

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

Injury No.: 12-106262

Employee: Charles Carroll  
Employer: Gardner Denver, Inc. (Settled)  
Insurer: New Hampshire Insurance Co. (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. We have reviewed the evidence, read the parties' briefs, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge.

**Introduction**

The parties asked the administrative law judge to resolve the sole issue of the liability, if any, of the Second Injury Fund for permanent partial disability benefits.

The administrative law judge determined as follows: (1) he was required, pursuant to *Conley v. Treasurer*, 999 S.W.2d 269 (Mo. App. 1999), to find that employee's preexisting disability as of the date of the primary injury on October 1, 2012, was consistent with a stipulation for compromise settlement entered in a 1986 workers' compensation claim; and (2) that employee's claim against the Second Injury Fund must be denied because employee failed to establish that at least one of his preexisting permanent partial disabilities met the applicable 15% permanent partial disability threshold for a major extremity injury set forth under § 287.220 RSMo.

Employee filed a timely application for review with the Commission alleging the administrative law judge erred in denying his claim against the Second Injury Fund, because subsequent decisions from the Missouri Court of Appeals have held that disability ratings contained in stipulations for compromise settlement are not conclusive as against the Second Injury Fund.

For the reasons set forth below, we reverse the award and decision of the administrative law judge.

**Findings of Fact**

*Preexisting conditions of ill-being*

On April 18, 1986, employee suffered a work injury while building compressors for employer. Employee was installing a gear weighing about 100 pounds, when the gear began to fall off the compressor. Employee reached to grab it, with the result that the gear landed on his left hand, smashing the middle and ring fingers. Employee underwent surgery, after which he suffered a permanent fixed deformity at 90 degrees of the left ring finger. The April 1986 injury left employee with diminished ability to hold and grip objects, especially small ones, and made his work for employer less efficient.

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Employee settled his claim against the employer arising from the 1986 injury for a lump sum of \$4,183.42, of which \$350.00 was for disfigurement. The receipt for compensation filed in that case with the Division of Workers' Compensation suggests that the parties based their settlement figure on an approximate 14.57% permanent partial disability of the left hand.

On February 13, 2015, employee's medical expert, Dr. James Stuckmeyer, examined employee's left hand for purposes of providing an opinion in this case. At that time, Dr. Stuckmeyer rated a 30% preexisting permanent partial disability of the left hand referable to the effects of the April 1986 work injury. The Second Injury Fund did not advance any expert medical opinion testimony providing a current rating for the April 1986 work injury. After careful consideration, we find that, as of October 1, 2012, employee was suffering from a 20% permanent partial disability of the left hand.<sup>1</sup>

In December 1995, employee injured his left little finger at work. Employee settled his claim against the employer arising from the 1995 injury based upon an approximate permanent partial disability of 17.5% of the left little finger. In his brief, employee concedes that he is not claiming that the Second Injury Fund has any liability for this injury, and that he does not ask the Commission to decide whether a little finger injury amounts to an injury affecting a "major extremity" for purposes of § 287.220 RSMo. Accordingly, we will not further discuss the December 1995 injury affecting the left little finger.<sup>2</sup>

#### Primary injury

The parties stipulated that employee sustained a compensable occupational disease arising out of and in the course of his employment with the employer on or about October 1, 2012. Specifically, employee sustained right cubital tunnel syndrome due to repetitive motion duties. On June 6, 2014, Dr. Clinton Walker performed a right cubital tunnel decompression surgery with anterior intramuscular transposition. Following surgery, employee underwent three months of physical therapy. He missed about two and a half weeks of work, and thereafter was on modified duty for about six weeks. Employer and employee entered a stipulation for compromise settlement based upon an approximate 17.5% permanent partial disability of the right upper extremity at the level of the elbow.

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<sup>1</sup> As further explained below, we do not read the decision in *Conley v. Treasurer*, 999 S.W.2d 269 (Mo. App. 1999) to control our factual determination with regard to the nature and extent of disability employee suffered referable to his preexisting conditions at the time of the October 1, 2012, primary injury.

