

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

Injury No. 11-080366

Employee: Jeremy Reynolds
Employer: Fulton State Hospital (Settled)
Insurer: C A R O (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 following issues: (1) statute of limitations; (2) permanent partial disability; and (3) liability of the Second Injury Fund.

The administrative law judge determined as follows: (1) employee timely filed his claim against the Second Injury Fund, and it is not barred by the statute of limitations; (2) employee suffered a permanent partial disability of 10% of the body as a whole referable to the groin; and (3) the Second Injury Fund is liable for 12.29 weeks of enhanced permanent partial disability.

The Second Injury Fund filed a timely application for review with the Commission alleging the administrative law judge erred in finding that employee timely filed his claim against the Second Injury Fund. The Commission granted a stay of review in this matter pending the court's issuance of a decision in the case of *Treasurer of Missouri-Custodian of the 2nd Injury Fund v. Couch*, 478 S.W.3d 417 (Mo. App. 2015).

On January 26, 2016, the Second Injury Fund filed a "Motion to Reverse Judgment," arguing that the *Couch* decision was dispositive and requesting that the Commission reverse the administrative law judge's award, or alternatively, reinstate the briefing schedule.

On March 14, 2016, the parties filed a "Joint Motion to Vacate," acknowledging the decision in *Couch*, agreeing that it is dispositive of the sole issue on appeal in this case, and requesting that the Commission vacate the administrative law judge's award.

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

Discussion

Statute of limitations

Section 287.430 RSMo provides, in relevant part, as follows:

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.

Employee: Jeremy Reynolds

The Missouri courts have recently clarified that the “claim” referenced in the foregoing language cannot be deemed to refer to the approval of a stipulation for compromise settlement where the employee has previously filed one or more claims for compensation for the injury. *Treasurer of Missouri-Custodian of the 2nd Injury Fund v. Couch*, 478 S.W.3d 417 (Mo. App. 2015).

The *Couch* court distinguished prior decisions in *Grubbs v. Treasurer of Mo. As Custodian of the Second Injury Fund*, 298 S.W.3d 907 (Mo. App. 2009), *Treasurer of the State - Custodian of the Second Injury Fund v. Cook*, 323 S.W.3d 105 (Mo. App. 2010), and *Elrod v. Treasurer of Mo.*, 138 S.W.3d 714 (Mo. 2004), and held that where an employee had previously filed a July 12, 2011, claim for compensation for a June 22, 2011, work injury, her March 28, 2013, settlement with employer could not be considered the relevant “claim” for purposes of § 287.430, and that the employee’s filing of a subsequent November 27, 2013, claim for compensation against the Second Injury Fund was therefore untimely.

The facts of this case are comparable to those at issue in *Couch*. Here, employee filed a claim for compensation against the employer and Second Injury Fund on October 27, 2011, for a work injury he sustained on October 9, 2011. On August 2, 2013, employee settled his claim against the employer. On August 16, 2013, employee voluntarily dismissed his claim against the Second Injury Fund. On July 30, 2014, employee re-filed a claim against the Second Injury Fund.

Pursuant to the holding in *Couch*, we conclude that employee’s claim for compensation is untimely, because it was not filed within two years after the date of injury or one year after filing of the claim for compensation against employer. For this reason, we deny the claim. All other issues are moot.

Conclusion

We reverse the award of the administrative law judge. Employee’s claim against the Second Injury Fund is denied because it was not timely filed for purposes of § 287.430 RSMo.

The award and decision of Administrative Law Judge Vicky Ruth, issued February 11, 2015, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 15th day of April 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Jeremy Reynolds

Injury No. 11-080366

Dependents: N/A

Employer: Fulton State Hospital
(SETTLED)

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: State of Missouri c/o CARO
(SETTLED)

Hearing Date: November 5, 2014

Checked by: VR/cs

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: October 9, 2011.
5. State location where accident occurred or occupational disease was contracted: Fulton, Callaway County, Missouri.
6. Was above employee in the employ of above employer at the time of the 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 attacked by a client and sustained an injury to his groin.
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: body as a whole referable to the groin.
14. Nature and extent of any permanent disability: 10% of the body as a whole referable to the groin.
15. Compensation paid to-date for temporary disability: N/A.

