

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

Injury No.: 08-089370

Employee: Steven Smithey
Employer: McCarthy Brothers (Settled)
Insurer: Arch Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 16, 2011. The award and decision of Administrative Law Judge Matthew D. Vacca, issued February 16, 2011, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 29th day of June 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Steven Smithey

Injury No.: 08-089370

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: McCarthy Brothers (Settled)

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

Additional Party: Second Injury Fund

Insurer: Arch Insurance Company

Hearing Date: January 6, 2011

Checked by: MDV

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: September 8, 2008
5. State location where accident occurred or occupational disease was contracted: St. Louis
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Injured left upper extremity unhooking trailer.
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: Left elbow
14. Nature and extent of any permanent disability: 15% right elbow, PTD vs. SIF
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? \$43,067.67

Employee: Steven Smithey

Injury No.: 08-089370

- 17. Value necessary medical aid not furnished by employer/insurer? -0-
- 18. Employee's average weekly wages: \$1,259.20
- 19. Weekly compensation rate: \$772.53/\$404.66
- 20. Method wages computation: Agreed

COMPENSATION PAYABLE

21. Amount of compensation payable:

weeks of permanent partial disability from Employer	(Previously settled)
---	----------------------

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:
 weekly differential (\$367.87) payable by SIF for 31.5 weeks beginning
 July 3, 2009 and, \$772.53 thereafter, for Claimant's lifetime *

* (Use of an asterisk denotes an uncertain contingent future benefit)

TOTAL:

23. Future requirements awarded:

Said payments to begin 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: James Sievers

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Steven Smithey	Injury No.:	08-089370
Dependents:	N/A	Before the	
Employer:	McCarthy Brothers (Settled)	Division of Workers'	Compensation
Additional Party:	Second Injury Fund	Department of Labor and Industrial	Relations of Missouri
		Jefferson City, Missouri	
Insurer:	Arch Insurance Company	Checked by:	MDV

ISSUES PRESENTED

The issues presented were accident, medical causation, nature and extent of PPD from the primary injury and nature and extent of Second Injury Fund liability, with the Employee alleging entitlement to permanent and total disability benefits.

FINDINGS OF FACT

1. Employee, Steven Joseph Smithey, is a 54-year-old married ironworker with no dependent children. He has belonged to Local 396 since 1980.
2. Claimant’s last day of work was July 3, 2009, at K. Bates, where he worked as an ironworker for six months. Prior to his employment with K. Bates, he worked as an ironworker for McCarthy Brothers for 32 years. Claimant did construction on bridges and high-rise buildings. Claimant would carry 50 to 80 pound buckets of bolts while wearing an 80-pound safety belt loaded with tools. His duties included cutting bars using hacksaws or torches, bending steel rods with hand tools or rod bending machines, reinforcing concrete with wire mesh and welding reinforcement bars together. Claimant also carried I-beams that weighed 200-300 pounds with the assistance of a co-worker. Claimant’s duties required walking on his feet constantly, all days on 4-inch wide beams of steel in all kinds of positions, bending, stooping and lifting on a constant basis. Claimant has never been a supervisor or worked with a computer. All of Claimant’s work experience has been manual and heavy in nature.
3. Claimant completed the 11th grade and later earned his GED.
4. In 1974, Claimant suffered a crush injury to his right index finger while working on a railroad. He underwent a surgical repair, remained off work for five weeks and symptoms resolved. In 1976, Claimant had a re-fracture of his fifth metacarpal fracture and underwent manipulation, closed reduction and application of a cast. In 1988, while feeding material into a wall, a coworker pulled and Claimant’s right index finger was smashed. In December 1993, Claimant reported that a brick struck his right hand. He was diagnosed with distal radius ulnar pain and in February 1994 underwent an arthrogram that revealed TFCC and

lunotriquetral tears on both sides. In 2006, Claimant complained of right thumb pain and was diagnosed with an avulsion fracture MP. Claimant testified his right hand and wrist injuries slowed him down at work and caused diminished strength.

