

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

Injury No.: 03-071549

Employee: Mark Grubbs  
Employer: Paulo Products Company (Settled)  
Insurer: Liberty Mutual Insurance Co. (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: July 30, 2003  
Place and County of Accident: St. Louis City, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by §287.480 RSMo, (2000). Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge was not made in accordance with the Missouri Workers' Compensation Act. Pursuant to §286.090 RSMo, the Commission reverses the award and decision of Administrative Law Judge John K. Ottenad, dated November 7, 2007. The award and decision is attached and incorporated to the extent it is not inconsistent with our findings, conclusions, award, and decision herein.

#### Preliminaries

At the time of trial, employee had worked for employer for almost 15 years as a maintenance man. The parties stipulated that on or about July 30, 2003, employee sustained an accidental injury arising out of and in the course of his employment that resulted in injury. Employer accepted liability for the injury and provided medical treatment and temporary total disability benefits. On November 15, 2004, a legal advisor of the Division of Workers' Compensation (Division) approved a Stipulation for Compromise Settlement entered into between employee and employer/insurer fully resolving employee's claimed entitlement to workers' compensation benefits from employer/insurer. On or about September 29, 2005, employee filed with the Division a document entitled *Claim for Compensation* on a Division-provided form designated as form WC-21 (03-04) AI. Employee checked the box stating "Second Injury Fund Only."

The Second Injury Fund answered the Claim for Compensation and raised the defense that employee's claim against the Second Injury Fund is time-barred because it was filed beyond the filing period set forth in §287.430 RSMo. The administrative law judge agreed and denied employee's claim.

A threshold issue in this matter is whether the employee's claim against the Second Injury Fund is barred by the provisions of §287.430.

#### Administrative Law Judge Award

As we read the award, the administrative law judge determined that September 29, 2005, was the date that employee first filed any document constituting a claim against any party for purposes of §287.430. The

administrative law judge found that the employee did so by the filing of a Form WC-21, *Claim for Compensation*. The administrative law judge concluded that because the employee marked the box "Second Injury Fund Only" on the pre-printed Form WC-21, the claim of September 29, 2005, was not a claim against the employer/insurer under the provisions of §287.430.

For ease of reference, we quote the following passages from the administrative law judge's award:

The statute that allows for the settlement of cases, Mo. Rev. Stat. § 287.390.1 (2000), specifically allows for the compromise of any dispute or claim for compensation..." [emphasis added]. Based on this wording, the legislature intended there to be the ability to settle not only cases with a claim for compensation, but also cases where there are disputes, but no claim.

...

Claimant next argues that the phrase "a claim" in Section 287.430 means any claim including an "informal" claim for compensation against an employer-insurer which is settled without filing a formal claim." Claimant argues that the settlement on November 15, 2004 amounts to an informal claim against the Second Injury Fund. This argument runs afoul of the very wording of Section 287.430.

According to Section 287.430, "[t]he filing of any form, report, receipt, or agreement, other than a claim for compensation, shall not toll the running of the periods of limitation provided in this section." There can be no doubt based on this sentence that the agreement reached on November 15, 2004, does not constitute a claim for the purposes of the statute of limitations. By using "claim for compensation" in this section, I find the legislature was clearly referring to the formal document entitled Claim for Compensation (Form WC-21) that Claimant first filed on September 21, 2005. Therefore, Claimant's argument that he had a year after the settlement of the case against Employer to file a claim against the Second Injury Fund, when a claim was never previously filed, is without merit.

Award p. 9.

Law

The provisions of the Missouri Workers' Compensation Law (Law) and the Division of Workers' Compensation Regulations that bear on our decision are set out below:

Section 287.430 RSMo.