<sup>2</sup> Incidentally, we cannot endorse the administrative law judge's determination that the decision in *Treasurer of Missouri-Custodian of the Second Injury Fund v. Witte*, 414 S.W.3d 455 (Mo. 2013) would preclude our making a factual finding as to the overall disability affecting employee's left upper extremity as of October 1, 2012, simply because such overall disability may have resulted from multiple injuries. For example, for purposes of triggering Second Injury Fund liability, it would seem to make no difference whether a 20% permanent partial disability of the body as a whole referable to the low back was the product of one or two prior injuries.

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Employee continues to suffer daily pain referable to the primary injury, as well as numbness in his right arm, in his right little and ring fingers, and along the palm of his right hand. His right hand grip strength has weakened, and he drops things. His right hand will cramp at night, causing him to wake up. Employee takes Tylenol about twice a day for pain and stiffness in his right hand. The primary injury has made employee less efficient at work.

Dr. Stuckmeyer believes that the effects of the primary injury interact synergistically with the effects of employee's preexisting disability affecting the left hand, for which he deemed a 15% "multiplicity" factor appropriate. After careful consideration, we find Dr. Stuckmeyer's opinion persuasive with regard to the issue of synergy. We find that the effects of the primary injury interact with the effects of employee's preexisting disability affecting the left hand to produce greater disability than the simple sum of disability referable to those conditions. We find that a 10% load factor is appropriate to account for this synergistic interaction.

### **Conclusions of Law**

#### *Second Injury Fund liability*

Section 287.220 RSMo creates the Second Injury Fund and controls the assessment of Second Injury Fund liability in "all cases of permanent disability where there has been previous disability." Section 287.220 provides as follows with respect to Second Injury Fund liability for enhanced permanent partial disability benefits:

If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus

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the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for.

The administrative law judge determined that the decision in *Conley v. Treasurer*, 999 S.W.2d 269 (Mo. App. 1999) stands for the proposition that he was required (as a matter of law) to find (as a matter of fact) that employee's preexisting permanent partial disability affecting the left hand was, as of the date of the primary occupational disease injury on or about October 1, 2012, consistent with the 14.57% rating set forth in a 1986 settlement. For this reason, he concluded that he was compelled to deny employee's claim herein against the Second Injury Fund, because employee's preexisting disability affecting the left upper extremity did not meet the applicable 15% permanent partial disability threshold. We disagree, for the following reasons.

First, we conclude that *Conley* is distinguishable, because therein, the court addressed the issue whether an employee was bound by the permanent partial disability rating contained in a stipulation for compromise settlement entered in the claim arising from his last or *primary* injury. 999 S.W.2d at 271. In contrast, the question herein is whether employee is bound by the rating contained in a 1986 settlement as to the question of preexisting disability as of October 1, 2012.<sup>3</sup>

Second, and along the same lines, the relevant inquiry under § 287.220 is not the nature and extent of disability employee suffered referable to his left hand in 1986, instead, it is the nature and extent of such disability as it existed on the date of the primary injury. See *Lawrence v. Joplin R-VIII School Dist.*, 834 S.W.2d 789, 793 (Mo. App. 1992). This is evident in the statute's direction that we are to determine "the degree or percentage of employee's disability that is attributable to all injuries or conditions *existing at the time the last injury was sustained*["] § 287.220 (emphasis added).

Stated simply, settlement terms regarding a prior injury do not preclude possible, additional disability involving the same body part, such as degeneration due to the normal aging process. For this reason, we conclude that although the 1986 settlement is relevant, it does not relieve us of our statutory duty to determine the degree or percentage of employee's disability attributable to all injuries or conditions existing as of October 1, 2012.<sup>4</sup>

Here, employee advanced the wholly uncontested expert medical opinion from Dr. Stuckmeyer that employee was suffering a 30% permanent partial left hand

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<sup>3</sup> Pursuant to the decision in *Conley*, employee may be prevented from relitigating the extent of his left hand permanent partial disability as it existed on the date he reached maximum medical improvement from the effects of the 1986 injury. But we need not consider or resolve that question herein, because it does not control the result under § 287.220.

<sup>4</sup> We note that the conclusive presumption under § 287.190.6(1) RSMo is not applicable in this case; because employee's primary injury did not involve the same parts of the body addressed in the 1986 settlement.