5. In 1984, Claimant sustained a left wrist fracture. Claimant underwent a surgical repair with instrumentation. After surgery, Claimant complained of stiffness, limited motion, weather-related aches, and tingling. In 1985, Claimant was diagnosed with comminuted fracture of the proximal portion and base of the left 3rd metacarpal. He was casted, however, continued to have problems with his hand in December of 1986. Claimant reinjured his left wrist in 1987 after falling from a ladder and catching himself with an outstretched left arm. In January 1990, Claimant underwent an open reduction internal fixation of the left scaphoid with iliac crest bone graft. In April 1990, Claimant underwent revision of Herbert screw fixation of the left navicular. In November 1990, Claimant sprained his left wrist rolling steel. He was diagnosed with a soft tissue injury to the left wrist. In June 1991, Claimant was diagnosed with a strain of the flexor tendons of the thumb. Claimant testified that his left wrist injuries caused him to suffer from bad arthritis, lost range of motion and caused him to feel unsafe on the job.
6. In May 1988, Claimant twisted his left knee while welding on a deck. Later in July 1988, Claimant twisted his left knee again after turning while welding on a metal deck. He also complained his knee buckled while getting out of a truck. Claimant was diagnosed with a tear of the medial meniscus and underwent arthroscopy and partial medial meniscectomy of the left knee on July 20, 1988. He was released back to work on November 18, 1988. Claimant also underwent surgical repairs to both knees in the 1990s. In 1995, Claimant slipped and twisted his right knee. In 2001, Claimant fell in a hole while carrying rebar and injured his left knee. In August 2003, Claimant fell 3 feet while drilling overhead. He landed on his feet, but his left knee buckled, twisted and popped. Claimant underwent a left knee arthroscopy in 2004. Claimant testified that currently he experiences constant aching and burning in both knees. He testified that weather changes cause pain in both knees and that he avoids stairs and ladders. Claimant also testified that while he was working, his avoidance of stairs and ladders limited him in performing his job duties.
7. In 1986, Claimant was breaking concrete when a piece broke off and struck his left ankle. In 1989, he injured his right foot playing softball and was later diagnosed with a probable contusion or sprain to the Lisfranc joint. Claimant testified that he experiences constant soreness and aching in both ankles and suffers from weather-related aches.
8. In 1987, Claimant was struck in the temple by a box lid and fell 3 feet onto a roll of sheets. He was treated in the emergency room, diagnosed with a head contusion and concussion and observed overnight. Claimant was treated with prescription medications and remained off work for one month. In 1998, Claimant again injured his neck and in 2003, Claimant was struck in the head by a 2x4 and was off work for one week. In 2004, Claimant continued to have stiffness in his neck and associated muscle spasms. He was diagnosed with blunt head

trauma with concussion and cervical strain with residual muscle spasms. Claimant testified that he still experiences pain when he looks up on a regular basis. He further testified that he suffers from frequent headaches, which were sometimes debilitating. Claimant noted that he was advised to be careful with heights.

9. In the 1980s, Claimant strained his back at work and was treated with physical therapy. In February 1992, Claimant pulled a muscle in his back while climbing a ladder carrying girt. In May 1992, he overextended himself putting girt in place while climbing a ladder and again strained his back. In 2003, Claimant fell 3 feet, twisting his back. He was diagnosed with a lumbar strain and an MRI revealed degenerative disc changes at L3-4 to the right and L4-5 to the left. Claimant underwent physical therapy, work hardening and eventually injections. Claimant testified that his back is achy in general and that although he can bend, twist, push, pull, run and jump, these activities cause pain.
10. In 1998, Claimant injured his right shoulder after attempting to break a fall with an outstretched right hand. He underwent a right rotator cuff repair. In 2003, Claimant fell and struck his left shoulder on an I-beam. It was then struck by a drill. He was diagnosed with left shoulder strain, clavicular and trapezius contusion and treated with therapy. Claimant testified he has pain in his right shoulder whenever he tries to lift or work overhead. He further testified his left shoulder is constantly sore.
11. On September 8, 2008, the date corresponding with the claim herein, Claimant was unhooking an 8 to 10 foot strap from an 18-wheeler. As he pulled the strap, it caught and he felt a pop in his left elbow with immediate pain and weakness. Claimant was examined and diagnosed with left triceps tendonitis. In October 2008, a diagnosis of medial epicondylitis was added, as his physician noted that any repetitive task such as climbing ladders or pulling objects aggravated his elbow pain. On October 16, 2008, Claimant saw Dr. Rotman for left elbow popping, cracking and pain. He was diagnosed with an elbow strain and a steroid injection was administered. Claimant testified that he currently suffers from pain, popping and diminished grip strength due the left elbow injury.
12. On a typical day, Claimant sits on his couch and watches television. He takes medication which has side effects that make him irritable. He is unable to participate in any home repairs.
13. Dr. Volarich opined that as a result of the September 8, 2008, injury, Claimant had 20 percent permanent partial disability of the left upper extremity for the medial compartment pain over the medial epicondyle as well as deep seeded left elbow joint pain due to the aggravation of underlying arthritis.
14. Pre-existing the September 8, 2008, injury, Dr. Volarich believed the Claimant suffered from 50 percent permanent partial disability of the left wrist due to multiple finger injuries, torn TFCC, torn lunotriquetral ligament, right thumb avulsion fracture and right 5th metacarpal fractures. He also assessed 50 percent permanent partial disability of the right wrist due to the scaphoid fracture that healed with non union and required two separate surgical repairs, as well as the third metacarpal fracture, as well as the recurrent strain injuries and tears of the

TFCC and lunotriquetral ligaments. He also assessed 75 percent permanent partial disability of the left knee due to the recurrent internal derangement that required three separate surgical repairs. He assessed 35 percent permanent partial disability of the right knee due to the internal derangement that required arthroscopic repair. He also assessed 15 percent permanent partial disability of the left ankle due to the medial compartment strain injury. He also assessed 20 percent permanent partial disability of the right ankle due to medial compartment strain and stress fracture of the second metatarsal. He also assessed 20 percent permanent partial disability to the body as a whole referable to the cervical spine due to Claimant's chronic cervical strain syndrome. He also assessed 30 percent permanent partial disability to the body as a whole referable to the lumbosacral spine due to the disc bulges at L3-4 and L4-5. He also assessed 20 percent permanent partial disability of the right shoulder due to the rotator cuff tear that required arthroscopic repair. He assessed 25 percent permanent partial disability of the left shoulder due to the impingement that was not surgically repaired. Dr. Volarich found the combination of Claimant's disabilities creates a substantially greater disability than the simple sum or total of each separate injury, and a loading factor should be added.