Except for a claim for recovery filed against the second injury fund, no proceedings for compensation under this chapter shall be maintained unless a claim therefor is filed with the division within two years after the date of injury or death, or the last payment made under this chapter on account of the injury or death, except that if the report of the injury or the death is not filed by the employer as required by section 287.380, the claim for compensation may be filed within three years after the date of injury, death, or last payment made under this chapter on account of the injury or death. The filing of any form, report, receipt, or agreement, other than a claim for compensation, shall not toll the running of the periods of limitation provided in this section. The filing of the report of injury or death three years or more after the date of injury, death, or last payment made under this chapter on account of the injury or death, shall not toll the running of the periods of limitation provided in this section, nor shall such filing reactivate or revive the period of time in which a claim may be filed. A claim against the second injury fund shall be filed within two years after the date of the injury or within one year after a claim is filed against an employer or insurer pursuant to this chapter, whichever is later. In all other respects

the limitations shall be governed by the law of civil actions other than for the recovery of real property, but the appointment of a conservator shall be deemed the termination of the legal disability from minority or disability as defined in chapter 475, RSMo. The statute of limitations contained in this section is one of extinction and not of repose.

#### Section 287.390.1 RSMo.

Nothing in this chapter shall be construed as preventing the parties to claims hereunder from entering into voluntary agreements in settlement thereof, but no agreement by an employee or his dependents to waive his rights under this chapter shall be valid, nor shall any agreement of settlement or compromise of any dispute or claim for compensation under this chapter be valid until approved by an administrative law judge or the commission, nor shall an administrative law judge or the commission approve any settlement which is not in accordance with the rights of the parties as given in this chapter. No such agreement shall be valid unless made after seven days from the date of the injury or death.

#### Division regulation 8 CSR 50-2.010(7)

The employee or the employee's dependents may file a Claim for Compensation. In order that the place of setting may be determined, the county in which the accident occurred must be stated on the claim, and if the injury occurred outside of the state of Missouri, the name of the county in which the contract of employment was made must be stated. The claim shall be filed with sufficient copies for the division and each employer and insurer named, and the attorney general in case of a Second Injury Fund claim. The claim must be filed within the time prescribed by sections 287.430 or 287.440, RSMo, for accidental injuries, or section 287.063.3, RSMo, for occupational disease. A claim against the Second Injury Fund must be asserted affirmatively by the claimant and cannot be made by any other party to the claim, on motion or otherwise. Naming the state treasurer as a party is not, in itself, sufficient to make a claim against the fund. Injuries which are claimed to create fund liability must be specifically set forth in the Claim for Compensation.

(A) The filing of a claim initiates a contested case.

(B) A claim against an employer/insurer and the Second Injury Fund are against two (2) separate parties and the assertion of a claim against one is not an assertion of a claim against the other.

#### Discussion

The word "claim" appears in several different clauses in §287.430. For purposes of Chapter 287, what does "claim" mean? What is a "claim for recovery"? What is a "claim for compensation"? What is a "claim against the Second Injury Fund"? These words and phrases are not defined in the Workers' Compensation Law. "It has long been established that a claim for compensation must be direct and unequivocal and must call for some immediate action by the Commission." *Clanton v. Teledyne Neosho*, 960 S.W.2d 532, 534-535 (Mo. App. 1998), citing *Higgins v. Heine Boiler Co.*, 328 Mo. 493, 41 S.W.2d 565, 572 (Mo. 1931).

Black's Law Dictionary defines "claim" as "[t]he aggregate of operative facts giving rise to a right enforceable by a court." Alternately, Black's defines "claim" as "[a]n interest or remedy recognized at law; the means by which a person can obtain a privilege, possession, or enjoyment of a right or thing; CAUSE OF ACTION." Webster's Dictionary says "claim" means "a demand for compensation, benefits, or payment (as one made in conformity with provisions of the Social Security Act or of a workmen's compensation law...)." "A 'claim' even in the barest of layman's language, includes not only a lawsuit but also a claim settled out of court." *Williams v. Barnes Hospital*, 736 S.W.2d 33, 38 (Mo. 1987).

The administrative law judge is convinced that the legislature was clearly referring to Form WC-21 when it used the phrase "claim for compensation" in §287.430. We disagree for several reasons. First, the portion of the statute reading, "no proceeding for compensation under this chapter shall be maintained unless a claim therefore [is] filed," has remained unchanged since the Workmen's Compensation Law was enacted by referendum in 1926. We find it highly improbable that those voting on this language in the 1920s were concerned with a particular form. If they were, they simply could have provided for one as they have in so many other statutes.

