

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

Injury No. 11-013401

Employee: Frederick Winingear
Employer: Fulton State Hospital (Settled)
Insurer: C A R O (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 7, 2014, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Vicky Ruth, issued November 7, 2014, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 10th day of February 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee:	Frederick Winingear	Injury No. 11-013401
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 Only	
Insurer:	State of Missouri, Office of Administration c/o CARO (SETTLED)	
Hearing Date:	August 4, 2014	Checked by: VR/cs

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: February 23, 2011.
5. State location where accident occurred or occupational disease was contracted: 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? See Award.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was involved in an altercation at work when a patient put him in a "choke hold" from behind, injuring his neck.
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: Neck.
14. Nature and extent of any permanent disability: 4% of the body as a whole referable to the neck.
15. Compensation paid to-date for temporary disability: N/A.
16. Value necessary medical aid paid to date by employer/insurer? N/A.

Employee: Frederick Winingear

Injury No. 11-013401

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Frederick Winingear

Injury No. 11-013401

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 Only

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

Hearing Date: August 4, 2014

PRELIMINARIES

On August 4, 2014, Frederick Winingear (the claimant) and the Second Injury Fund appeared in Jefferson City, Missouri, for a final award hearing regarding the Second Injury Fund claim. Claimant was represented by attorney Christine Kiefer. The Second Injury Fund was represented by attorney Maggie Ahrens. Claimant testified in person at the hearing. Claimant and the Second Injury Fund submitted briefs on or about August 5, 2014, and the record closed at that time.

STIPULATIONS

The parties stipulated to the following:

1. On or about February 23, 2011, Frederick Winingear (the claimant) was an employee of Fulton State Hospital (the employer) when he sustained an injury by accident to his neck. 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 insured by State of Missouri Office of Administration 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. Claimant's compensation rate was \$418.58 for permanent partial disability benefits.
6. The parties agree that the Second Injury Fund claim was re-filed on December 4, 2013.

ISSUES

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

Employee: Frederick Winingear

Injury No. 11-013401

1. Whether the Second Injury Fund claim was timely filed/statute of limitations issue;
2. Nature and extent of Claimant's permanent partial disability, and
3. Liability, if any, of the Second Injury Fund.

EXHIBITS

On behalf of the claimant, the following exhibits were entered into evidence without objection:

- | | |
|------------|--|
| Exhibit 1 | <i>Stipulation for Compromise Settlement</i> , Injury No. 11-013401. |
| Exhibit 2 | <i>Stipulation for Compromise Settlement</i> , Injury No. 10-075021. |
| Exhibit 3 | <i>Claim for Compensation</i> , Injury No. 11-013401, filed 5/5/2011. |
| Exhibit 4 | <i>Claim for Compensation</i> . Second Injury Fund only, Injury No. 11-013401, filed 12/04/2013. |
| Exhibit 5 | Medical report of Dr. Raymond Cohen and <i>Curriculum Vitae</i> . |
| Exhibit 6 | Medical records from Callaway Community Hospital. |
| Exhibit 7 | Medical records from St. Mary's Occupational Medicine. |
| Exhibit 8 | Medical records from Select Physical Therapy. |
| Exhibit 9 | Medical records from Runde Occupational & Environmental Physicians. |
| Exhibit 10 | Medical records from University Hospital and Clinics. |
| Exhibit 11 | Medical records from Select Physical Therapy. |
| Exhibit 12 | Medical records from Runde Occupational & Environmental Physicians. |
| Exhibit 13 | Medical records from Callaway Community Hospital. |
| Exhibit 14 | Medical records from Select Physical Therapy. |
| Exhibit 15 | Medical records from Orthopedic and Sports Medicine, Inc. |
| Exhibit 16 | Medical records from Fulton Medical Clinic. |
| Exhibit 17 | Medical records from Fulton Dental Clinic. |
| Exhibit 18 | Medical records from Columbia Orthopaedic Group. |

On behalf of the Second Injury Fund, the following exhibits were entered into evidence without objection:

- | | |
|-----------|---|
| Exhibit A | Claim acknowledgement letter, 12/09/2013, Injury No. 11-013401, and <i>Claim for Compensation</i> . |
| Exhibit B | Dismissal request v. Second Injury Fund, Injury No. 11-013401 and Injury No. 11-054685. |
| Exhibit C | Claim acknowledgement letter, 5/10/2011, Injury No. 11-013401, and <i>Claim for Compensation</i> . |