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disability as of the date of his February 13, 2015, examination. We have found that as of October 1, 2012, employee suffered a 20% permanent partial disability of the left hand referable to the 1986 injury; this satisfies the applicable 15% major extremity threshold for Second Injury Fund liability. See *Treasurer of Missouri-Custodian of the Second Injury Fund v. Witte*, 414 S.W.3d 455 (Mo. 2013). The next question is whether this preexisting disability was serious enough to constitute a hindrance or obstacle to employment. The Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a “hindrance or obstacle to employment”:

[T]he proper focus of the inquiry is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition.

*Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 637 (Mo. App. 2007)(citation omitted).

After careful consideration, we are convinced that employee’s preexisting left hand disability was serious enough to constitute a hindrance or obstacle to employment. This is because we are convinced employee’s preexisting left hand disability had the potential to combine with a future work injury to result in worse disability than would have resulted in the absence of this preexisting condition. See *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. 1995). That potential was borne out by the very facts of this case, as we have credited Dr. Stuckmeyer’s opinion that there is a synergistic interaction between employee’s preexisting disability affecting the left hand and the primary injury.

Based on the foregoing, we conclude that employee has satisfied each of the statutory requirements for proving Second Injury Fund liability for permanent partial disability benefits. Accordingly, we calculate the Second Injury Fund’s liability as follows: 35 weeks (20% preexisting permanent partial disability of the left hand referable to the 1986 injury) + 36.75 weeks (17.5% permanent partial disability of the right elbow referable to the primary injury) = 71.75 weeks x the 10% load factor = 7.175 weeks of enhanced permanent partial disability. At the stipulated permanent partial disability rate of \$433.58, the Second Injury Fund is liable for \$3,110.94 in permanent partial disability benefits.

### **Decision**

We reverse the award of the administrative law judge.

The Second Injury Fund is liable to employee for enhanced permanent partial disability benefits in the amount of \$3,110.94.

The award and decision of Administrative Law Judge Robert J. Dierkes, issued January 7, 2016, is attached solely for reference.

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For necessary legal services rendered to employee, Jerry Kenter, Attorney at Law, is allowed a fee of 25% of the compensation awarded, which shall constitute a lien on said compensation.

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

Given at Jefferson City, State of Missouri, this 9<sup>th</sup> day of September 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

## AWARD

Employee: Charles Carroll

Injury No. 12-106262

Employer: Gardner Denver, 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: New Hampshire Insurance Co. (settled)

Hearing Date: November 24, 2015

Checked by: RJD/cs

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No additional benefits are awarded.
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: October 1, 2012.
5. State location where accident occurred or occupational disease was contracted: Pettis 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: Employee developed right cubital tunnel syndrome due to repetitive motion.
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: 17.5% permanent partial disability of the right elbow.
15. Compensation paid to-date for temporary disability: N/A.
16. Value necessary medical aid paid to date by employer/insurer? N/A.
17. Value necessary medical aid not furnished by employer/insurer? N/A.
18. Employee's average weekly wages: Sufficient for maximum permanent partial disability rate.

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19. Weekly compensation rate: \$433.58 for permanent partial disability benefits.

20. Method wages computation: Stipulation.

**COMPENSATION PAYABLE**

21. Second Injury Fund liability:

None. The claim against the Second Injury Fund is denied.

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**FINDINGS OF FACT AND RULINGS OF LAW:**

Employee: Charles Carroll

Injury No. 12-106262

Employer: Gardner Denver, 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: New Hampshire Insurance Co. (settled)

Hearing Date: November 24, 2015

**PRELIMINARIES**

The parties appeared before the undersigned administrative law judge on November 24, 2015, in Sedalia for a final hearing to determine the liability of the Second Injury Fund in this case. Claimant's claim in this case against Employer, Gardner Denver, Inc., was resolved by a Stipulation for Compromise Settlement approved by the undersigned administrative law judge on June 5, 2015. Claimant, Charles Carroll, appeared personally and by counsel, Jerry Kenter. The Treasurer of the State of Missouri, as custodian of the Second Injury Fund, appeared by Assistant Attorney General Maggie Ahrens.

The parties stipulated to the following:

1. The Missouri Division of Workers' Compensation has jurisdiction over the hearing and adjudication of this matter;
2. That venue for the hearing is proper in Pettis County;
3. That the claim for compensation was filed within the time allowed by the statute of limitations, Section 287.430, RSMo;
4. That both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
5. That the average weekly wage is sufficient for the maximum permanent partial disability rate of \$433.58;
6. That Employee sustained a compensable occupational disease arising out of and in the course of his employment with Gardner Denver, Inc. on or about October 1, 2012; and
7. That the notice requirement of Section 287.420 does not serve as a bar to the claim for compensation.