Second, if we accept the administrative law judge's conclusion that "claim" as it appears in the Law means the Form WC-21, *Claim for Compensation*, accepted meanings of many other provisions of the Law are called into question. For example, §287.390.1 provides that an administrative law judge can only approve a settlement entered into between "parties to claims." If "claim" means only the WC-21, then an administrative law judge can only approve a settlement entered into between parties to a dispute for which a Form WC-21 has been filed. The settlement between employee and employer/insurer in this case would be invalid because no WC-21 was filed before the administrative law judge approved the settlement. We find no indication in the plain language of the statute to support such a legislative intent.

We are not the first tribunal to ponder the legal significance of the submission of a settlement agreement before any document entitled a "claim for compensation" has been filed:

The filing of the settlement agreement gave the commission jurisdiction of the plaintiff's claim for compensation for injuries ensuing on account of the accident. It was in effect the filing of a claim for compensation. It was signed by the parties, and was accompanied by a report of the facts.

*O'Malley v. Mack International Motor Truck Corp.*, 31 S.W.2d 554, 557 (Mo. App. 1930). See also, *Myers v. Cap Sheaf Bread Co.*, 192 S.W.2d 503 (Mo. 1946). Of course, the settlement filed in *O'Malley* met the long-established requirements that a claim for compensation be direct and unequivocal and call for some immediate action by the Commission; to wit, approval. The settlement filed in this matter satisfied those requirements as well.

We are not persuaded by the administrative law judge's assumption that the provision, "[t]he filing of any form, report, receipt, or agreement, other than a claim for compensation, shall not toll the running of the periods of limitation provided in this section" somehow precludes a finding that the filing of the settlement under §287.390.1 constitutes the filing of a claim for compensation. The quoted provision states nothing about what constitutes a claim for compensation. It merely states the legislature's intention that the periods of limitation will not be tolled by the filing of the listed documents. The determination of this case does not turn on whether the period of limitation was tolled.

We conclude that the November 15, 2004, submission of a Stipulation for Compromise Settlement also served as the filing of a claim for compensation against employer/insurer. The Second Injury Fund claim filed on September 29, 2005, was filed within one year of the filing of the claim for compensation against the employer/insurer as required by §287.430. Employee's claim against the Second Injury Fund is not time-barred. We reverse the administrative law judge's conclusion to the contrary.

#### Merits of Second Injury Fund Claim

Employee testified at the hearing of this cause. We find employee credible. Employee also offered medical records related to his primary injury as well as prior injuries. He offered the deposition testimony of his medical expert, Dr. Robert P. Poetz, D.O. The Second Injury Fund offered no witnesses and no exhibits at the hearing.

On July 30, 2003, employee slipped on some oil at work and sustained a torn medical meniscus in his right

knee. Dr. Poetz testified that employee sustained a 35% permanent partial disability at the right knee. The Second Injury Fund offered no evidence regarding employee's disability from the primary injury. We find credible Dr. Poetz's testimony. We find employee sustained a 35% permanent partial disability (56 weeks) at the right knee.

The medical records and employee's testimony establish that employee sustained several injuries prior to the primary injury. In 1993, employee tore the medial meniscus in his left knee. The knee was surgically repaired. In 2000, employee again tore the medial meniscus in his left knee. The knee was again surgically repaired. The condition of employee's left knee after the second surgery was such that employee has difficulty kneeling, bending, squatting, and climbing ladders. These are activities in which employee engages frequently as a maintenance man for employer. As such, the condition of employee's left knee is a hindrance or obstacle to his employment. Dr. Poetz testified that employee has a permanent partial disability of 40% at the left knee (64 weeks), which disability pre-existed the primary injury. The Second Injury Fund offered no evidence to the contrary. We find credible Dr. Poetz's testimony.

In 1994, employee sustained a right wrist fracture in a work injury. Employee experiences occasional pain with manipulation of tools while performing work duties. In that respect, the condition of employee's right wrist is a hindrance or obstacle to his employment. Dr. Poetz testified that employee has a permanent partial disability of 25% at the right wrist (43.75 weeks), which disability pre-existed the primary injury. The Second Injury Fund offered no evidence to the contrary. We find credible Dr. Poetz's testimony.