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 October 30, 1954. He is 59 years of age. Claimant currently works at the Dollar General Warehouse in Fulton, Missouri, where he has been employed for about two years.
2. Claimant previously worked for Fulton State Hospital (the employer) for approximately 23 and one-half years. He was employed as an SA-II. He was in charge of his assigned ward, including staff and clients/patients.
3. On February 23, 2011, Claimant sustained an injury by accident arising out of and in the course and scope of employment. The accident occurred when a patient put Claimant in a "choke hold" from behind, injuring Claimant's neck. Claimant promptly reported the incident and the employer/insurer sent him for medical treatment. That day, Claimant treated at the Callaway Community Hospital emergency room, where a diagnostic scan of Claimant's neck was performed. The CT report indicates the impression was "Spondylosis. Atherosclerosis. I doubt acute fracture. Findings agree with preliminary report given on call."¹
4. On February 28, 2011, Claimant treated with Dr. Eddie Runde.² The diagnosis was neck pain. The doctor put Claimant on restricted duty with no staff supports while they wait for the CT report.
5. Claimant returned to Dr. Runde on March 7, 2011. Dr. Runde noted that the CT scan report revealed advanced spondylosis, especially at C5-6 and C6-7. There was also evidence of calcifications in the posterior cervical spine at the C7 and T1 spinous processes, which were felt to be benign and chronic. There was some prominent bony spinal and foraminal stenosis at C5-6 and C6-7 with lesser changes elsewhere. No acute fractures were found. Dr. Runde's diagnosis was neck pain/strain and degenerative disc disease, and he continued the same restrictions as the prior visit.
6. On March 14, 2011, Claimant returned to Dr. Runde with no significant change in his symptoms. Dr. Runde prescribed Cataflam and Flexeril. On March 31, 2011, Dr. Runde discharged Claimant from treatment and returned him to regular duty work with no restrictions. The diagnosis was (1) neck pain, improving, and (2) degenerative disc disease of the cervical spine.
7. At trial, Claimant's attorney asked him about his continuing neck symptoms and Claimant indicated that he still has some problems with stiffness and range of motion, but that the problems were not as bad as they were before.³ He would have some problems at

¹ Exh. 13.

² Exh. 12.

³ Trial transcript, pp. 10-11.

work if he had to do a lot of looking upwards. After the 2011 work injury, Claimant's neck pain has averaged a 3 or 4 on a 10-point scale.⁴

Pre-existing injuries

1993 injury

8. Claimant testified that in 1993 he was hit over the head with a typewriter. When asked whether he was having trouble with his range of motion before the 2011 work injury, Claimant testified "[N]ot too much...."⁵ He did indicate that he would probably have to say that did have some neck stiffness. He also indicated that before his 2011 work injury, he did not have a lot of pain in his neck, and sometimes he was even pain-free.⁶

October 2008 injury

9. On October 17, 2008, Claimant saw Dr. Runde regarding a work injury from October 15, 2008.⁷ Dr. Runde's diagnosis was mid cervical strain/sprain and occipital contusion. Dr. Runde put Claimant on restricted duty with no staff supports. The doctor also prescribed physical therapy. Claimant continued to treat with Dr. Runde on October 28 and November 4, 2008, and was given the same restrictions and therapy was continued. On November 11, 2008, Dr. Runde noted that Claimant continued to have improvements in his neck and head pain. Dr. Runde returned Claimant to regular work duty with no restrictions.
10. On November 18, 2008, Claimant saw Dr. Runde, who gave him a diagnosis of cervical strain, resolved, and discharged him from treatment.⁸ The doctor also returned Claimant to regular work duty with no restrictions.

December 2009 injury

11. On or about December 1, 2009, Claimant was head-butted by a client. Handwritten notes from St. Mary's Occupational Medicine, dated December 2, 2009, are difficult to decipher.⁹ Claimant returned on January 12, 2010, and reported that his neck was better but he still had some soreness, headaches, and restricted movement. On February 1, 2010, Claimant saw Dr. Janet Elliot, who noted that he had returned to work on regular duty on January 28, and on that day he was involved in three take-downs. Claimant reported that the last take-down re-injured his neck. Dr. Elliot noted Claimant has a cervical strain. Dr. Elliot restricted Claimant to no staff supports or one-on-one situations; although she further found that Claimant could return to regular duty work on February 15, 2010.
12. In his report, Dr. Cohen suggested that this injury resulted in a 12.5% permanent partial disability of the head/neck, and he indicated that the agreed with that resolution. A copy

⁴ Trial transcript, pp. 21-22.

⁵ Trial transcript pp. 16-17. It is not entirely clear whether Claimant was testifying as to the 1993 injury or another injury that occurred before the 2011 injury.

⁶ Trial transcript pp. 18-19.

⁷ Exh. 9.

⁸ Exh. 9.

⁹ Exh. 7.

of the settlement was not offered into evidence.

January 2010 injury

13. Claimant treated with Dr. Kevin Komes on March 3, 2010.¹⁰ The doctor noted Claimant was injured at work on January 28, 2010, when he attempted to retrain a client. The diagnosis was somatic dysfunction of the cervical spine. Dr. Brooks, under the supervision of Dr. Komes, performed a mobilization of the OA joint and mobilization of multiple segments of the cervical spine. Claimant was referred to physical therapy. On March 22, 2010, Dr. Komes noted that Claimant reported little improvement and he still complained of neck pain, headache, and shoulder pain. The assessment was somatic dysfunction of the cervical spine. A trial of a TENS unit was ordered, along with another mobilization of multiple segments by Dr. Brooks. On April 10, 2010, Dr. Komes provided a diagnosis was "[n]eck pain and headache resolved."¹¹
14. On April 26, 2010, Dr. Komes provided an assessment of somatic dysfunction of the neck.¹² The doctor also found Claimant to be at maximum medical improvement with no restrictions.

September 17, 2010 injury

15. On September 17, 2010, Claimant sustained another work injury involving a staff support with a combative patient. This staff support resulted in a "pile up" of staff members, who fell on Claimant. Claimant reported this injury and received treatment, including arthroscopic repair of his shoulder. The September 17, 2010 records from Callaway Community Hospital reflect that a chest x-ray revealed no acute radiographic abnormality.¹³ The cervical spine x-rays taken on the same day showed degenerative disc disease with no acute fracture, although the radiologist also noted that the study "is not adequate to clear and I would recommend a CT examination if there is clinical suspicion of occult injury."¹⁴
16. Claimant saw Dr. Runde on September 20, 2010, regarding the September 17, 2010 attack.¹⁵ The diagnosis was left anterior chest wall/rib contusion and bilateral hip pain/strain. Dr. Runde recommended conservative treatment, including heat/ice, over-the-counter analgesics, and gentle stretching exercises. Claimant was released to full-duty work with no restrictions.
17. Claimant returned to Dr. Runde on October 1, 2010, reporting that his pain has gradually gotten worse.¹⁶ The doctor suggested the use of a rib belt to help with symptoms, and he ordered a chest/rib x-ray. The doctor's October 15, 2010 notes indicate the x-rays showed no rib fractures or other abnormalities. Dr. Runde ordered a week of physical therapy and put Claimant on restricted duty (off work for a week). At the October 27

¹⁰ Exh. 11.

¹¹ Exh. 11

¹² Exh. 11.

¹³ Exh. 13.

¹⁴ Exh. 13.

¹⁵ Exh. 12.

¹⁶ Exh. 12.

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visit, Dr. Runde continued Claimant on restricted duty, with the restriction of no staff supports and lifting no more than 30 pounds. An additional week of physical therapy was ordered. Claimant saw Dr. Runde on November 3, 2010, at which time his left rib complaints were found to be improving, although his mid back pain had minimal or no improvement.

- 18. On November 10, 2010, Dr. Runde noted Claimant's pain has improved. The doctor discharged Claimant from treatment and returned him to regular duty work with no restrictions. According to Dr. Runde, no permanent disability was likely.
- 19. On November 29, 2010, x-rays of the chest revealed no acute radiographic process.
- 20. On September 6, 2011, Claimant saw Dr. Ronald Carter for his shoulder complaints. Dr. Carter reviewed Claimant's MRI and performed an examination of Claimant. Dr. Carter recommended arthroscopy of Claimant's shoulder to treat the labral injury, the partial rotator cuff tears, and the impingement. The surgery was performed on or about September 21, 2011. Claimant subsequently underwent physical therapy.
- 21. On April 9, 2012, Dr. Carter examined Claimant and found that he had flexion of the left shoulder to 175 degrees and abduction to 170 degrees.¹⁷ Claimant's internal and external rotation was 80 degrees, and he had some weakness at and above shoulder level. Dr. Carter found Claimant to be at maximum medical improvement and he released him from treatment. The doctor also determined that Claimant had a "10% permanent impairment of the left upper extremity at the level of the shoulder secondary to the September, 2010 injury...."¹⁸
- 22. Claimant testified that after the September 2010 incident, he continued to have a lump in his chest where he believes a rib was "knocked out of place." He has ongoing shoulder pain, along with limited range of motion in reaching overhead or behind his back. At work, Claimant limits the use of his left shoulder, but he is left-hand dominate so this can be difficult.

