

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

Injury No.: 10-054278

Employee: Thomas Cummiskey
Employer: Martin C. Heck Brick Contracting (Settled)
Insurer: Secura Insurance Company (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. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated October 18, 2012. The award and decision of Administrative Law Judge John K. Ottenad, issued October 18, 2012, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 1st 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: Thomas Cummiskey

Injury No.: 10-054278

Dependents: N/A

Employer: Martin C. Heck Brick Contracting (Settled)

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Secura Insurance Company (Settled)

Hearing Date: June 19, 2012

Checked by: JKO

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 4, 2010
5. State location where accident occurred or occupational disease was contracted: St. Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was employed as a bricklayer, tuck-pointer and acid washer for Employer and injured his right knee, as a result of the leg-intensive, repetitive job duties he performed for Employer, including kneeling, squatting and climbing up and down ladders.
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 Knee
14. Nature and extent of any permanent disability: 25% of the Right Knee
15. Compensation paid to-date for temporary disability: \$0.00
16. Value necessary medical aid paid to date by employer/insurer? \$0.00

Employee: Thomas Cummiskey

Injury No.: 10-054278

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Sufficient to result in the applicable rates of compensation
- 19. Weekly compensation rate: \$635.00 for TTD/\$422.97 for PPD
- 20. Method wages computation: By agreement (stipulation) of the parties

COMPENSATION PAYABLE

- 21. Amount of compensation payable:
Employer previously settled its risk of liability
- 22. Second Injury Fund liability:
10.125 weeks of permanent partial disability \$4,282.57

TOTAL: \$4,282.57

- 23. Future requirements awarded: None.

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 hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Sam W. Eveland

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Thomas Cummiskey	Injury No.: 10-054278
Dependents:	N/A	Before the
Employer:	Martin C. Heck Brick Contracting (Settled)	Division of Workers' Compensation
Additional Party:	Second Injury Fund	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Insurer:	Secura Insurance Company (Settled)	Checked by: JKO

On June 19, 2012, the employee, Thomas Cummiskey, appeared in person and by his attorney, Mr. Sam W. Eveland, for a hearing for a final award on his claim against the Second Injury Fund. The employer, Martin C. Heck Brick Contracting, and its insurer, Secura Insurance Company, were not present or represented at the hearing since they had previously settled their risk of liability in this case. The Second Injury Fund was represented at the hearing by Assistant Attorney General Da-Niel Cunningham. At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of fact and rulings of law, are set forth below as follows:

STIPULATIONS:

- 1) On or about June 4, 2010, Thomas Cummiskey (Claimant) sustained an occupational disease arising out of and in the course of employment that resulted in injury to Claimant.
- 2) Claimant was an employee of Martin C. Heck Brick Contracting (Employer).
- 3) Venue is proper in the City of St. Louis.
- 4) Employer received proper notice.
- 5) The Claim was filed within the time prescribed by the law.
- 6) At the relevant time, Claimant earned an average weekly wage sufficient to result in applicable rates of compensation of \$635.00 for total disability benefits and \$422.97 for permanent partial disability benefits.
- 7) Employer paid no temporary total disability (TTD) benefits in this case.
- 8) Employer paid no medical benefits in this case.

- 9) Claimant sustained permanent partial disability of 25% of the right knee, as a result of the June 4, 2010 (primary) injury.
- 10) Claimant sustained pre-existing permanent partial disabilities of 17.5% of the right wrist and 17.5% of the left wrist, prior to the June 4, 2010 injury.
- 11) A load factor of 10% for the combination of the primary and pre-existing disabilities is applicable.

ISSUES:

- 1) Does an occupational disease claim trigger Second Injury Fund liability as an “injury” under Mo. Rev. Stat. § 287.220?
- 2) What is the liability of the Second Injury Fund?

