

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, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

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

Employee: Eric R. Buhlinger

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- 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: _____

Made by: _____

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

A true copy: Attest:

Division of Workers' Compensation