

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

Injury No.: 08-084064

Employee: James Burke
Employer: City of St. Louis (Settled)
Insurer: Self-Insured (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 all briefs, reviewed the evidence, and considered the whole record, we find that the award and decision 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 judge with this supplemental opinion.

The Second Injury Fund argues that employee's primary injury referable to his cervical spine does not qualify as "a subsequent compensable injury" for purposes of triggering Second Injury Fund liability under § 287.220.1 RSMo, because the term "injury" as defined in § 287.020.3 RSMo excludes occupational diseases.

The Commission offers this supplemental opinion to note that we have addressed and rejected an identical argument from the Second Injury 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 Second Injury 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 Second Injury Fund argument. See, respectively, *Treasurer of State v. Stiers*, WD75101 (Oct. 9, 2012), and *Peters v. Treasurer of State*, ED98300 (Nov. 6, 2012).

We affirm and adopt the award and decision of the administrative law judge, as supplemented herein.

The award and decision of Administrative Law Judge Linda J. Wenman, issued August 14, 2012, is attached and incorporated by this reference.

We approve and affirm the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Employee: James Burke

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

Given at Jefferson City, State of Missouri, this 10th day of January 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Member

Attest:

Secretary

AWARD

Employee:	James Burke	Injury No.:	08-084064
Dependents:	N/A		Before the
Employer:	City of St. Louis (settled)		Division of Workers'
Additional Party:	Second Injury Fund		Compensation
Insurer:	Self-insured (settled)		Department of Labor and Industrial
Hearing Date:	August 9, 2012		Relations of Missouri
			Jefferson City, Missouri
		Checked by:	LJW

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: September 17, 2008
5. State location where accident occurred or occupational disease was contracted: St. Louis City, MO
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 carrying planks that weighed 150 pounds, Employee developed neck pain.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Cervical spine.
14. Nature and extent of any permanent disability: 48.5% BAW PPD referable to the cervical spine.
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? \$4,883.41 previously paid by Employer.

Employee: James Burke

Injury No.: 08-084064

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Sufficient to produce the rates listed below.
- 19. Weekly compensation rate: \$360.00 / \$360.00
- 20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable:

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

70.8 weeks of permanent partial disability from Second Injury Fund	\$25,488.00
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TOTAL:	\$25,488.00
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23. Future requirements awarded: N/A

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 in favor of the following attorney for necessary legal services rendered to the claimant: James M. Hoffmann

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	James Burke	Injury No.: 08-084064
Dependents:	N/A	Before the
Employer:	City of St. Louis (settled)	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
		Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
Insurer:	Self-insured (settled)	Checked by: LJW

PRELIMINARIES

A hearing for a Second Injury Fund final award was held regarding the above referenced Workers' Compensation claim by the undersigned Administrative Law Judge on August 9, 2012. The case was taken under submission on the day of hearing. Attorney James Hoffman represented James Burke (Claimant). Assistant Attorney General Tim Maurer represented the Second Injury Fund (SIF).

Prior to the start of the hearing, the parties identified the issue for disposition in this case as the liability of SIF for permanent partial disability (PPD) benefits. Hearing venue is correct, and jurisdiction properly lies with the Missouri Division of Workers' Compensation. Claimant offered Exhibits B-F, and Claimant and SIF offered Joint Exhibit A/I. The exhibits were admitted without objection. Any objections not expressly ruled on in this award are overruled. All markings contained within any exhibit were present when received, and the markings did not influence the evidentiary weight given the exhibit.

STIPULATIONS

1. Claimant has a compensable injury that occurred on September 17, 2008 (primary injury), which produced a stipulation for compromise settlement of 48.5% BAW PPD referable to his cervical spine.
2. Claimant has preexisting injuries that produced the following disability at the time of the primary injury: 30% BAW PPD referable to the lumbar spine; and 25% PPD referable to the left knee.
3. If Claimant's primary and preexisting injuries combine to produce synergistic disability a 20% load factor should be assigned.

FINDINGS OF FACT

All evidence presented has been reviewed. Only testimony and evidence necessary to support this award will be summarized.