In 2000, employee was diagnosed with a herniated cervical disc. The disc was surgically removed and several cervical vertebrae were fused. As a result, employee occasionally experiences tightness in his neck which makes movement of his head difficult. Employee has missed work due to the tightness. The condition of employee's neck/cervical spine is a hindrance or obstacle to his employment. Dr. Poetz testified that employee has a permanent partial disability of 45% of the body as a whole referable to the cervical spine (180 weeks), which disability pre-existed the primary injury. The Second Injury Fund offered no evidence to the contrary. We find credible Dr. Poetz's testimony.

Dr. Poetz testified that employee's disability resulting from the primary injury combines with his pre-existing disabilities to produce a total disability that exceeds the simple sum of the disabilities by a factor of 15%. The Second Injury Fund offered no evidence to the contrary. We find credible Dr. Poetz's testimony.

Section 287.220.1 RSMo, provides:

All cases of permanent disability where there has been previous disability shall be compensated as herein provided...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.

As we have already found, each of employee's conditions of ill-being meets the thresholds set forth in §287.220.1 and each of employee's conditions of ill-being is a hindrance or obstacle to his employment. The only remaining task is to determine the liability of the Second Injury Fund, if any.

The calculation of the Second Injury Fund liability is set forth below (in weeks):

left knee (40%).....	64.00
right wrist (25%).....	43.75
cervical spine (45% BAW).....	180.00
right knee (35%).....	56.00
Combined disability.....	343.75
synergistic effect/load factor (15% of 343.75)....	51.5625

Employee's compensation rate for permanent partial disability is \$347.05. The Second Injury Fund is liable to employee for permanent partial disability benefits in the amount of \$17,894.77 (347.05 X 51.5625 weeks).

Steven K. Brown, Attorney at Law, is allowed a fee of 25% of the lump sum for necessary legal services rendered to employee, 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 19th day of December 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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## Secretary

All statutory references are to the Revised Statutes of Missouri 2000 unless otherwise indicated.

The claim is dated September 21, 2005.

Black's Law Dictionary 264 (8th ed. 2004).

Black's Law Dictionary 264 (8th ed. 2004).

Webster's Third New International Dictionary 414 (2002).

"Nothing in this chapter shall be construed as preventing the parties to claims hereunder from entering into voluntary agreements in settlement thereof,..."

Contrary to the implication by the inclusion of the clause "other than a claim for compensation," we can conceive of no circumstances where the filing of a claim for compensation would toll the §287.430 periods of limitation, either.

## AWARD

Employee:	Mark Grubbs	Injury No.:	03-071549
Dependents:	N/A		Before the
Employer:	Paulo Products Company (Settled)		<b>Division of Workers'</b>
			<b>Compensation</b>
			Department of Labor and Industrial Relations of Missouri
Additional Party:	Second Injury Fund		Jefferson City, Missouri
Insurer:	Liberty Mutual Insurance Co. (Settled)		
Hearing Date:	July 3, 2007	Checked by:	JKO

## FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
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: July 30, 2003
5. State location where accident occurred or occupational disease was contracted: St. Louis City
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? No
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was a senior maintenance mechanic for Employer who injured his right knee when he slipped on some oil.
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: N/A
- 15. Compensation paid to-date for temporary disability: \$4,233.60
- 16. Value necessary medical aid paid to date by employer/insurer? \$10,498.16

Employee: Mark Grubbs Injury No.: 03-071549

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Sufficient to result in the maximum rate for PPD
- 19. Weekly compensation rate: \$347.05 for PPD
- 20. Method wages computation: By agreement (stipulation) of the parties

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable:

Employer liability already settled

- 22. Second Injury Fund liability:

None \$0.00

Total: **\$0.00**

- 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: Steven K. Brown.

**FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Mark Grubbs	Injury No.: 03-071549
Dependents: N/A	Before the <b>Division of Workers’ Compensation</b>
Employer: Paulo Products Company (Settled)	Department of Labor and Industrial Relations of Missouri
Additional Party: Second Injury Fund	Jefferson City, Missouri

On July 3, 2007, the employee, Mark Grubbs, appeared in person and by his attorney, Mr. Steven K. Brown, for a hearing for a final award on his claim against the Second Injury Fund. The employer, Paulo Products Company, and its insurer, Liberty Mutual Insurance Co., had previously settled out their liability in this Claim and were not present for, or represented at, the hearing. The Second Injury Fund was represented at the time of the hearing by Assistant Attorney General Jennifer Chestnut. 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 July 30, 2003, Mark Grubbs (Claimant) sustained an accidental injury arising out of and in the course of his employment that resulted in injury to Claimant.
2. Claimant was an employee of Paulo Products Company (Employer).
3. Venue is proper in the City of St. Louis.
4. Employer received proper notice.
5. At the relevant time, Claimant earned an average weekly wage sufficient to result in the maximum applicable rate of compensation of \$347.05 for permanent partial disability (PPD) benefits.
6. Employer paid temporary total disability (TTD) benefits in the amount of \$4,233.60, representing a period of 8 6/7 weeks.
7. Employer paid medical benefits totaling \$10,498.16.

### **ISSUES:**

1. Is the Second Injury Fund Claim barred by the Statute of Limitations?
2. What is the nature and extent of Claimant's permanent partial disability (PPD) attributable to this injury?
3. What is the liability of the Second Injury Fund?

### **EXHIBITS:**

The following exhibits were admitted into evidence:

#### ***Employee Exhibits:***

##### ***A. Offered but not admitted into evidence***

- B. Certified medical treatment records from Forest Park Hospital
- C. Certified medical treatment records of St. Alexius Hospital
- D. Certified medical treatment records of Metropolitan Neurosurgery, Inc.
- E. Certified medical treatment records of Barnes Jewish Hospital-Department of Plastic and Reconstructive Surgery
- F. Certified medical treatment records of Missouri Baptist Medical Center
- G. Certified medical treatment records of St. Louis Orthopedic, Inc.
- H. Certified medical treatment records of St. Joseph Health Center
- I. Certified medical treatment records of HealthSouth
- J. Certified medical treatment records of Dr. Patrick Hogan
- K. Certified medical treatment records of BarnesCare
- L. Certified copy of Claimant's files from the Missouri Division of Workers'

## Compensation

- M. Medical report of Dr. Robert P. Poetz dated February 26, 2007
- N. Deposition of Dr. Robert P. Poetz, with attachments, dated May 1, 2007
- O. Stipulation for Compromise Settlement for Injury No. 03-071549 resolving case between Claimant and Employer
- P. Notice of Conference for Injury No. 03-071549 for setting on November 15, 2004 for Claimant and Employer/Insurer

### ***Second Injury Fund Exhibits:***

Nothing submitted at the time of hearing

**Notes:** 1) *The parties requested that I take Judicial/Administrative Notice of the file contents in this case, including the Claim and Answer filed in it. Accordingly, I have taken that Judicial/Administrative Notice of those file contents while formulating my decisions in this case.*

2) *The Second Injury Fund objected to Exhibit A based on the fact that it was a medical opinion, not a treatment record, and no deposition was ever taken to make the opinions admissible at hearing. The objection was sustained and Exhibit A was not admitted into evidence in this case.*

3) *Unless otherwise specifically noted below, any objections contained in these Exhibits are overruled and the testimony fully admitted into evidence.*

4) *Some of the records submitted at hearing contain handwritten remarks or other marks on the Exhibits. 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 July 3, 2007.*

### **FINDINGS OF FACT:**

Based on a comprehensive review of the substantial and competent evidence, including Claimant's testimony, the expert medical opinion, the medical records, the Stipulation for Compromise Settlement between Claimant and Employer in this case, and the file contents, as well as my personal observations of Claimant at hearing, I find :