The issue to be decided is the liability, if any, of the Second Injury Fund for permanent partial disability benefits.

**DISCUSSION**

Claimant testified at the hearing. His testimony was credible.

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Claimant also offered into evidence Exhibits A through G, all of which were admitted. These exhibits are:

- A. Copy of the approved Stipulation for Compromise Settlement in Injury No. 12-106262.
- B. Report of James A. Stuckmeyer, M.D. dated February 13, 2015.
- C. Copy of the approved Stipulation for Compromise Settlement in Injury No. 95-180711.
- D. Transcript of settlement proceedings in Injury No. 86-036795.
- E. Medical records.
- F. Report of Injury in Injury No. 12-106262.
- G. Peak Performance record: "Workers' Compensation Questionnaire"

The Second Injury Fund offered no exhibits.

As stipulated, Claimant sustained an occupational disease due to repetitive motion in October 2012; the occupational disease was right cubital tunnel syndrome, i.e., ulnar nerve entrapment at the elbow. It is clear from the evidence that Employer accepted Claimant's condition as a compensable case, paying over \$9500.00 in medical benefits and paying 2 4/7 weeks of temporary total disability benefits. Employer provided all appropriate medical testing, including electrodiagnostic testing; Employer also provided all appropriate medical treatment, including surgery consisting of right cubital tunnel decompression with ulnar nerve transposition. Claimant and Employer settled this case for an amount equivalent to 17.5% of the right elbow.

Dr. James Stuckmeyer identified preexisting disability of 30% of the left wrist (hand); Dr. Stuckmeyer specifically mentioned that "physical examination of the left hand reveals a fixed deformity at 90 degrees of the 4<sup>th</sup> digit, which I do feel interferes with the overall hand function". My observation of Claimant at the hearing was that his left ring finger was significantly permanently deformed, which observation correlates precisely with Dr. Stuckmeyer's finding of "a fixed deformity at 90 degrees".

Claimant actually sustained two separate injuries to his left hand while working at Gardner Denver, Inc., in 1986 and in 1995. In April 1986, Claimant "smashed" the middle (long) finger and ring finger of his left hand. The 1986 injury left Claimant with the permanent deformity of the ring finger described above. In December 1995, Claimant injured the left little finger at work. The 1986 injury (Injury No. 86-036795) resulted in a settlement based on a permanent partial disability of 14.57% of the left hand and an additional \$350.00 for disfigurement. The 1995 injury (Injury No. 95-180711) resulted in a settlement based on a permanent partial disability of 17.5% of the left little finger.

### **FINDINGS OF FACT AND RULINGS OF LAW**

*Treasurer v. Witte*, 414 S.W.3d 455 (Mo. 2013) held that, in order to qualify for permanent partial disability benefits from the Second Injury Fund, at least one of the preexisting permanent partial disabilities must meet "the threshold", i.e., 15% permanent partial disability of a major extremity or 50 weeks for a body as a whole disability. *Treasurer v. Witte* also held that

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preexisting permanent partial disabilities cannot be combined to meet the threshold. This latter holding means that Claimant's 1986 left hand disability cannot be combined with the 1995 left little finger disability to meet (or exceed) the 15% preexisting permanent partial disability of the left hand "threshold".

It is abundantly clear that the disability from the 1995 left little finger injury, considered alone, does not and cannot meet the statutory threshold. It is less clear whether the disability from the 1986 left hand injury, considered alone, meets the threshold. It is obvious to me that Dr. Stuckmeyer's "rating" of 30% preexisting permanent partial disability of the left hand was due primarily, if not solely, to the permanent deformity of the left ring finger described above. If I could disregard the settlement in Injury No. 86-036795, I would agree with Dr. Stuckmeyer that Claimant indeed had a preexisting permanent partial disability of the left hand of at least 15%.