Employee: Jeremy Reynolds

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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: N/A.
19. Weekly compensation rate: \$425.19.
20. Method of wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable from employer: Previously settled.
22. Second Injury Fund liability: \$5,225.59.
 $12.29 \text{ weeks} \times \$425.19 \text{ compensation rate} = \$5,225.59.$
23. Future medical awarded: N/A.

Said payments to begin immediately and to be payable and subject to modification and review as provided by law.

The compensation awarded to 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: the Van Camp Law Firm.

Employee: Jeremy Reynolds

Injury No. 11-080366

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jeremy Reynolds

Injury No: 11-080366

Dependents: N/A

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Fulton State Hospital
(SETTLED)

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: State of Missouri c/o CARO
(SETTLED)

PRELIMINARIES

On November 5, 2014, Jeremy Reynolds (the claimant) and the Second Injury Fund appeared in Jefferson City, Missouri, for a final award hearing regarding the Second Injury Fund claim in Injury Numbers 08-041325, 11-080366, 12-000434, 12-019268, and 13-048443. Claimant was represented by attorney Christine Kiefer. The Second Injury Fund was represented by attorney Maggie Ahrens. Claimant testified in person at the hearing. The parties submitted brief position statements on or about November 21, 2014, and the record closed at that time.

STIPULATIONS

The parties stipulated to the following:

Injury No. 08-041325

1. On or about May 16, 2008, Jeremy Reynolds (the claimant) was an employee of Fulton State Hospital (the employer) when he sustained an injury by accident to his left ankle. This accident occurred while claimant was working in the course and scope of his employment with employer.
2. The employer was operating subject to the provisions of Missouri Workers' Compensation Law.
3. The employer's liability for workers' compensation was self-insured by State of Missouri, in care of CARO.
4. The Missouri Division of Workers' Compensation has jurisdiction and venue in Callaway County is proper. For trial purposes, venue is also proper in Jefferson City, Missouri.
5. Notice is not an issue.
6. Claimant filed a Claim for Compensation within the time prescribed by law.
7. Claimant's compensation rate of for permanent partial disability benefits was \$359.74.
8. Medical aid was provided.

Employee: Jeremy Reynolds

Injury No. 11-080366

Injury No. 11-080366

1. On or about October 9, 2011, claimant was an employee of Fulton State Hospital (the employer) when he sustained an injury by accident to his body as a whole referable to the groin. This accident occurred while claimant was working in the course and scope of his employment with employer.
2. The employer was operating subject to the provisions of Missouri Workers' Compensation Law.
3. The employer's liability for workers' compensation was self-insured by State of Missouri, in care of CARO.
4. The Missouri Division of Workers' Compensation has jurisdiction and venue in Callaway County is proper. For trial purposes, venue is also proper in Jefferson City, Missouri.
5. Notice is not an issue.
6. Claimant's compensation rate of for permanent partial disability benefits was \$425.19.
7. Medical aid was provided.

Injury No. 12-000434

1. On or about January 7, 2012, the claimant was an employee of Fulton State Hospital (the employer) when he sustained an injury by accident to his left ankle. This accident occurred while claimant was working in the course and scope of his employment with employer.
2. The employer was operating subject to the provisions of Missouri Workers' Compensation Law.
3. The employer's liability for workers' compensation was self-insured by State of Missouri, in care of CARO.
4. The Missouri Division of Workers' Compensation has jurisdiction and venue in Callaway County is proper. For trial purposes, venue is also proper in Jefferson City, Missouri.
5. Notice is not an issue.
6. Claimant filed a Claim for Compensation within the time prescribed by law.
7. Claimant's average weekly compensation rate for permanent partial disability benefits was \$421.17.
8. Medical aid was provided.

Injury No. 12-019268

1. On or about March 23, 2012, the claimant was an employee of Fulton State Hospital (the employer) when he sustained an injury by accident to his left hand/wrist. This accident occurred while claimant was working in the course and scope of his employment with employer.
2. The employer was operating subject to the provisions of Missouri Workers' Compensation Law.
3. The employer's liability for workers' compensation was self-insured by the State of Missouri, in care of CARO.
4. The Missouri Division of Workers' Compensation has jurisdiction and venue in Callaway County is proper. For trial purposes, venue is also proper in Jefferson City, Missouri.
5. Notice is not an issue.
6. Claimant filed a Claim for Compensation within the time prescribed by law.
7. Claimant's compensation rate for permanent partial disability benefits was \$394.49.