1. Claimant was involved in an accident on July 30, 2003, when he was working as a senior maintenance mechanic for Paulo Products Company (Employer). He slipped on some oil and hurt his right knee. The injury was accepted by Employer and benefits were paid.
2. Employer filed a Report of Injury for this accident with the Division of Workers' Compensation dated July 30, 2003.
3. Employer paid for medical treatment for the right knee totaling \$10,498.16. Employer also paid 8 6/7 weeks of temporary total disability (TTD), or \$4,233.60. Employer's last TTD payment was on October 8, 2003.
4. On November 15, 2004, Claimant appeared at the Division of Workers' Compensation in St. Louis for a Conference setting. While the Notice of Conference (Exhibit P) does state that a legal advisor or administrative law judge will be present to explain his workers' compensation benefits, the notice also specifically states, "A legal advisor or an administrative law judge cannot act as the employee's attorney or give any specific legal advice regarding the employee's case."
5. Claimant and Employer reached an agreement to resolve this case on November 15, 2004 at the Conference setting. According to the Stipulation for Compromise Settlement in Injury No. 03-071549 (Exhibit O), approved by Legal Advisor Tutt on November 15, 2004, Claimant settled his case for the payment of \$13,881.60 or 25% of the right knee.
6. Claimant's attorney entered his initial appearance with the Division of Workers' Compensation in this case in a filing dated September 14, 2005, which was received by the Division on September 16,

2005. The entry of appearance filing was entitled, "Entry of Appearance for Second Injury Fund" and further specifically indicated that Claimant's attorney was entering his appearance "on behalf of the employee regarding the Second Injury Fund."
7. Claimant's first and only Claim for Compensation in this case was dated September 21, 2005 and was received by the Division on September 29, 2005. At the top of the Claim form, Claimant had three choices for the type of Claim he was filing: an Original Claim; an Amended Claim; or a Second Injury Fund Only Claim. Claimant checked the box indicating that this was a Second Injury Fund Only Claim.
  8. The Division of Workers' Compensation acknowledged receipt of the Claim on October 17, 2005. The Second Injury Fund then timely filed its Answer which was dated November 3, 2005 and which was received by the Division on November 7, 2005. In its Answer, the Second Injury Fund asserted a statute of limitations defense to this Claim pursuant to Mo. Rev. Stat. § 287.430.

## **RULINGS OF LAW:**

Based on a comprehensive review of the evidence, and based upon the applicable laws of the State of Missouri, I find:

### ***Issue 1: Is the Second Injury Fund Claim barred by the Statute of Limitations?***

**Mo. Rev. Stat. § 287.430 (2000)** sets out the statute of limitations for Workers' Compensation cases. Historically, it is important to note that until 1992, both the Employer/Insurer and the Second Injury Fund had the same statute of limitations under this section. In 1992, the Legislature added a separate, more restrictive, statute of limitations for Second Injury Fund cases.

Pursuant to **Mo. Rev. Stat. § 287.430 (2000)**, "A claim against the second injury fund shall be filed within two years after the date of injury or within one year after a claim is filed against an employer or insurer pursuant to this chapter, whichever is later." This section also notes that, "The filing of any form, report, receipt, or agreement, other than a claim for compensation, shall not toll the running of the periods of limitation provided in this section." Finally, the section indicates, "The statute of limitations contained in this section is one of extinction and not of repose."

The Missouri Court of Appeals has held that, "Statutes of limitations are favored in the law, and cannot be avoided unless the party seeking to do so brings himself within some exception." *Neal v. Laclede Gas Company*, 517 S.W.2d 716, 719 (Mo.App. 1974). It further held that "strict compliance is required with regard to specific statutory exceptions" and "statutes of limitations may be suspended or tolled only by specific disabilities or exceptions enacted by the legislature, and courts cannot extend those exceptions." *Id.* The Court finally noted that while they were addressing general statutes of limitations, the same principles apply even to specific statutes of limitations.

In terms of applying the rules of statutory construction, the Supreme Court has held in *Jones v. Director of Revenue*, 832 S.W.2d 516, 517 (Mo.banc 1992), "The primary rule of statutory construction requires the Court to ascertain the intent of the legislature by considering the plain and ordinary meaning of the words used in the statute." The Court continued, "Where the language of the statute is clear and unambiguous, there is no room for construction." Finally, specifically with regard to the Workers' Compensation law, the Eastern District Court of Appeals has ruled that since the Workers' Compensation law is entirely a creature of statute, we are bound by the rules of statutory construction in interpreting it, including ascertaining the intent of the legislature by considering the plain and ordinary meaning of the terms. *Frazier v. Treasurer of Missouri*, 869 S.W.2d 152, 156 (Mo.App. E.D. 1993), *overruled on other grounds*, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d at 223 (Mo.banc 2003).

After considering the facts of this case in light of Section 287.430, and applying the above-referenced rules of statutory construction, I find that Claimant did not timely file a claim under Section 287.430 of the Workers' Compensation Act, and thus he is time-barred from pursuing any such claim under this statute.

Claimant was injured by accident on July 30, 2003. He never filed a claim against his Employer, but instead chose to enter into a Stipulation for Compromise Settlement on November 15, 2004, which relieved Employer of any liability for this injury once that settlement was approved by the Legal Advisor of the Division on that date. Having never filed a claim against Employer, by the plain and ordinary wording of the statute, Claimant then had 2 years from the date of his injury to file a claim against the Second Injury Fund, if he wished to pursue benefits from the Fund. Two years from the date of injury would have been July 30, 2005. Claimant's first and only Claim for Compensation was filed in this case with a date of September 21, 2005, and it was received by the Division on September 29, 2005. Since it was filed after July 30, 2005, I find it is untimely, and Claimant is barred from pursuing any compensation under this statute.

Claimant presents a number of arguments to try to persuade this fact-finder that the Claim against the Second Injury Fund was, in fact, timely under the statute, but those arguments, as will be explained below, are either faulty or without merit.

Claimant first argues that since he had not previously filed a claim against Employer, this September 21, 2005 Claim constitutes a simultaneous filing against both Employer and the Second Injury Fund, thus making his Fund Claim timely. As support for this position, he cites *Sparks v. Spartech Plastics*, 62 S.W.3d 573 (Mo.App. E.D. 2001), which is a *per curiam* order affirming a prior Labor and Industrial Relations Commission decision without any written opinion filed by the Court.

The facts of this case and Claimant's own filings run clearly contrary to this argument that he now makes at trial. Claimant alleges this is a simultaneous filing against Employer and the Fund, but yet when he filed the Claim, he clearly marked the box that categorized this Claim as "Second Injury Fund Only." Further, when Claimant's attorney entered his appearance, he did so with a motion entitled, "Entry of Appearance for Second Injury Fund", which specifically indicated that Claimant's attorney was entering his appearance "on behalf of the employee regarding the Second Injury Fund." There is absolutely no ambiguity or confusion with these filings. Claimant was clearly intending to file and proceed against *only* the Second Injury Fund, not simultaneously against Employer and the Second Injury Fund as he now contends.

Further, there are some significant differences that now exist between the facts that formed the basis of the *Sparks* decision and those that form the basis of the decision in this case. In *Sparks*, the original claim filed by the employee had absolutely no heading to denote if it was a Second Injury Fund only claim, or if instead it was being simultaneously filed against both the employer and the Fund. This lack of specificity in the filing allowed for the assumption that the filing was effectively against both the employer and the Second Injury Fund. We do not have any such lack of specificity here. In fact, Claimant very clearly filed his Claim against only the Second Injury Fund at the time he filed his Claim.

Additionally, the statute of limitations section used in the *Sparks* decision (Section 287.430) included a Subsection 2, which described the reactivation of claims after a settlement for some specific reasons such as medical treatment for a life-threatening condition or to help with prosthetic devices. The ALJ in the *Sparks* decision reasoned that if the employee was able to reactivate a claim based on this Subsection of the statute of limitations provision, then the employee could have a valid claim against employer and the Second Injury Fund even if a prior claim had not been filed. Section 287.430 was subsequently changed in 1998 to remove Subsection 2 dealing with this reactivation of claims. Although the same language was moved to Section 287.140.8, the fact remains that it was removed from the statute of limitations section of the statute.

I find that reliance on this Subsection to support the proposition that reactivation of a claim after settlement allows for an extended time to file against the Fund is misplaced. In *Clanton v. Teledyne Neosho*, 960 S.W.2d 532 (Mo.App. S.D. 1998), the Court held that three prerequisites must be met before reactivation can occur: first, there must have been a claim filed within the time frame of the statute; second, that claim must have been settled; and third, there must be good cause for reactivation of the claim. In this case, there was never a claim filed to allege that the reactivation statute contemplates an extended filing period for Second Injury Fund purposes. It is fairly straightforward that one cannot reactivate a claim which one never filed in the first place. It is, therefore, counterintuitive to argue that even if no claim against Employer were filed, Claimant still had a right to reactivate a claim that never existed. In

short, if Claimant never filed a claim before settling the case with Employer, then the first prerequisite of the reactivation statute cannot be met, as there is nothing to reactivate. Thus, Claimant cannot be allowed to file a claim in an effort to bootstrap in a claim against the Second Injury Fund.