However, I believe that I cannot ignore or disregard the settlement in Injury No. 86-036795. While the settlement is barely short of the 15% threshold, it is short. In *Conley v. Treasurer*, 999 S.W.2d 269 (Mo. App. E.D. 1999), the issue was whether employee's settlement of the "last injury" or "primary injury" for 14% permanent partial disability of the left elbow precluded a finding of Second Injury Fund liability as the 14% did not meet the "threshold".<sup>1</sup> Counsel for Mr. Conley argued that the settlement document should not have been admitted into evidence<sup>2</sup> and that the settlement did not bind Conley to the percentage of disability stated therein. Regarding Mr. Conley's arguments, the Court noted (at page 274):

Initially, we note that approval of a settlement by the commission or an ALJ is a prerequisite to its validity. Section 287.390.1. Further, a settlement is made by the parties and is wholly voluntary. *Shockley v. Laclede Elec. Co-op.*, 825 S.W.2d 44, 47 (Mo. App. S.D.1992). The ALJ has no power to coerce a settlement of a workers' compensation claim, but only has veto power to refuse to approve the settlement already made if he deems it not in accordance with the rights of the parties. A settlement approved by the ALJ is conclusive and irrevocable and, when approved, a settlement of a workers' compensation claim is the basis of res judicata and estoppel by judgment. Any relief from a settlement approved by the ALJ under section 287.390 can be had only in a court of equity on proof of fraud or mistake. *Id.*

The *Conley* court rejected Mr. Conley's arguments and found against Second Injury Fund liability, stating (at page 275):

Employee argues that the settlement should not have been admitted into evidence nor relied upon as a "proof of fact in dispute," and effectively wishes to relitigate his percentage of PPD as agreed in the lump sum settlement because that percentage may prevent him from receiving compensation from the Fund.

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<sup>1</sup> *Witte* has subsequently held that the "last injury" or "primary injury" is not subject to the "threshold"; however the *Conley* court held that the "threshold" did indeed so apply.

<sup>2</sup> The admission of the settlement document is not in issue here, as Claimant himself offered the settlement document into evidence.

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Here, the settlement was relevant as proof of employee's percentage of disability from his last injury, a requirement of Fund liability. Further, to find that the settlement was inadmissible would permit employee to relitigate his percentage of PPD resulting from his last injury and collaterally attack the award and defeat its finality. Section 287.390. Finally, workers' compensation is purely a creature of statutory creation, and we shall not violate and defeat the clear purpose of the statute establishing the Fund and in particular, section 287.390. For these clear and cogent reasons, the settlement was admissible. See *Newman*, 975 S.W.2d at 149. Point denied.

In his first point on appeal, employee contends that the Commission erred in denying him benefits from the Fund because it ignored the unimpeached and uncontradicted testimony of Berkin regarding employee's last injury. However, as discussed in our disposition of employee's second point on appeal, to relitigate employee's disability from his last injury as determined by the ALJ would violate section 287.390 and we decline to do so.

I find, therefore, that *Conley* stands for the proposition that, when a percentage of disability has been fixed by a settlement approved by an ALJ, the employee cannot "relitigate" that percentage in a subsequent proceeding.<sup>3</sup>

The issue decided by the court in *Totten v. Treasurer*, 116 S.W.3d 624 (Mo. App. E.D. 2003) and by the court in *Seifner v. Treasurer*, 362 S.W.3d 59 (Mo. App. W.D. 2012) has no applicability to the instant case. In *Totten* and *Seifner*, it was held that the terms of a prior approved settlement were not binding upon the Second Injury Fund, as the Fund was not a party to the settlement, nor had the Fund consented to the terms of the settlement. That is not the issue here. Claimant was a party to the settlement in question. Claimant asked the administrative law judge to approve the settlement, and Claimant's counsel recommended approval of the settlement. The issue here is the same as in *Conley*. Claimant "effectively wishes to relitigate his percentage of PPD as agreed in the lump sum settlement because that percentage may prevent him from receiving compensation from the Fund." *Conley* is still good law.

I am compelled to find that Claimant had no preexisting permanent disability which meets the statutory threshold, and thus the Second Injury Fund has no liability for permanent partial disability benefits.

The claim against the Second Injury Fund is denied.

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<sup>3</sup> While *Conley* dealt with a settlement of the "last injury" or "primary injury", and the instant case involves a settlement of a "prior injury", the logic of *Conley* would still apply: Claimant cannot relitigate what has already been adjudicated.

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Made by \_\_\_\_\_  
/s/ Robert J. Dierkes 1-7-16  
Chief Administrative Law Judge  
*Division of Workers' Compensation*