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Injury No. 11-080366

8. Medical aid was provided.

Injury No. 13-048443

1. On or about July 11, 2013, the claimant was an employee of Fulton State Hospital (the employer) when he sustained an injury by accident to his left ankle. This accident occurred while claimant was working in the course and scope of his employment with employer.
2. The employer was operating subject to the provisions of Missouri Workers' Compensation Law.
3. The employer's liability for workers' compensation was self-insured by the State of Missouri, in care of CARO.
4. The Missouri Division of Workers' Compensation has jurisdiction and venue in Callaway County is proper. For trial purposes, venue is also proper in Jefferson City, Missouri.
5. Notice is not an issue.
6. Claimant filed a Claim for Compensation within the time prescribed by law.
7. Claimant's compensation rate for permanent partial disability benefits was \$276.32.
8. Medical aid was provided.

ISSUES

The parties agreed that the issues to be resolved are as follows:

Injury Nos. 08-041325, 12-000434, 12-019268, and 13-048443

1. Nature and extent of permanent partial disability.
2. Liability, if any, of the Second Injury Fund.

Injury No. 11-080366

1. Whether the Second Injury Fund claim was timely filed.
2. Nature and extent of permanent partial disability.
3. Liability, if any, of the Second Injury Fund.

EXHIBITS

On behalf of claimant, the following exhibits were entered into evidence:

- | | |
|-----------|--|
| Exhibit 1 | <i>Stipulation for Compromise Settlement</i> , Injury No. 13-048443. |
| Exhibit 2 | <i>Stipulation for Compromise Settlement</i> , Injury No. 12-019268. |
| Exhibit 3 | <i>Stipulation for Compromise Settlement</i> , Injury No. 12-000434. |
| Exhibit 4 | <i>Stipulation for Compromise Settlement</i> , Injury No. 11-080366. |
| Exhibit 5 | <i>Stipulation for Compromise Settlement</i> , Injury No. 08-041325. |
| Exhibit 6 | Records of the Division of Workers' Compensation, including <i>Stipulation for Compromise Settlement</i> , Injury No. 02-033464. |
| Exhibit 7 | Medical report of Dr. David Volarich, 5/11/2011. |
| Exhibit 8 | Medical records from Callaway Community Hospital. |

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Exhibit 9	Medical records from Urology Associates of Central Missouri.
Exhibit 10	Medical records from University Hospital and Clinics.
Exhibit 11	Medical records from St. Mary's Occupational Medicine.
Exhibit 12	Medical records from University Hospital and Clinics.
Exhibit 13	Medical records from Columbia Orthopaedic Group.
Exhibit 14	Medical records from The Orthopedic Center of St. Louis.
Exhibit 15	Medical records from Fulton Medical Clinic.
Exhibit 16	Medical records from The Orthopedic Center of St. Louis.
Exhibit 17	Medical records from The Orthopedic Center of St. Louis.
Exhibit 18	Medical records from Runde Occupational & Environmental Physicians.

The following exhibits were entered into evidence on behalf of the Second Injury Fund:

Exhibit A	<i>Claim for Compensation</i> , Injury No. 11-080366.
Exhibit B	<i>Order of Dismissal</i> , Injury No. 11-080366.
Exhibit C	<i>Claim for Compensation</i> , Second Injury Fund only, Injury No. 11-080366.

Note: All marks, handwritten notations, highlighting, or tabs on the exhibits were present at the time the documents were admitted into evidence.

FINDINGS OF FACT

Based on the above exhibits and the testimony presented at the hearing, I make the following findings:

1. Claimant was born on September 15, 1975. On the date of the hearing, he was 39 years old.
2. Claimant is not currently employed. His last employment was with Fulton State Hospital (the employer); he worked there for approximately 7.5 years. He started with the employer as a Forensic Rehabilitation Specialist (a/k/a Security Aide) and then transferred to a position in Housekeeping. He was employed full time with the employer.
3. In April 2002, claimant sustained an injury to his right knee while working for Dollar General Distribution [Center]. He underwent surgery in approximately 2003. He subsequently settled with Dollar General for 15% of the right knee.
4. On or about May 16, 2008, claimant sustained an injury by accident arising out of and in the course and scope of employment with the employer (Fulton State Hospital). This injury was designated Injury No. 08-041325. The accident occurred when claimant was playing basketball with the clients of Fulton State Hospital. Claimant's foot became tangled up with a client's foot, causing claimant's left foot to roll and sustain injury. Claimant heard a loud pop and immediately experienced swelling. The employer/insurer provided medical treatment. Claimant was diagnosed with a torn anterior talofibular

ligament, possible lateral malleolus stress fracture. In approximately October 2008, claimant underwent surgery for lateral compartment reconstruction of the anterior talofibular ligament with orthopedic hardware. In 2009, he underwent a second surgical repair for left peroneal tenosynovectomy with lysis of adhesions and open debridement of the peroneal tendon. On August 2, 2010, claimant sustained another injury while at work; this injury was also an inversion injury to the left ankle.¹ In 2010, claimant underwent a third surgery for arthroscopic debridement of the ankle, repeat lateral ankle reconstruction with allograft, peroneal tenosynovectomy with stabilization and removal of hardware that was previously placed in the talus and fibula.

5. On or about October 9, 2011, claimant sustained an injury when he was involved in a staff support and a client grabbed him in the groin area and pulled and twisted forcefully. Claimant filed a claim for compensation on October 27, 2011, and the injury was designated Injury No. 11-080366.²
6. On October 27, 2011, claimant saw Dr. Eddie Runde regarding the October 2011 work injury to his groin. The diagnosis was bilateral testicle and scrotum injury.
7. On November 9, 2011, claimant returned to Dr. Runde for a follow-up visit on his groin injury. At that visit, claimant reported his pain had gotten a little better but it was still a constant pain that caused a sense of nausea.³ Dr. Runde noted claimant would see a urologist in about two weeks. Claimant was continued on restricted duty. He subsequently received additional conservative care for this injury.
8. On January 7, 2012, claimant sustained an injury at work when he stepped on an uneven portion of concrete and "rolled" his left ankle; this injury was designated as Injury No. 12-000434. Claimant first treated for this injury with Dr. Runde on January 10, 2012.⁴ Dr. Runde's diagnosis was (1) left ankle sprain, (2) history of previous injury to the left ankle, and (3) rule out internal derangement.
9. At a visit on January 18, 2012, Dr. Runde noted that the recent MRI report revealed torn peroneal tendons without retraction, along with some post-operative changes. The study also showed tears of the anterior and posterior talofibular ligaments that were thought to be old tears. Dr. Runde referred claimant to an orthopedic surgeon.
10. On January 23, 2012, claimant saw Dr. John Krause with a chief complaint of left ankle pain.⁵ Dr. Krause recorded a history of a 2010 ankle reconstruction and a January 7, 2012 work injury that occurred when claimant misstepped on uneven pavement and rolled his ankle. Dr. Krause's assessment was history of left ankle sprain status post lateral ankle reconstruction. The doctor referred claimant to physical therapy.

¹ This injury was designated Injury No. 10-060087, although it was subsequently dismissed as a part of the settlement in Injury No. 08-041325.

² Exh. A.

³ Exh. 18.

⁴ Exh. 18.

⁵ Exh. 17.

11. Claimant returned to Dr. Krause on February 24, 2012.⁶ The doctor noted claimant had minimal soft tissue swelling laterally with full ankle and hind foot motion and a negative anterior drawer. Dr. Krause found claimant was at maximum medical improvement and released him to full duty with no restrictions.
12. Upon cross-examination, claimant acknowledged that after the healing period for the January 2012 work injury to his left ankle, the ankle basically returned to how it was after the 2008 injury.
13. On March 23, 2012, claimant sustained another work injury to his left hand when a client fell on him during a staff support. Claimant felt immediate discomfort in his left hand and received prompt medical treatment. This injury was designated Injury No. 12-019268. Claimant is right-hand dominant.
14. On March 28, 2012, claimant saw Dr. Runde regarding his March 23, 2012 injury.⁷ Claimant reported being injured during a staff support, when a client fell and landed on claimant's left hand. Claimant was also hit or kicked in the right side of his face. Claimant treated at the emergency room. Dr. Runde noted that claimant has had improvement in his right face pain but was still having issues with his left wrist. Dr. Runde's diagnoses was left wrist sprain and left pinkie finger sprain.
15. Claimant returned to Dr. Runde on April 2, 2012.⁸ Claimant reported that his wrist pain was getting a little better but that his pinkie finger still hurt. Dr. Runde recommended that claimant begin physical therapy.
16. At the April 11, 2012 visit, Dr. Runde noted that claimant's left pinkie sprain was improving as was his left wrist sprain.⁹
17. On April 18, 2012, claimant followed up with Dr. Runde.¹⁰ Claimant reported that his hand pain and finger pain was getting better and he had no problem with grasping or gripping. Dr. Runde discharged claimant from treatment.
18. On July 11, 2013, claimant was injured while working when he stepped on a pallet and hurt his left ankle. This injury was designated as Injury No. 13-048443. Claimant again treated with Dr. Krause. At the August 9, 2013 visit, claimant saw Dr. Krause recorded the following in his notes:

Jeremy is here for evaluation of his left ankle. He was at maximum medical improvement from his last injury in February 2012. **From February 2012 to July 2013 he had no problems with the ankle and went back to all activities.**

⁶ Exh. 17.

⁷ Exh. 18.

⁸ Exh. 18.

⁹ Exh. 18.

¹⁰ Exh. 18.

Employee: Jeremy Reynolds

Injury No. 11-080366

On 7/11/13 he was putting away some supplies when he stepped on a pallet. There was a hole in the pallet and he rolled his ankle. He caught himself and did not fall to the ground. He was able to keep working that day. He had increased pain and swelling the next day and was seen by a worker's compensation physician. He went back into his boot that he had at home and eventually had an MRI. He is here for follow-up. He has been on light duty. He denies other injuries.¹¹ [Emphasis added.]

Dr. Krause reviewed the MRI and noted that it showed that claimant's ligament reconstruction is still intact and that there was no acute bony injury. The doctor's assessment was left ankle sprain and status post Elmslie left lateral ankle reconstruction. Dr. Krause recommended claimant come out of the boot and undergo a course of physical therapy.

19. Claimant returned to Dr. Krause on August 30, 2013. At that time, the doctor noted that claimant had been doing physical therapy and was making "slow, steady progress. He still has some aching in his ankle."¹² Dr. Krause put claimant on full duty with no restrictions.
20. At the September 20, 2013 follow-up visit, Dr. Krause recorded that claimant "notes that his pain is slowly improving. He is happy with his progress."¹³ The doctor's assessment was status post left ankle reconstruction with ankle sprain, resolved; he also found claimant to be at maximum medical improvement.

Independent Medical Evaluation - Dr. David T. Volarich

21. On or about May 22, 2011, Dr. David T. Volarich examined claimant for an Independent Medical Examination (IME). Dr. Volarich examined claimant and reviewed various medical records. In his report, Dr. Volarich addresses claimant's May 16, 2008 work injury to his left ankle and claimant's August 2, 2010 injury to the same ankle. Dr. Volarich did **not** address claimant's subsequent injuries that occurred in 2011, 2012, or 2013.
22. Dr. Volarich opined that claimant has a permanent partial disability of 15% of the left knee due to the sprain/strain injury. As to the May 16, 2008 work injury, Dr. Volarich opined that claimant has a permanent partial disability of 40% of the left ankle due to the torn anterior talofibular ligament that required reconstruction and excision of a portion of the talus as well as synovectomy to repair impingement. Dr. Volarich opined that as to the August 2, 2010 work injury, claimant sustained a 30% permanent partial disability of the left lower extremity rated at the ankle due to ongoing instability that required debridement of the ankle, repeat lateral ankle reconstruction with allograft, peroneal tenosynovectomy and stabilization with removal of previously placed hardware.

¹¹ Exh. 16.

¹² Exh. 16.

¹³ Exh. 16.

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23. Dr. Volarich opined that the combination of claimant's disabilities creates a substantially greater disability than the simple sum or total of each separate injury/illness and that a loading factor should be added.
24. Claimant testified that in September 2014, he underwent surgery on his right knee; this injury was not designated as a work injury.

Stipulations for Compromise Settlement and Miscellaneous

25. Claimant settled the primary case in Injury No. 02-033464 for 15% of the right knee.
26. Claimant settled his primary case against the employer/insurer in Injury Number 08-041325 for 38% permanent partial disability of the left ankle at the 155-week level. That settlement includes the dismissal of Injury No. 10-060087.
27. On August 2, 2013, claimant settled his case against the employer/insurer in Injury Number 11-080366 for 10% permanent partial disability of the body as a whole plus 3.5 weeks disfigurement.¹⁴ On August 16, 2013, claimant's claim against the Second Injury Fund was dismissed.¹⁵ Claimant re-filed his claim against the Second Injury Fund on July 30, 2014.¹⁶
28. Claimant settled his case against the employer/insurer in Injury Number 12-000434 for 3% permanent partial disability of the left ankle.
29. In Injury Number 12-019268, claimant settled with the employer/insurer for 3.5% of the left hand at the level of the wrist.
30. Claimant settled Injury Number 13-048443 with the employer/insurer for "7.5% of the 91.45 week level referable to the left ankle."¹⁷

CONCLUSIONS OF LAW

Based upon the findings of fact and the applicable law, I find the following:

Under Missouri Workers' Compensation law, the claimant bears the burden of proving all essential elements of his or her workers' compensation claim.¹⁸ The employee must prove by a preponderance of credible evidence all material elements of his or her claim, including Second

¹⁴ Exh. 4.

¹⁵ Exh. B.

¹⁶ Exh. C.

¹⁷ Exh. 1.

¹⁸ *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo.App. W.D. 1990); *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo.App. 2002).

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Injury Fund liability.¹⁹ Proof is made only by competent and substantial evidence, and may not rest on speculation.²⁰

The Second Injury Fund is a creature of statute, and benefits from the Fund are awarded only if the employee proves that under Section 287.220.1, RSMo (2000), he or she is entitled to such benefits. In order to recover against the Second Injury Fund, a claimant must prove that he had a pre-existing permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment should he become unemployed; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15% for major extremities.²¹ Second Injury Fund liability exists only if the employee suffers from a pre-existing permanent partial disability (PPD) that combines with a compensable injury to create a disability greater than the simple sum of disabilities.²² When such proof is made, the Second Injury Fund is liable only for the difference between the combined disability and the simple sum of the disabilities.²³

Section 287.430, addresses the applicable statute of limitations as follows: “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....”²⁴

Injury No. 11-080366

Issue 1: Whether the Second Injury Fund claim was timely filed.

Issue 2: Nature and extent of permanent partial disability.

Issue 3: Liability, if any, of the Second Injury Fund.

In Injury No. 11-080366, claimant contends that he is entitled to benefits from the Second Injury Fund under Section 287.220, RSMo. The Second Injury Fund argues that no benefits are due in this case as the Fund believes that the claim is barred by Section 287.430. Specifically, the Second Injury Fund contends that claimant’s Claim for Compensation against the Fund was dismissed and not re-filed within two years of the date of injury or within one year from the date of the claim against the employer.

A summary of relevant dates is as follows:

- 10/09/11 Date of injury.
- 10/27/11 Original claim for compensation against the employer and the Second Injury Fund.²⁵

¹⁹ *Meilves v. Morris*, 422 S.W.2d 335, 399 (Mo. 1968).

²⁰ *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo.App. W.D. 1974).

²¹ *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo.App. E.D. 2008) (Citations omitted).

²² Section 287.220.1, RSMo.; *Anderson v. Emerson Elec. Co.*, 698 S.W.2d 574, 576 (Mo.App. 1985).

²³ *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo.App. 1990).

²⁴ Section 287.430, RSMo.

²⁵ Exh. A.

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- 8/02/13 Claimant settled with the employer/insurer.²⁶
- 8/16/13 Claimant's claim against the Second Injury Fund was dismissed.²⁷
- 7/30/14 Claimant re-filed his claim against the Second Injury Fund.²⁸

The Second Injury Fund argues that the re-filing of the claim against the Fund, on July 30, 2014, was not timely as it was more than two years after the date of injury (October 9, 2011) and more than a year after the (original) claim against the employer (October 27, 2011).

Claimant, relying on the Supreme Court decision in *Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund*,²⁹ contends that "a claim" does not mean "the claim" or "original claim," but instead refers to any claim that is timely filed. Claimant also relies on the case of the *Treasurer of the State – Custodian of the Second Injury Fund v. Cook*.³⁰ In *Cook*, the court found that a stipulation for compromise settlement constitutes "a claim" filed against an employer. Following claimant's reasoning, the August 2, 2013 settlement with the employer/insurer constitutes a claim, and thus the re-filing of the claim against the Second Injury Fund on July 30, 2014, was within the two-year deadline.

On December 31, 2014, after the trial in this case and the filing of the parties' position statements, the Labor and Industrial Relations Commission issued its decision in the case of *Couch v. Treasurer of Missouri as Custodian of the Second Injury Fund*.³¹ Although not binding, this decision addresses this same statute of limitations question and is instructive to the case at hand. In *Couch*, the Administrative Law Judge found that for purposes of determining the timeliness of a filing for Second Injury Fund benefits, a settlement between the claimant and the employer/insurer constitutes a claim. The Administrative Law Judge then found that the statute of limitations was not a bar to recovery in that case, where the claim against the Second Injury Fund was filed within one year after the settlement of the claim with employer/insurer. The Commission affirmed, adding that the "[e]mployee also correctly notes that in the case of *Elrod v. Treasurer of Mo.*, 138 S.W.3d 714 (Mo. 2004), the Missouri Supreme Court specifically held that 'a claim' does not mean 'the claim' or 'original claim,' but rather any claim that is timely filed."³²

Upon a thorough review of the applicable law and the facts, I find that claimant's claim against the Second Injury Fund was timely filed and is not barred by the statute of limitations.

I further find that claimant has established a right to recover from the Second Injury Fund. On October 9, 2011, claimant sustained a compensable work injury that resulted in permanent partial disability of 10% of the body as a whole referable to the groin. This injury resulted in a total of 40 weeks of disability.

²⁶ Exh. 4.

²⁷ Exh. B.

²⁸ Exh. C.

²⁹ 138 S.W.3d 714 (Mo. 2004).

³⁰ 323 S.W.3d 105 (Mo.App.W.D. 2010).

³¹ 2014 WL 7466197 (Mo.Lab.Ind.Rel.Com) (Injury No. 10-012307).

³² *Id.*

Employee: Jeremy Reynolds

Injury No. 11-080366

I also find that at the time of the 2011 work injury, claimant had the following pre-existing permanent partial disabilities that meet the statutory requirements and were of such seriousness as to constitute a hindrance or obstacle to employment or re-employment: 38% of the left ankle and 15% of the right knee. Thus, the pre-existing injuries resulted in 82.9 weeks of disability.

Claimant contends that the primary injury of October 9, 2011, combined synergistically with the pre-existing injuries to cause an overall greater disability. Although no medical expert testified specifically on this issue as it pertains to the 2011 injury, I find that based on record as a whole, claimant has met his burden of proof that the disability from the 2011 work injury combined with the pre-existing permanent partial disabilities to cause 10% greater overall disability than the independent sum of the disabilities. The Second Injury Fund liability is calculated as follows: 40 weeks for the primary injury (body as a whole referable to the groin) plus 82.9 weeks for the pre-existing injuries (left ankle and right knee) equals 122.9 weeks. I find that it is appropriate to multiply this figure, 122.9 weeks, by a 10% load factor, resulting in 12.29 weeks of overall greater disability. Thus, the Second Injury Fund is liable for \$5,225.59 (12.29 weeks of overall greater disability x \$425.19 weekly compensation rate).

Any pending objections not expressly ruled on in this award are overruled.

This Award is subject to a lien in the amount of 25% of the payments hereunder in favor of the Van Camp Law Firm for necessary legal services rendered to claimant.

Made by: _____

Vicky Ruth
Administrative Law Judge
Division of Workers' Compensation