EXHIBITS:

The following exhibits were admitted into evidence:

Employee Exhibits:

- A. Stipulation for Compromise Settlement in Injury Number 10-054278 between Claimant and Employer
- B. Independent medical report of Dr. Shawn Berkin dated August 22, 2011
- C. Certified medical treatment records of Dr. Stephen Benz
- D. Stipulation for Compromise Settlement in Injury Number 09-030821 between Claimant and Employer

Second Injury Fund Exhibits:

Nothing offered or admitted at the time of trial

Note: *Some of the records submitted at hearing contain handwritten comments or other marks. All of these marks were on these records at the time they were admitted into evidence and no other marks have been added since their admission on June 19, 2012.*

FINDINGS OF FACT:

Based on a comprehensive review of the evidence, including Claimant's testimony, the expert medical opinions, the medical treatment records and the Stipulations for Compromise Settlement between Claimant and Employer in this case and the pre-existing injury, as well as based on my personal observations of Claimant at hearing, I find:

- 1) **Claimant** is a 54-year-old bricklayer, tuck-pointer and acid washer, who was employed by Martin C. Heck Brick Contracting (Employer) on or about June 4, 2010. Claimant had been working in this position for Employer for approximately ten years, but was unemployed as of the time of the hearing. Claimant's job duties for Employer included constant and repetitive kneeling, squatting and climbing up and down ladders to perform the bricklaying, tuck-pointing and acid washing.
- 2) Leading up to June 4, 2010, Claimant developed right knee pain and tenderness when performing his various work activities. He treated with **Dr. Stephen Benz** (Exhibit C), who diagnosed Claimant with an extensive amount of degenerative arthritis, mostly in the medial compartment of the right knee. On June 4, 2010, Dr. Benz took Claimant to surgery to treat his right knee complaints. He performed a partial right knee replacement (unicondylar knee replacement and Oxford knee).
- 3) Claimant reported that he continues to have ongoing problems with the right knee since the onset of this condition and his surgical treatment for it. He said that he has pain and swelling in the knee, aggravated by climbing stairs. He reported weakness in the right leg and said that he is unable to squat.
- 4) Claimant and Employer resolved their portion of this June 4, 2010 case (Injury Number 10-054278) by **Stipulation for Compromise Settlement** (Exhibit A) for the payment of \$23,268.80, or 25% permanent partial disability of the right knee and 10 weeks of temporary total disability (TTD). The Second Injury Fund Claim was left open on the Stipulation. This Stipulation for Compromise Settlement was approved by Chief Administrative Law Judge Lee B. Schaefer on December 5, 2011.
- 5) Prior to the June 4, 2010 occupational disease, Claimant sustained a pre-existing injury to his bilateral wrists, resulting in pre-existing disabilities to those body parts.
- 6) Claimant testified that he suffered an injury on the job for Employer leading up to March 20, 2009. As a result of his hand-intensive, repetitive work activities for Employer as a bricklayer, tuck-pointer and acid washer, he developed bilateral carpal tunnel syndrome and bilateral Guyon's canal syndrome.
- 7) Claimant treated with **Dr. Stephen Benz** (Exhibit C), who first tried a period of conservative treatment, which did not alleviate Claimant's complaints. Eventually, he performed surgery on Claimant's right wrist on April 23, 2009 and on Claimant's left wrist on May 5, 2009. He performed carpal tunnel releases and Guyon's canal releases in each wrist, to treat Claimant's bilateral carpal tunnel and Guyon's canal syndromes.

- 8) Following his wrist treatment and leading up to the time of the June 4, 2010 injury, Claimant reported that he continued to have wrist pain and tingling in his hands.
- 9) Claimant and Employer resolved their portion of the March 20, 2009 case (Injury Number 09-030821) by **Stipulation for Compromise Settlement** (Exhibit D) for the payment of \$28,500.00, or 17.5% permanent partial disability of each wrist, with a 10% load for multiplicity, 2 weeks of disfigurement and \$426.71 in past temporary total disability (TTD) benefits. This Stipulation for Compromise Settlement was approved by Administrative Law Judge John A. Tackes on June 22, 2010.
- 10) Claimant was examined by **Dr. Shawn Berkin** (Exhibit B) on June 22, 2011 at the request of his attorney for an independent medical examination. Dr. Berkin issued his report on August 22, 2011, following his physical examination and his review of the medical treatment records. Medically causally related to Claimant's work activities for Employer leading up to June 4, 2010, Dr. Berkin diagnosed overuse syndrome of the right leg with traumatic tendinitis of the right knee, status post partial right knee replacement. Dr. Berkin assessed permanent partial disability for Claimant's primary right knee and pre-existing bilateral wrist injuries/conditions. He opined that the pre-existing disabilities represent a hindrance or obstacle to employment or re-employment. Finally, he opined that the combination of the disabilities creates a significantly greater disability than the simple sum or total of each separate injury/illness, and so a loading factor should be applied.
- 11) Claimant testified that the combination of the injuries made it more difficult for him to work, because of the inability to stand for a prolonged period of time or repetitively reach and work with his arms.