Intrinsic to this argument by Claimant is the belief that while Claimant may have previously settled his pre-claim case against Employer by stipulation, Claimant still retained the option of filing a claim against Employer for this same injury at some later time after the settlement. I find that the logic of this argument is flawed, and if accepted, it would turn the finality of settled cases on its head. By the plain meaning of the settlement document Claimant signed to forever close this case against Employer, Claimant certified that he was “forever closing this claim” under the statute, and he was releasing Employer/Insurer “from all liability for this accident” once the settlement was approved by the Division. The statute that allows for the settlement of cases, **Mo. Rev. Stat. § 287.390.1 (2000)**, specifically allows for the “settlement or compromise of any *dispute or claim for compensation*...” [emphasis added]. Based on this wording, the legislature intended there to be the ability to settle not only cases with a claim for compensation, but also cases where there are disputes, but no claim. If that were not the case, then the words “disputes or claim for compensation” would have no meaning. As noted above, while there are provisions that allow for the reactivation of claims after they are settled, the threshold issue is whether a claim was first filed.

When reading all of these provisions together, I find that an employee is expressly allowed to settle his case without first filing a claim for compensation. However, if he does so, he is fully and finally closing out all liability against employer/insurer, and he is not then allowed to apply the reactivation statute under Section 287.140.8, since there was never a claim filed for him to reactivate. Any claims for compensation filed then after the date of the settlement based on the same accident could not include any component of a case against employer, because that was fully and finally closed by the terms of the agreed-upon settlement. Therefore, since the employer cannot be implicated by the filing of any claims for the same injury after a settlement has occurred, if no prior claim was filed, the only part of the Second Injury Fund statute of limitations that would apply, would be the two years from the date of injury. There being no other specifically enumerated tolling provisions for the Fund statute of limitations, if the claim was not filed within the two years, then it is barred. Since those are the facts we have here, the Claim against the Fund in this matter is thus barred, and no compensation can be allowed under the statute.

Claimant next argues that the phrase “a claim” in Section 287.430 means any claim including an “informal” claim for compensation against an employer-insurer which is settled without filing a formal claim.” Claimant argues that the settlement on November 15, 2004 amounts to an informal claim against Employer which then allowed Claimant one additional year to file his Claim for Compensation against the Second Injury Fund. This argument runs afoul of the very wording of Section 287.430.

According to Section 287.430, “The filing of any form, report, receipt, or agreement, other than a claim for compensation, shall not toll the running of the periods of limitation provided in this section.” There can be no doubt based on this sentence that the agreement reached on November 15, 2004 does not constitute a claim for the purposes of the statute of limitations. By using the term “claim for compensation” in this section, I find the legislature was clearly referring to the formal document entitled Claim for Compensation (Form WC-21) that Claimant first filed on September 21, 2005. Therefore, Claimant’s argument that he had a year after the settlement of the case against Employer to file a claim against the Second Injury Fund, when a claim was never previously filed, is without merit.

In summary, Claimant failed to timely file a Claim against the Second Injury Fund for the reasons described above. Therefore, Claimant’s Claim for Second Injury Fund benefits in this matter is denied. Since this issue is dispositive of the case, the rest of the issues are moot and will not be addressed here.

## **CONCLUSION:**

Claimant failed to timely file a Claim for Compensation against the Second Injury Fund in this case. Since Claimant’s Claim violated the statute of limitations for Second Injury Fund cases, this Claim against the Second Injury Fund is denied and no benefits are awarded.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

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

A true copy: Attest:

\_\_\_\_\_  
Jeffrey W. Buker

*Director*

*Division of Workers' Compensation*

Only those facts pertinent to the statute of limitations issue addressed below are being summarized here. Since that first issue was dispositive of the case, there was no reason to find any other facts or further summarize the evidence in this matter.