1. Claimant is 59 years old and worked for the City of St. Louis (Employer) as a utility maintenance worker in the Water Division for approximately ten years. On September 17, 2008, Claimant was carrying 150 pound planks at a jobsite when he developed neck pain. Conservative medical care was provided, and later an MRI was obtained that demonstrated degenerative disc disease and disc herniations at C5, C6, and C7. Eventually, Claimant underwent surgical fusions at C5-6 and C6-7. Claimant settled his claim with Employer for 48.5% BAW PPD referable to his cervical spine. As of his rating with Dr. Volarich, Claimant continues to experience neck pain and stiffness, he must avoid any heavy lifting or overhead activities, and weather changes affect his neck symptoms.
2. Claimant has preexisting injuries involving his lumbar spine and left knee. During 2001, Claimant developed right lumbar radiculopathy and he received conservative medical care. During 2002, an MRI of Claimant's lumbar spine demonstrated a large herniated disc at L5-S1, and Claimant underwent microdiscectomy and hemilaminotomy at L5-S1. As of his rating with Dr. Volarich, Claimant believes his back "slowed him down," he avoids sudden or quick movements, and he has trouble maintaining a fixed seated position. During 2006, Claimant fell from a ladder and fractured his left tibia. He underwent open reduction internal fixation surgery to treat the fracture. As of Dr. Volarich's examination, Claimant continues to experience left leg pain, walks with a limp, and weather changes affect his symptoms.
3. Dr. Volarich examined Claimant at his request on March 3, 2010. During examination, Dr. Volarich noted the following abnormalities related to the cervical spine, lumbar spine and left leg: bilateral weakness of the biceps and triceps; weakness of the left quadriceps and hamstrings; weakness of the left calf muscle; left leg limp; atrophy of the left thigh and calf muscles; low back pain with movement; decreased cervical and lumbar spine range of motion; mistracking and crepitus of the left knee; and decreased left ankle range of motion. Dr. Volarich rated the primary injury at 50% BAW PPD referable to the cervical spine. Dr. Volarich rated the preexisting injuries at 30% BAW PPD referable to the lumbar spine and 25% PPD referable to the left knee.¹ Dr. Volarich found Claimant's disabilities combined to create permanent total disability, and that the disabilities were a hindrance or obstacle to obtaining or maintaining employment.

RULINGS OF LAW WITH SUPPLEMENTAL FINDINGS

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:

Issues related to SIF liability for PPD benefits

Section 287.220.1 RSMo., provides SIF is implicated in all cases of permanent partial disability where there has been previous disability that created a hindrance or obstacle to employment or re-employment, and the primary injury along with the pre-existing disability(s) reach a threshold of 50 weeks (12.5%) for a body as a whole injury or 15% of a major extremity. The combination of the primary and preexisting conditions must produce additional disability greater than the simple sum of the conditions.

¹ Dr. Volarich also rated other preexisting conditions that are not a part of the parties' stipulations.

Claimant's primary injury settled by compromise and produced BAW PPD disability of 48.5% referable to the cervical spine. The parties stipulate to this level of disability, and I adopt this PPD percentage when considering Claimant's SIF claim. Claimant's documented preexisting disabilities involve his lumbar spine and left knee. The parties stipulated Claimant's lumbar spine disability represents 30% BAW PPD, and his left knee disability represents 25% PPD. I adopt these percentages when considering Claimant's SIF PPD claim. I further find these conditions to have been a hindrance or obstacle to his employment or reemployment.

Taking into account Claimant's preexisting disabilities, and combining these disabilities with his work related cervical spine injury; I find the combination synergistically produces a disability greater than the simple sum. Applying a 20% load factor, I find SIF to be liable for 70.8 weeks of PPD disability or \$25,488.00.

CONCLUSION

Claimant's work at Employer was the prevailing factor in causing injury to his cervical spine. Claimant has preexisting disabilities to his lumbar spine and left knee. SIF is liable for PPD benefits in the amount of \$25,488.00. Claimant's attorney is entitled to a 25% lien.

Date: _____

Made by: _____

LINDA J. WENMAN
Administrative Law Judge
Division of Workers' Compensation