15. Dr. Volarich believed that Claimant is unable to engage in any substantial gainful activity nor can he be expected to perform in an ongoing working capacity in the future. He noted that Claimant cannot be reasonably expected to perform on an ongoing basis eight hours per day, five days per week throughout the work year.
16. Based on his medical assessment alone, Dr. Volarich opined that Claimant is permanently and totally disabled as a result of the work-related injury of September 8, 2008, in combination with all his preexisting medical conditions.
17. Following a mental status examination and testing, Dr. Stillings found Claimant suffered from psychiatric disabilities. He found that Claimant, as a result of the primary injury of September 8, 2008, suffered a mood disorder with an associated 15 percent permanent partial psychiatric disability of the body as a whole, a pain disorder with an associated 10 percent permanent partial psychiatric disability of the body as a whole and an anxiety disorder with an associated 10 percent permanent partial psychiatric disability of the body as a whole.
18. Dr. Stillings also found Claimant to have significant preexisting disabilities. He assessed 5 percent permanent partial psychiatric disability due to parent-child relational problem; 5 percent permanent partial psychiatric disability due to cognitive disorder (resulting from three traumatic brain injuries); 5 percent permanent partial psychiatric disability due to mood disorder; 10 percent permanent partial psychiatric disability due to pain disorder associated with both psychological factors and a general medical condition; 2 percent permanent partial psychiatric disability due to polysubstance abuse/dependence; and 3 percent permanent partial psychiatric disability due to personality disorder.
19. Dr. Stillings opined Claimant's psychiatric conditions and disabilities due to his primary injuries combine synergistically with his pre-existing conditions and disabilities, which are a hindrance or an obstacle to employment or re-employment, creating a total disability greater

than the simple sum rendering him permanently and totally disabled from gainful employment.

20. Mr. England performed a vocational rehabilitation evaluation on Claimant and noted he believed Claimant was not employable at all. He opined that absent significant improvement in Claimant's overall functioning he believed that Claimant is likely to remain totally disabled from a vocational standpoint and that this would be due to a combination of his injuries and medical problems over the years and not simply due to one injury alone.
21. Claimant saw Ms. Gonzalez for a vocational rehabilitation evaluation and transferability of skills analysis. Ms. Gonzalez found that Claimant suffers from permanent physical and psychiatric disabilities which prevent him from performing his past jobs or any job on the open labor market. It was her opinion that Claimant is not a candidate for vocational rehabilitation and that he is not capable of any competitive work for which there is a reasonably stable job market as a result of his primary injury in combination with his pre-existing conditions.
22. Ms. Browning performed a record review in order to assess Claimant's potential for vocational rehabilitation. When asked if Ms. Browning believed a reasonable employer in Missouri would hire Claimant, Ms. Browning replied, "I don't think Mr. Smithey is employable at this point." Ms. Browning also noted that Claimant stopped working due to disability retirement. Ms. Browning testified that she reached the same conclusion as Mr. England and Ms. Gonzalez that Claimant is permanently and totally disabled due to a combination of his injuries.

RULINGS OF LAW

1. Claimant sustained an accident on September 8, 2008 to his left elbow.
2. As a result of the accident and injuries on September 8, 2008, Claimant sustained 15 percent permanent partial disability of the left elbow, that is medically and causally related to the September 8, 2009 injury.
3. Preexisting this injury, Claimant suffered from 45 percent permanent partial disability of both the left and right wrists, 70 percent of the left knee, 30 percent of the right knee, 10 percent of the left ankle, 15 percent of the right ankle, 15 percent body as a whole referable to the cervical spine, 25 percent body as a whole referable to the lumbosacral spine, 15 percent of the right shoulder, 20 percent of the left shoulder, and 30 percent body as a whole for psychiatric disabilities.
4. Following the September 8, 2008, injury, Claimant thereafter became permanently and totally disabled from competing in the open labor market. It was not the last injury in and of itself that caused Claimant to become permanently and totally disabled. It was the last injury working in concert with the preexisting injuries that caused Claimant to become permanently and totally disabled and, therefore, liability for payment of permanent total disability benefits falls upon the Second Injury Fund.

5. The Second Injury Fund is liable for a differential payment for 31.5 weeks beginning July 3, 2009 in the amount of \$367.87, and \$772.53 beginning 31.5 weeks after July 3, 2009 and continuing thereafter for Claimant's lifetime.

Date: _____

Made by: _____

MATTHEW D. VACCA
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation