overhead work with other co-workers if the work required him to use his shoulder. The right shoulder was painful every day after work. Claimant used ice and/or heat on a daily basis, along with over the counter analgesics and anti-inflammatories.
 9. Knees, Claimant credibly testified about the problems he experience with his right and left knees prior to the February 23, 2009 injury and workplace exposure that resulted in a bilateral upper extremity occupational disease diagnosis. Claimant suffered from pain in both knees and he used heat and cold for treatment. The knees injuries caused Claimant problems with climbing and squatting. Claimant would swap work with other workers if he had to do any climbing. Claimant had difficulty descending stairs and kneeling. Claimant took Tylenol and Advil for his pain. Claimant would put ice on his right knee

and wrap it when he woke up to go to work. The left knee was not as bad but hindered his ability to squat and kneel. Claimant wore an elastic brace to help him work.

10. Claimant was examined by Dr. Thomas Musich on October 4, 2010. Dr. Musich testified by deposition, taken May 23, 2011 that Claimant's work as a union laborer was the prevailing cause of his occupational disease in both upper extremities. He further opined that Claimant has sustained a permanent partial disability of 25% of the left elbow and 30% of both wrists.
11. Dr. Musich also testified and opined that prior to the diagnosis of the occupational disease to the Claimant's upper extremities and that Claimant has pre-existing permanent partial disability to his right shoulder of 65%, pre-existing permanent partial disability to his right knee of 50% and to his left knee of 50%.
12. Dr. Musich also testified and opined that the combination of Claimant's past and present disabilities is significantly greater than their simple sum and will produce a chronic hindrance in his routine activities of daily living.

RULINGS OF LAW

Claimant's testimony was candid, credible and spontaneous and included sufficient detail to compare easily with recognized body mechanics and the treatment history. His description of symptoms was neither overstated nor understated. Claimant's age and extensive medical experience suggests he has suffered from considerable orthopedic and neurologic discomfort to date.

It should be noted that the reported date of injury June 1, 2009, is based on the date of diagnosis, but the exposure and injury was caused prior to that date. Claimant was severely injured at work with the same employer on February 23, 2009, and had not returned to work as of June 1, 2009. Thus, the exposure that caused the occupational disease to both upper extremities had to pre date the February 23, 2009, accident.

The Second Injury Fund is liable for permanent partial disability sustained by Claimant due to the combination of his prior injuries to knees, his right shoulder and his primary injury to his bilateral elbow and wrists. In order to recover permanent partial disability compensation from the Second Injury Fund, Claimant has the burden to prove that he had a pre-existing injury of such seriousness as to constitute a hindrance or obstacle to employment. RMSo § 287.220.1, *Leutziner v. Treasurer*, 895 S.W.2d 591,593 (Mo. Ct.App.1995). The mere fact that a Claimant is working is not conclusive proof that a pre-existing condition does not affect Claimant's earning capacity or ability to work. *Searcy v. McDonnell Douglas Aircraft Co.*, 894S.W.2d 173,177 (Mo.Ct. App. 1995).

Claimant settled the primary injuries to his upper extremities with the employer. According to the Stipulation for Compromise Settlement, these injuries were settled for 32.5% of the left elbow, 25% of the right elbow, a 10% multiplicity load, and 4 weeks disfigurement.

The proffered opinion evidence is useful. Dr. Thomas Musich reiterated the physical limitations noted in the doctor's examination that were consistent with those seen at trial. His opinion that the Claimant has sustained a 65% permanent partial disability at the level of the right shoulder, and 50% permanent partial disability to both knees is consistent with type of serious and disabling injuries that were described by the Claimant. Claimant has endured numerous therapies and treatments in an attempt to obtain relief. Many of these treatments certainly caused Claimant additional significant pain and anguish, independent of the original injury.

Made by: _____
CORNELIUS T. LANE
Administrative Law Judge
Division of Workers' Compensation