December 2010 injury

- 23. On December 31, 2010, Claimant treated at the Callaway Community Hospital emergency room with a chief complaint of a head and neck injury due to an attack at work. He also complained of his left eye twitching, along with a bite to his left hand and injury to his left elbow/arm. He had a laceration to his left eyebrow region. The report for the CT scan of Claimant's cervical spine notes that the impression was no acute fracture; probably old fracture of the T1 spinous process versus ossification of the overlying ligament; and degenerative disc disease. The CT scan of the head revealed "no definite acute process."¹⁹

In general

- 24. Upon cross-examination, Claimant agreed that before his 2011 injury, his prior injuries

¹⁷ Exh. 18.
¹⁸ Exh. 18.
¹⁹ Exh. 13.

would have an exacerbation of symptoms but they would then go back to baseline or cease.²⁰ During cross-examination, Claimant was asked about the severity of his neck pain before the 2011 work injury, and he responded as follows: "Didn't have a lot of pain. Probably a one."²¹ He also indicated that before the 2011 work injury, there were times when his neck was pain-free.²² When asked about accommodations for his neck, before the 2011 work injury and not while he was treating for a particular injury, Claimant indicated he did not have restrictions or accommodations.²³

25. Claimant indicated that his shoulder injury causes him some problems at work, so he limits himself as to how much and how high he lifts. Claimant's attorney asked him if he has "problems doing the stuff that's overhead" and he responded "yes."²⁴ He was then asked if he attributes these problems to his neck or shoulder or both, and he answered "both."²⁵
26. He testified that the rib injury (chest) has quit hurting, although he does still have a knot on his chest.²⁶

Dr. Cantrell

27. Claimant saw Dr. Russell Cantrell on or about May 23, 2011, for an evaluation of his complaints related to three separate work injuries that occurred on or about September 17, 2010, December 31, 2010, and February 23, 2011.²⁷ Dr. Cantrell examined Claimant and reviewed various medical records. Dr. Cantrell noted that Claimant presented with chronic complaints of neck pain. Dr. Cantrell opined that this complaint was likely a result of a combination of his moderate to severe degenerative disc disease within the cervical spine coupled with chronic residual pain complaints stemming from a 2009 work injury "with the injuries in December of 2010 and February of 2011 serving to temporarily exacerbate those chronic complaints."²⁸ Dr. Cantrell further noted the following:

He has complaints in his left shoulder that are consistent with mild adhesive capsulitis and impingement syndrome without evidence of rotator cuff tear and without any clinical evidence to suggest a labral tear. He has residual in his left anterior costal margin that is as a result of this September 17, 2010 work injury and likely represents a costal cartilage junction injury without fracture. He has regarding his September 17, 2010 work injury to his chest wall, reached maximum medical improvement. The findings of impingement syndrome and mild adhesive capsulitis in the left shoulder are attributable to this injury and for

²⁰ Trial transcript p. 20.

²¹ Trial transcript, p. 18. See also p. 21.

²² Trial transcript, p. 19.

²³ Trial transcript pp. 19-20.

²⁴ Trial transcript, p. 15.

²⁵ Trial transcript p. 15.

²⁶ Trial transcript, p. 14.

²⁷ Exh. 15.

²⁸ Exh. 15, report p. 5.

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which I have suggested Mobic 7.5 mg twice daily. Mr. Winingear may benefit from additional physical therapy in an attempt to improve range of motion in his left shoulder. He has otherwise regarding that September 17, 2010 work injury reached maximum medical improvement.²⁹

28. Dr. Cantrell further noted that regarding the December 31, 2010 work injury, Claimant has reached maximum medical improvement and does not need any additional treatment.³⁰ The doctor further opined that regarding the February 23, 2011 work injury Claimant had a temporary exacerbation of a chronic history of neck pain.
29. As to all three injuries, Dr. Cantrell felt that Claimant was capable of performing his regular duty activities without restrictions.
30. On June 27, 2011, Claimant returned to Dr. Cantrell. Claimant reported that the Mobic reduced his pain complaints in his posterior neck and left shoulder.³¹ Dr. Cantrell recommended Claimant continue taking Mobic and that he resume physical therapy for the left shoulder impingement syndrome. Dr. Cantrell continued Claimant on regular duty.
31. Claimant again saw Dr. Cantrell on July 25, 2011. Claimant reported continued pain in his left shoulder.³² Claimant also reported that another injury that occurred on July 20, 2011, when he was involved in a staff support and was struck in the head and flank. In that attack a tooth was knocked loose. He also had blood in his kidney and is waiting for the report from a kidney ultrasound. Dr. Cantrell recommended Claimant temporarily discontinue the Mobic and begin a Medrol dose pack, and that he continue with physical therapy.
32. At the August 3, 2011 visit, Dr. Cantrell recommended that a contrasted MRI scan of the left shoulder be conducted to help evaluate Claimant's persistent pain complaints associated with the end range external rotation.³³ The doctor continued Claimant on regular duty activities and continued his physical therapy. Dr. Cantrell, on August 18, 2011, recommended that Claimant be evaluated by an orthopedic surgeon for consideration of either subacromial corticosteroid injection versus arthroscopic intervention.

