

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

Injury No.: 05-128902

Employee: Wilbert Shepard  
Employer: Yellow Transportation (Settled)  
Insurer: Self-Insured (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.<sup>1</sup> We have reviewed the evidence, read the briefs of the parties, and considered the whole record. Pursuant to § 286.090 RSMo, we reverse the award and decision of Administrative Law Judge Cornelius T. Lane dated December 2, 2009. The award and decision of the administrative law judge is attached hereto and incorporated to the extent it is not inconsistent with our findings and conclusions herein.

**Preliminaries**

Employee alleges injury resulting from two work-related falls. Employee settled his claim against employer/insurer for the payment of a lump sum of \$28,040.76. The settlement was "based upon approximate disability of 14% of the body as a whole referable to the head and 9% of the left shoulder."

The claim proceeded to hearing on employee's claim against the Second Injury Fund. The administrative law judge awarded permanent partial disability benefits against the Second Injury Fund. Both employee and the Second Injury Fund filed Applications for Review from the administrative law judge's award in this matter.

The Second Injury Fund alleges the administrative law judge should have denied permanent partial disability benefits against the Second Injury Fund on the ground that employee failed to prove his compensable head injury met the statutory threshold for Second Injury Fund permanent partial disability liability. Employee counters that he had several disabilities from his December 19, 2005, work falls that met the threshold.

Employee alleges the award of permanent partial disability against the Second Injury Fund is insufficient. Employee contends that the administrative law judge erred by failing to take into account a preexisting right knee injury and by using a combined disability for employee's conditions of chronic obstructive pulmonary disorder (COPD) and coronary artery disease (CAD). The Second Injury Fund counters that employee's knee condition, COPD, and CAD were not hindrances or obstacles to employee's employment.

Before we address the points raised in the Second Injury Fund's application for review, we must comment on the Second Injury Fund's filings in this matter. This matter was heard at the same time as two other matters (Injury Nos. 05-041995 and 06-097574). The administrative law judge issued a distinct award in each case. The Second Injury Fund filed one Application for Review that challenged all three awards. The Second

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<sup>1</sup> Statutory references are to the Revised Statutes of Missouri 2005, unless otherwise indicated.

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Injury Fund also addressed all three cases in each of its briefs. We advise the Second Injury Fund that if the facts and issues underlying each claim are distinct, we generally require that a distinct application for review and brief be filed for each award. We recognize that the parties are well-acquainted with the facts and allegations of each case by the time the cases have been tried. But we are not. The job of familiarizing ourselves with the facts and allegations in each case is made more difficult where a brief addresses more than one award.

### **Second Injury Fund**

The only issue before us is the extent of Second Injury Fund liability for enhanced permanent partial disability. To recover on a claim of enhanced permanent partial disability against the Second Injury Fund, employee must first show that he sustained a compensable injury that meets one of the minimum thresholds set forth in § 287.220.1 RSMo. If employee clears that hurdle, he must then show that he suffers from one or more pre-existing disabilities constituting a hindrance or obstacle to his employment or reemployment, which pre-existing disabilities also meet the thresholds set out in § 287.220.1.

The Second Injury Fund does not dispute that employee sustained a compensable injury. The Second Injury Fund only disputes the administrative law judge's finding that employee's disabilities from the primary injury meet the thresholds of § 287.220.1.

The administrative law judge found "the settlement reached in the case of 14% body as a whole, referable to the neck and 9% of the shoulder to be correct." The administrative law judge later concluded that 14% accurately reflects the disability associated with employee's head injury. The administrative law judge concluded employee's head disability satisfied the threshold of § 287.220.1.

### **Employee's Settlements Do Not Bind Us**

The Second Injury Fund alleges the administrative law judge erred in awarding permanent partial disability against the Second Injury Fund because "only [employee's] head injury settled with his employer in excess of the necessary threshold of 12.5% disability" and the opinion of Dr. Volarich shows that employee sustained only a 5% disability attributable to the head injury.

By this argument, the Second Injury Fund suggests that we may only consider the conditions and injuries identified in employee's settlement with employer/insurer when determining the Second Injury Fund's liability for enhanced permanent partial disability. Notwithstanding the Second Injury Fund's belief that we are constrained by the terms of the settlement as to what may qualify as a compensable primary injury, the Second Injury Fund contends we are not constrained by the settlement terms as to the agreed percentage of disability.

The Second Injury Fund frequently advances the argument that we are bound by the terms of a worker's compromise settlement with employer if those terms would defeat Second Injury Fund liability but we are not bound by the terms of a worker's compromise settlement with employer if those terms would establish an element of Second Injury Fund liability. The Second Injury Fund usually cites the Eastern District

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decision in *Conley v. Treasurer*<sup>2</sup> for this proposition notwithstanding the Eastern District's later expression that, "*Conley* merely holds that a prior settlement agreement may be admitted in a workers' compensation hearing if clear and cogent reasons exist to do so."<sup>3</sup> To quell any lingering beliefs that *Conley* compels us to use the terms of a settlement resolving a worker's primary claim to defeat that worker's Second Injury Fund claim, we explain why we are not.

As we understand it, the *Conley* court's reasoning was as follows: Under the version of § 287.390 RSMo in effect in 1994, an administrative law judge was prohibited from approving "a settlement that was not in accordance with the rights of the parties as given in [Chapter 287]."<sup>4</sup> The administrative law judge approved Mr. Conley's settlement. Therefore, the *Conley* court concluded that the approval was equivalent to the administrative law judge making a determination that the permanent partial disability percentage recited in the settlement was in accordance with § 287.190 RSMo regarding permanent partial disability. The court found clear and cogent reasons to admit the settlement as evidence of employee's permanent partial disability under those circumstances. The *Conley* court concluded "to relitigate employee's disability from his last injury *as determined by the ALJ* would violate section 287.390 and we decline to do so."<sup>5</sup> (Emphasis added).

With the sweeping 2005 changes to the Workers' Compensation Law, § 287.390 was amended to take away the administrative law judge's power to disapprove settlements that are not in accordance with the Workers' Compensation Law. Now, the administrative law judge must approve a settlement "as long as the settlement is not the result of undue influence or fraud, the [worker] fully understands his or her rights and benefits, and voluntarily agrees to accept the terms of the agreement." This is so even if the administrative law judge does not think the settlement is in accordance with the worker's rights under the law.

The administrative law judge approved the Stipulation for Compromise Settlement in this case on November 28, 2008. The settlement and its approval tend to establish only that the settlement was not the result of undue influence or fraud, employee fully understood his rights and benefits, and employee voluntarily agreed to accept the terms of the settlement. As none of those issues are germane to our determination of Second Injury Fund liability, we would find there was no clear and cogent reason to admit the settlement. But, the administrative law judge admitted the settlement and neither party raised its admission as an issue for us to decide. The settlement is in the record. We are not bound by the permanent partial disability recitations in employee's settlement and we give them little weight in determining the extent of employee's permanent partial disability from the primary injury.

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<sup>2</sup> *Conley v. Treasurer*, 999 S.W.2d 269 (Mo. App. 1999), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

<sup>3</sup> *Reidelberger v. Hussman Refrigerator Co.*, 135 S.W.3d 431, 434 (Mo. App. 2004).

<sup>4</sup> *Conley*, 999 S.W.2d at 275

<sup>5</sup> *Conley*, 999 S.W.2d at 275

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### **Permanent Partial Disability**

As discussed above, the determination of the nature and extent of employee's disability from the work injury cannot be made solely by reference to the settlement. A proper determination of the nature and extent of employee's disability requires a review of all of the evidence on the issue.

At the outset, we note that employee's testimony regarding the effects of his December 19, 2005, falls is vague. From what we can glean from his testimony and the treatment records, employee returned to work shortly after the accident. He worked light duty for a short time after the falls. Employee then underwent bilateral carpal tunnel syndrome releases. Employee returned to work full duty after his recovery from surgery and continued to work full duty until he was again injured on October 16, 2006.

Dr. Volarich was the only medical expert to testify regarding employee's disabilities resulting from the December 19, 2005, accident. Dr. Volarich opined that as a result of employee's two falls on December 19, 2005, employee sustained the following disabilities:

- 15% permanent partial disability of the body as a whole rated at the lumbosacral spine;
- 10% permanent partial disability of the body as a whole rated at the cervical spine;
- 15% permanent partial disability of the right upper extremity at the shoulder;
- 15% permanent partial disability of the left upper extremity at the shoulder;
- 5% permanent partial disability of the body as a whole rated at the head; and
- 15% permanent partial disability of the right lower extremity at the right knee.

Dr. Volarich's opinions are inconsistent with the medical records in evidence. The medical records do not reflect that employee complained of neck pain during his treatment after the falls. The medical records do not reflect that employee complained of right knee pain during his treatment after the falls. The medical records do not reflect that employee complained of left shoulder pain during his treatment after the falls. Dr. Volarich's opinions that employee sustained permanent disability to his neck, right knee, and left shoulder as a result of the December 19, 2005, falls are not supported by the medical records. These unfounded opinions undercut his credibility regarding employee's other alleged permanent partial disabilities.

We will address the other ratings in turn. The diagnosis related to employee's low back was a lumbar strain. At various times, employee's treating physician imposed restrictions on lifting, walking, climbing, pushing, pulling, squatting, kneeling and driving. Notwithstanding, employee returned to work full duty after his recovery from his carpal tunnel syndrome releases. The only treatments prescribed employee were physical therapy and anti-inflammatory medications. Dr. Volarich ultimately concluded that employee sustained an aggravation of his underlying degenerative disc disease. We conclude that employee sustained a 5% permanent partial disability of the body as a whole referable to lumbar spine as a result of the December 19, 2005, falls.

Employee initially complained of pain in his left thigh and left hip. Employee's treating physician diagnosed a thigh sprain and hip strain. Employee later complained of pain in his left groin. Dr. Volarich ultimately concluded that employee sustained an aggravation of his underlying degenerative disc disease.

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Employee initially complained of pain in his right shoulder for which his treating physician made a diagnosis of shoulder strain. Again, the only treatments prescribed employee were physical therapy and anti-inflammatory medications. There is no mention of employee's shoulder at his follow-up treatment visits of January 5, 2006, and January 10, 2006. Employee did not testify about any problems he is having with his right shoulder. Dr. Volarich's opinion that employee sustained an injury or permanent disability to his right shoulder as a result of the December 19, 2005, falls is not supported by the medical records of employee's treating physicians or even by employee's own testimony.

Employee did not complain of a headache or vision problems at his first treatment visit the day after the accident. By the next day, however, employee complained of a headache and blurry vision. By the second day after the falls, employee complained of double vision. The double vision resolved after about 2½ weeks but employee complained of ongoing headaches. Dr. Volarich notes that employee's headaches ultimately improved. Dr. Volarich offered a disability rating of 5% permanent partial disability rated at the head due to a closed head injury resulting in concussion. We find no medical records evidencing that employee suffered a concussion as a result of the December 19, 2005, falls. We are not persuaded by Dr. Volarich's permanent partial disability opinions in this matter. Nonetheless, based upon the medical records and employee's testimony, a 5% rating seems appropriate for employee's lingering headaches.

### **Conclusion**

We find that employee sustained a 5% permanent partial disability of the body as a whole referable to his headaches and a 5% permanent partial disability of the body as a whole referable to his lumbar spine as a result of his December 19, 2005, work falls. Because employee has not shown he sustained any disabilities from the December 19, 2005, falls that meet the thresholds set forth in § 287.220 RSMo, employee is not entitled to permanent partial disability benefits from the Second Injury Fund.

### **Award**

We reverse the award of the administrative law judge and deny compensation in this matter.

Given at Jefferson City, State of Missouri, this 9<sup>th</sup> day of February 2011.

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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**DISSENTING OPINION FILED**

John J. Hickey, Member

Attest:

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Secretary

Employee: Wilbert Shepard

**DISSENTING OPINION**

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be affirmed. I adopt the award and decision of the administrative law judge.

I respectfully dissent from the decision of the majority of the Commission to deny benefits in this case.

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John J. Hickey, Member

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

Injury No.: 05-041995

Employee: Wilbert Shepard  
Employer: Yellow Transportation (Settled)  
Insurer: Self-Insured (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.<sup>1</sup> We have reviewed the evidence, read the briefs of the parties, and considered the whole record. Pursuant to § 286.090 RSMo, we reverse the award and decision of Administrative Law Judge Cornelius T. Lane dated December 2, 2009. The award and decision of the administrative law judge is attached hereto solely for reference.

**Preliminaries**

Employee alleges he sustained bilateral carpal tunnel syndrome arising out of and in the course of his employment. Employee settled his claim against employer/insurer. This matter is before us to determine the liability of the Second Injury Fund for enhanced permanent partial disability, if any.

**Discussion**

“A mere cursory reading of § 287.220.1 makes it clear that an employee/claimant must establish that he or she sustained a compensable injury and that the injury caused the requisite level of permanent partial disability as part of his or her claim against the Fund.”<sup>2</sup>

The administrative law judge allowed compensation in this matter without making a finding that employee's alleged primary injury – bilateral carpal tunnel syndrome – constituted a compensable injury. In particular, the administrative law judge did not address whether employee had proven his bilateral carpal tunnel syndrome was medically causally related to his employment.

“An occupational disease is compensable if it is clearly work related and meets the requirements of an injury which is compensable as provided in subsections 2 and 3 of section 287.020.”<sup>3</sup>

“In proving a causal connection between the conditions of employment and the occupational disease, the claimant bears the burden of proof. ‘To prove causation it is sufficient to show ‘a recognizable link between the disease and some distinctive feature of the job which is common to all jobs of that sort.’ And, ‘there must be evidence of a direct causal connection between the conditions under which the work is performed and the occupational disease.’ However, the cause and development of an occupational

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<sup>1</sup> Statutory references are to the Revised Statutes of Missouri 2000, unless otherwise indicated.

<sup>2</sup> *Nance v. Treasurer of Mo.*, 85 S.W.3d 767, 771 (Mo. App. 2002), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

<sup>3</sup> Section 287.067.2 RSMo.

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disease is not a matter of common knowledge. There must be medical evidence of a direct causal connection. 'The question of causation [is] one for medical testimony, without which a finding for claimant would be based on mere conjecture and speculation and not on substantial evidence.' 'A claimant must submit medical evidence establishing a probability that working conditions caused the disease, although they need not be the sole cause.'"<sup>4</sup>

The administrative law judge sustained the Second Injury Fund objections to the admission of Dr. Berkin's report (hearsay) and Dr. Berkin's deposition (offered after the record closed). Employee did not raise the propriety of the administrative law judge's evidentiary ruling as an issue in either his Application for Review or his brief. Consequently, Dr. Berkin's opinions are not in evidence. We disregard references in employee's brief to Dr. Berkin's opinions.

In his brief, employee states Dr. Volarich provided an opinion establishing employee's carpal tunnel syndrome is compensable. We have reviewed Dr. Volarich's deposition and his report. Dr. Volarich offers no opinion that there was a causal relationship between the conditions under which employee performed his work duties and the development of carpal tunnel syndrome. Nor did Dr. Volarich offer an opinion that there exists a recognizable link between carpal tunnel syndrome and some distinctive feature of employee's job which is common to all jobs of that sort.

### **Conclusion**

The record is devoid of an expert medical opinion establishing a medical causal relationship between employee's work duties and his carpal tunnel syndrome. Because employee has failed to establish that he sustained a compensable occupational disease, employee's claim against the Second Injury Fund must fail.

### **Award**

We reverse the award of the administrative law judge and deny compensation in this matter. All other issues are moot.

Given at Jefferson City, State of Missouri, this 9<sup>th</sup> day of February 2011.

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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**DISSENTING OPINION FILED**

John J. Hickey, Member

Attest:

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<sup>4</sup> *Vickers v. Mo. Dep't of Pub. Safety*, 283 S.W.3d 287, 292 (Mo. App. 2009) (internal citations omitted).

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Secretary

Employee: Wilbert Shepard

**DISSENTING OPINION**

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be affirmed. I adopt the award and decision of the administrative law judge.

I respectfully dissent from the decision of the majority of the Commission to deny benefits in this case.

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John J. Hickey, Member

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

Injury No.: 06-097574

Employee: Wilbert Shepard  
Employer: Yellow Transportation (Settled)  
Insurer: Self-Insured (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.<sup>1</sup> We have reviewed the evidence, read the briefs of the parties, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of Administrative Law Judge Cornelius T. Lane dated December 2, 2009. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

**Preliminaries**

The administrative law judge awarded permanent total disability benefits to employee from the Second Injury Fund. The Second Injury Fund filed an Application for Review of the award alleging the administrative law judge erred in awarding permanent total disability benefits from the Second Injury Fund. Employee filed an Application for Review alleging he is entitled to additional benefits from the Second Injury Fund.

**Additional Findings**

We have considered employee's testimony regarding his fall of October 16, 2006, and its effects. We have also considered the records of Dr. Heim, the deposition and report of Dr. Volarich, and the Stipulation for Compromise Settlement employee entered with employer. Based upon the foregoing, we find that employee sustained a 12.5% permanent partial disability of the body as a whole referable to the lumbar spine (50 weeks) and a 15% permanent partial disability at the level of the right knee (24 weeks) as a result of the 2006 work fall.

**Permanent Total Disability**

We are not persuaded that employee is unable to compete in the open labor market. We find the opinions of Dr. Heim more credible than the opinions of Dr. Volarich. Although Dr. Heim does not believe employee can return to his work as a dockhand, the only restrictions Dr. Heim recommends is no lifting greater than 50 pounds and no prolonged bending and twisting. Vocational expert Delores Gonzalez agrees with Dr. Heim that employee cannot return to his work as a dockhand with these restrictions. However, Ms. Gonzalez believes that employee can perform work within the sedentary to light exertional levels under the restrictions of Dr. Heim. We find credible the opinion of

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<sup>1</sup> Statutory references are to the Revised Statutes of Missouri 2005, unless otherwise indicated.

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Ms. Gonzalez. We believe an employer could reasonably be expected to hire employee with those restrictions.

Accordingly, we reverse the administrative law judge's conclusion that employee is permanently and totally disabled.

### **Permanent Partial Disability**

We must next consider whether employee is entitled to permanent partial disability benefits from the Second Injury Fund. To recover on a claim of enhanced permanent partial disability against the Second Injury Fund, employee must first show that he sustained a compensable injury that meets one of the minimum thresholds set forth in § 287.220.1 RSMo. If employee clears that hurdle, he must then show that he suffers from one or more pre-existing disabilities constituting a hindrance or obstacle to his employment or reemployment, which pre-existing disabilities also meet the thresholds set out in § 287.220.1. Then, the employee must show that the effects of all of the disabilities under consideration combine in such a way that the overall resulting disability exceeds the simple sum of the disabilities.

In this case, there is no dispute that employee's disability from the October 16, 2006, injury meets the thresholds set out in § 287.220.1, so we may direct our attention to employee's pre-existing disabilities. We must first determine which pre-existing disabilities employee has shown constituted hindrances or obstacles to employee's employment or reemployment at the time of his 2006 work fall.

The administrative law judge mentions multiple preexisting permanent partial disabilities suffered by employee including disabilities associated with employee's chronic obstructive pulmonary disorder (COPD), coronary artery disease (CAD), vascular disorder, left shoulder, right shoulder, left thumb, right wrist, left wrist, right knee, cervical spine, lumbar spine, and, head trauma. As to his COPD and heart problems, employee testified he thinks they are no big deal. Likewise, employee testified that his surgically repaired left shoulder caused him no problem in performing his work for employer (again, "[i]t's no big deal."). These conditions did not constitute hindrances or obstacles to employee's employment or reemployment.

As to the remaining preexisting conditions, we find that only employee's wrist disabilities meet the thresholds set forth in § 287.220.1. We have considered employee's testimony, the medical records in evidence, the deposition and report of Dr. Volarich, and employee's settlement with employer regarding his bilateral carpal tunnel syndrome. We find that employee had a preexisting 17.5% permanent partial disability of each wrist (30.625 weeks per wrist).

### **Conclusion**

We find that the disabilities of employee's lumbar spine and right knee resulting from the 2006 work fall combine with employee's preexisting wrist disabilities to result in a greater disability than the simple sum of all disabilities by a factor of 10 percent. Employee's permanent partial disability rate is \$376.55.

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**Award**

We modify the award of the administrative law judge on the issue of Second Injury Fund liability. The Second Injury Fund is liable for enhanced permanent partial disability benefits in the amount of \$5,092.84.<sup>2</sup>

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 9<sup>th</sup> day of February 2011.

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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**DISSENTING OPINION FILED**  
John J. Hickey, Member

Attest:

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Secretary

<sup>2</sup> 74 weeks + 61.25 weeks x 10% = 13.525 weeks. 13.525 X \$376.55 = \$5,092.84.

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**DISSENTING OPINION**

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based upon my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be affirmed and I adopt his award and decision.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

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John J. Hickey, Member