RULINGS OF LAW:

Based on a comprehensive review of the evidence described above, including Claimant's testimony, the expert medical opinions, the medical treatment records and the Stipulations for Compromise Settlement between Claimant and Employer in this case and the pre-existing injury, as well as based on my personal observations of Claimant at hearing, and based on the applicable laws of the State of Missouri, I find the following:

I find that there is no dispute in this case, and the evidence clearly shows, that Claimant sustained an occupational disease, arising out of and in the course of his employment for Employer on June 4, 2010, which resulted in an injury to his right knee. I find that he was working as a bricklayer, tuck-pointer and acid washer for Employer and developed right knee complaints as a result of the leg-intensive, repetitive job duties he performed for Employer, including kneeling, squatting and climbing up and down ladders. I find that Claimant sustained overuse syndrome of the right leg with traumatic tendinitis of the right knee, status post partial right knee replacement. I find that his right knee injury and medical treatment was medically causally connected to his occupational disease exposure at work leading up to June 4, 2010. I further find, based on the stipulation of the parties, that Claimant sustained 25% permanent

partial disability of the right knee related to this compensable (primary) occupational disease injury at work on June 4, 2010.

Issue 1: Does an occupational disease claim trigger Second Injury Fund liability as an “injury” under Mo. Rev. Stat. § 287.220?

Considering the date of the injury, it is important to note that the new statutory provisions are in effect, including **Mo. Rev. Stat. § 287.800 (2005)**, which mandates that the Court “shall construe the provisions of this chapter strictly” and that “the division of workers’ compensation shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.” Additionally, **Mo. Rev. Stat. § 287.808 (2005)** establishes the burden of proof that must be met to maintain a claim under this chapter. That section states, “In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true.”

Claimant bears the burden of proof on all essential elements of his Workers’ Compensation case. *Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute*, 793 S.W.2d 195 (Mo. App. E.D. 1990) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). The fact finder is charged with passing on the credibility of all witnesses and may disbelieve testimony absent contradictory evidence. *Id.* at 199.

Under **Mo. Rev. Stat. § 287.067.1 (2005)**, occupational disease is defined as “an identifiable disease arising with or without human fault out of and in the course of the employment.” Additionally, under **Mo. Rev. Stat. § 287.067.3 (2005)**, “An occupational disease due to repetitive motion is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability.” That section then defines “prevailing factor” as “the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.” It continues, “Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.”

Considering the competent and substantial evidence listed above, I find that Claimant has met his burden of proving the presence of an occupational disease, resulting in overuse syndrome of the right leg with traumatic tendinitis of the right knee, status post partial right knee replacement, which arose out of and in the course of his employment for Employer and which is medically causally connected to that employment.

The main dispute in this case seems to revolve around whether or not occupational disease claims are properly defined as injuries, and, thus, whether they can give rise to Second Injury Fund benefits under the statute, when that statute is strictly construed. In other words, the Second Injury Fund argues that occupational disease claims are not “injuries” under a strict construction of the statute. Therefore, the Second Injury Fund has no liability for benefits based on an occupational disease claim.

Any review of this issue must begin with the statute that gives rise to Second Injury Fund benefit exposure in Workers' Compensation cases. Second Injury Fund liability for permanent partial disability is set out in **Mo. Rev. Stat. § 287.220.1 (2005)**, which in pertinent part states:

All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. 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 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. [Emphasis added]

So, since the statute indicates that it is the combination of the pre-existing disability with the disability from the last "injury" that triggers Second Injury Fund liability, the question becomes how "injury" is defined and whether "injury" includes both accidents and occupational disease claims or not.

The Workers' Compensation Statute provides a definition for the term "injury." Under **Mo. Rev. Stat. § 287.020.3 (1) (2005)**, the statute provides that, "In this chapter the term '**injury**' is hereby defined to be an injury which has arisen out of and in the course of employment." The definition continues under **Mo. Rev. Stat. § 287.020.3 (5) (2005)**, "The terms 'injury' and 'personal injuries' shall mean violence to the physical structure of the

body...These terms shall in no case except as specifically provided in this chapter be construed to include occupational disease in any form..." Therefore, by the plain meaning of this language, except as provided later in the statute, occupational diseases are not injuries.

The exception, specifically referenced in this definition, is contained in **Mo. Rev. Stat. § 287.067 (2005)**. Section 3 of that statute indicates, "An injury due to repetitive motion is recognized as an occupational disease for the purposes of this chapter. An occupational disease due to repetitive motion is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability."

To read the statute as the Second Injury Fund suggests, would be to ignore or exclude the words "except as specifically provided in this chapter" from Section 287.020.3 (5). I find that that would not be appropriate. Even with the mandate of strictly construing the statute, words placed in the statute by the Legislature are presumed to have meaning and certainly should not be ignored or excluded. I find that only if those words are essentially eliminated from Section 287.020.3 (5) can you then reach the conclusion that occupational diseases are not injuries for the purposes of the Workers' Compensation Statute.

The Second Injury Fund further cites recent case law that interpreted the exclusivity provision of the statute in relation to occupational disease claims, as further support for their position in this matter. I do not find this case law probative or relevant to the direct question of whether an occupational disease can be an "injury" under the terms of the Second Injury Fund statute. The case law the Second Injury Fund cites interpreted the exclusivity provision to only apply to accidental injuries, not occupational disease injuries, because in Section 287.120, the terms "accidental injury" and "personal injury or death...by accident" are specifically included in that section. In other words, since the statute contains the specific description of injury by accident in Section 287.120, then occupational diseases are not also included.

However, that is not the case in the matter at bar. Section 287.220 does not include any specific description of injury by accident or otherwise. It simply says "injury." Therefore, the definitional section of the chapter and any other related sections referenced in that definitional section are the parts of the chapter available for determining the meaning of the broad term "injury" in the Second Injury Fund section of the statute.

Reading all of these sections of the Workers' Compensation Statute together and attempting to give meaning to each of the sections, as best as it can be determined by the meaning of the words contained in each section, I find that "injury" is specifically defined as "violence to the physical structure of the body." I find that the leg-intensive, repetitive work activities Claimant performed for Employer leading up to June 4, 2010, which resulted in overuse syndrome of the right knee that had to be surgically repaired, amounted to a "violence to the physical structure of the body," namely his right knee.

I further find that occupational diseases "except as specifically provided in this chapter" are not injuries. However, I find that under Mo. Rev. Stat. § 287.067.3, "An injury due to repetitive motion is recognized as an occupational disease for the purposes of this chapter." I find no dispute in the record that Claimant's primary compensable Claim against Employer was based on repetitive motion. Since repetitive motion injuries are specifically recognized as

occupational diseases under this chapter, and since occupational diseases specifically provided for in this chapter are recognized as injuries, therefore, Claimant's repetitive motion occupational disease is recognized as an "injury" for the purposes of the Workers' Compensation Statute. As such, I find that it constitutes an "injury" as contained in Section 287.220 to give rise to Second Injury Fund benefits under the statute.

Issue 2: What is the liability of the Second Injury Fund?

Under **Mo. Rev. Stat. § 287.190.6 (1) (2005)**, "'permanent partial disability' means a disability that is permanent in nature and partial in degree..." The claimant bears the burden of proving the nature and extent of any disability. *Elrod v. Treasurer of Missouri as Custodian of Second Injury Fund*, 138 S.W.3d 714, 717 (Mo. banc 2004). Proof is made only by competent substantial evidence and may not rest on surmise or speculation. *Griggs v. A.B. Chance Co.*, 503 S.W.2d 697, 703 (Mo. App. 1973). Extent and percentage of disability is a finding of fact within the special province of the [fact finding body, which] is not bound by the medical testimony but may consider all the evidence, including the testimony of the claimant, and draw all reasonable inferences from other testimony in arriving at the percentage of disability. *Fogelsong v. Banquet Foods Corp.*, 526 S.W.2d 886, 892 (Mo. App. 1975) (citations omitted).

Additionally, under the 2005 amendments to the Workers' Compensation Law, the Legislature added further provisions that have an impact on the determination of the nature and extent of permanent partial disability. **Mo. Rev. Stat. § 287.190.6 (2) (2005)** states,

Permanent partial disability... shall be demonstrated and certified by a physician. Medical opinions addressing compensability and disability shall be stated within a reasonable degree of medical certainty. In determining compensability and disability, where inconsistent or conflicting medical opinions exist, objective medical findings shall prevail over subjective medical findings. Objective medical findings are those findings demonstrable on physical examination or by appropriate tests or diagnostic procedures.

Therefore, according to the terms of this statute, it is incumbent upon the claimant to have a medical opinion from a physician that demonstrates and certifies claimant's permanent partial disability attributable to a given injury within a reasonable degree of medical certainty. Further, if there are conflicting opinions from physicians in a given case, then objective medical findings must prevail over subjective findings.

In awarding permanent partial disability from the Second Injury Fund under these new statutory provisions, it is, thus, necessary to deal with each of these sections. Considering the competent and substantial evidence listed above, I find that the medical opinion from Dr. Berkin demonstrates and certifies, within a reasonable degree of medical certainty, that Claimant sustained permanent partial disability as a result of the work-related right knee injury, as well as his pre-existing condition.

In cases such as this one where the Second Injury Fund is involved, we must also look to **Mo. Rev. Stat. § 287.220 (2005)** for the appropriate apportionment of benefits under the statute. In order to recover from the Fund, Claimant must prove that he had a pre-existing permanent partial disability that existed at the time of the primary injury. Then to have a valid Fund claim, that pre-existing permanent partial disability must combine with the primary disability in one of two ways. First, the disabilities combine to create permanent total disability, or second, the disabilities combine to create a greater overall disability than the simple sum of the disabilities when added together.

In the second (permanent partial disability) combination scenario, pursuant to **Mo. Rev. Stat. § 287.220.1 (2005)**, the disabilities must also meet certain thresholds before liability against the Second Injury Fund is invoked and they must be of such seriousness so as to constitute a hindrance or obstacle to employment or re-employment should employee become unemployed. *Messex v. Sachs Electric Co.*, 989 S.W.2d 206 (Mo. App. E.D. 1999) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). The pre-existing disability and the subsequent compensable injury each must result in a minimum of 12.5% permanent partial disability of the body as a whole (50 weeks) or 15% permanent partial disability of a major extremity. These thresholds are not applicable in permanent total disability cases.

It is first necessary to determine the nature and extent of the permanent partial disability against Employer. I find, pursuant to the stipulation of the parties at the outset of this hearing, that Claimant sustained 25% permanent partial disability of the right knee, on account of the June 4, 2010 (primary) injury.

Having now established the nature and extent of the permanent partial disability attributable to the primary injury against Employer, it is now appropriate to determine whether or not Claimant has successfully met his burden of proving Second Injury Fund liability for permanent partial disability based on the combination of his primary (June 4, 2010) injury and any pre-existing permanent partial disabilities. Having thoroughly considered all of the competent and credible evidence in the record, I find that Claimant has met his burden of proof to show an entitlement to a permanent partial disability award against the Second Injury Fund.

Claimant has alleged pre-existing disabilities to the right wrist and left wrist that potentially combine with the disability from the primary 2010 right knee injury to trigger Second Injury Fund liability. In order for the alleged pre-existing disabilities to actually trigger Second Injury Fund liability, they must meet the appropriate threshold of 12.5% permanent partial disability of the body as a whole (50 weeks) or 15% permanent partial disability of a major extremity and they must be found to have been a hindrance or obstacle to employment or re-employment, should Claimant become unemployed.

With regard to Claimant's pre-existing injury/condition, I find Claimant's testimony and his statements in the medical reports credible regarding the continued complaints and problems he had, and the effect the pre-existing condition had on his ability to work, prior to June 4, 2010. I also found medical treatment records and reports in evidence documenting the treatment Claimant received for this condition/injury prior to the occupational disease injury on or about June 4, 2010.

I further find Dr. Berkin's diagnoses and opinions on the pre-existing injury/condition to be competent, credible and reliable evidence. Dr. Berkin rated Claimant as having pre-existing permanent partial disabilities on account of the pre-existing injury/condition. Dr. Berkin further credibly opined that the pre-existing disabilities combined with the disability from the June 4, 2010 injury to create disability that is significantly greater than their simple sum and so a loading factor should be added. He also credibly opined that the disabilities represented a hindrance or obstacle to employment or re-employment, should Claimant become unemployed.

Based on the totality of the evidence in the record, as described above, and pursuant to the stipulation of the parties at the start of the hearing, I find that Claimant had pre-existing permanent partial disabilities of 17.5% of the right wrist and 17.5% of the left wrist.

Given the applicable statutory thresholds of 15% of a major extremity or 12.5% of the body as a whole (50 weeks), I find that the primary right knee and the pre-existing right wrist and left wrist injuries/conditions meet the statutory thresholds to trigger Second Injury Fund liability. I further find that the pre-existing right wrist and left wrist injuries/conditions were of such seriousness so as to constitute a hindrance or obstacle to employment or re-employment, should Claimant become unemployed. Finally, consistent with Dr. Berkin's opinion on combination, I find that the pre-existing and primary injury disabilities combine to create disability that is significantly greater than the simple sum. I, therefore, find that Claimant is entitled to receive 10.125 weeks of compensation from the Second Injury Fund.

In order to calculate the amount of this award from the Second Injury Fund, I added together all of the qualifying disabilities and assessed a loading factor of 10% [25% of the right knee (40 weeks) + 17.5% of the right wrist (30.625 weeks) + 17.5% of the left wrist (30.625 weeks) = 101.25 total weeks of compensation times the 10% loading factor = 10.125 weeks from the Fund]. I arrived at the 10% loading factor based on the credible evidence submitted at trial and the stipulation of the parties at the time of trial.

Accordingly, the Second Injury Fund is responsible for the payment of 10.125 weeks of permanent partial disability pursuant to this award.

CONCLUSION:

Claimant sustained an occupational disease, arising out of and in the course of his employment for Employer on June 4, 2010, which resulted in an injury to his right knee. He was working as a bricklayer, tuck-pointer and acid washer for Employer and developed right knee complaints as a result of the leg-intensive, repetitive job duties he performed for Employer, including kneeling, squatting and climbing up and down ladders. Claimant sustained overuse syndrome of the right leg with traumatic tendinitis of the right knee, status post partial right knee replacement. His right knee injury and medical treatment was medically causally connected to his occupational disease exposure at work leading up to June 4, 2010. Claimant sustained 25% permanent partial disability of the right knee related to this compensable (primary) occupational disease injury at work on June 4, 2010.

Since repetitive motion injuries are specifically recognized as occupational diseases under this chapter, and since occupational diseases specifically provided for in this chapter are recognized as injuries, therefore, Claimant's repetitive motion occupational disease is recognized as an "injury" for the purposes of the Workers' Compensation Statute. As such, it constitutes an "injury" as contained in Section 287.220 to give rise to Second Injury Fund benefits under the statute.

Claimant had pre-existing permanent partial disabilities of 17.5% of the right wrist and 17.5% of the left wrist. Based on the applicable thresholds, the primary right knee and the pre-existing right wrist and left wrist injuries/conditions meet the statutory thresholds to trigger Second Injury Fund liability. Claimant also met his burden of proof to show that the pre-existing right wrist and left wrist injuries/conditions were of such seriousness so as to constitute a hindrance or obstacle to employment or re-employment, should Claimant become unemployed. The Second Injury Fund is to pay 10.125 weeks of permanent partial disability benefits, or \$4,282.57. Compensation awarded is subject to a lien in the amount of 25% of all payments in favor of Mr. Sam W. Eveland for necessary legal services.

Made by: _____

JOHN K. OTTENAD
Administrative Law Judge
Division of Workers' Compensation