Independent Medical Evaluation - Dr. Cohen

33. On or about September 8, 2012, Dr. Cohen examined Claimant for an Independent Medical Examination (IME). Dr. Cohen reviewed medical records and performed an examination of Claimant. Dr. Cohen concluded that Claimant has the following permanent partial disabilities as a result of the September 17, 2010 work injury: 40% of the left shoulder and 5% permanent partial disability of the body as a whole referable to the chest. As to the December 31, 2010 injury, Dr. Cohen opined that no disability

²⁹ Exh. 15, report p. 5.

³⁰ Exh. 15, report p. 5.

³¹ Exh. 15.

³² Exh. 15.

³³ Exh. 15.

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resulted from this event. In regard to the February 23, 2011 work injury, Dr. Cohen opined that Claimant has a 10% permanent partial disability of the whole person referable to the cervical spine. Dr. Cohen further opined that in regards to the July 19, 2011 work injury, Claimant has an aggravation of his head injury and his bite injury and that these did not result in any additional disability. He deferred any disability for injury to Claimant's teeth to the dentist. As to the pre-existing conditions, Dr. Cohen agreed with the "previously adjudicated awards of 12.5% to the head/neck from the December 1, 2009 work-related injury, as well as the 12% whole body injury from the 1993 work-related injury to the neck."³⁴

34. Dr. Cohen also indicated that in his opinion, Claimant's "pre-existing conditions or disabilities combine with the primary work-related injuries to create a greater overall disability than their simple sum. Due to the multiplistic effect, there is a load factor of 15%. His pre-existing conditions or disabilities are industrially disabling."³⁵

Stipulations for Compromise Settlement

35. Claimant settled his case against the employer/insurer in the present case, Injury Number 11-013401, for 4% permanent partial disability of the body as a whole referable to the neck.
36. Claimant settled his case against the employer/insurer in Injury Number 10-075021 for 20% permanent partial disability of the left shoulder and 3% of the body as a whole referable to the chest.

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.³⁶ The employee must prove by a preponderance of credible evidence all material elements of his or her claim, including Second Injury Fund liability.³⁷ Proof is made only by competent and substantial evidence, and may not rest on speculation.³⁸

Section 287.430 provides that 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."³⁹

³⁴ Exh. 5, report p. 10.

³⁵ Exh. 5, report p. 10.

³⁶ *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).

³⁷ *Meilves v. Morris*, 422 S.W.2d 335, 399 (Mo. 1968).

³⁸ *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo.App. W.D. 1974).

³⁹ Section 287.430

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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 first prove that he has sustained a compensable injury, referred to as "the last injury," which resulted in permanent partial disability.⁴⁰ A claimant must also 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.⁴¹ Once it has been established that one of the pre-existing disabilities meets or exceeds the statutory threshold, *all* pre-existing injuries or conditions must be considered in determining the liability of the Second Injury Fund.⁴² 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.⁴³ 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.⁴⁴

The Missouri Supreme Court in *Treasurer of State of Missouri v. Witte* held that "[B]y its plain and ordinary language, section 287.220.1 does not require a disability from the last injury to meet a numerical threshold to trigger liability."⁴⁵ Nevertheless, this does not mean that every compensable "last injury" triggers Second Injury Fund liability. The "last injury" must also combine with pre-existing disabilities to cause greater overall disability than the independent sum of the disabilities; this is commonly referred to as the synergistic effect. In addition, at least one of the pre-existing disabilities must meet the statutory threshold discussed above (50 weeks of employment for injuries to the body as a whole or 15% for major extremities).

Issue 1: Whether the Second Injury Fund claim was timely filed/statute of limitations

Section 287.430 provides that 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."⁴⁶ When a claim for compensation is voluntarily dismissed with or without prejudice, it may be re-filed by the claimant "so long as the statute of limitations has not run."⁴⁷

The parties have identified Issue 1 as a threshold issue (i.e. the statute of limitations question). The Second Injury Fund argues that Claimant's claim against the Fund is time barred

⁴⁰ Section 287.220.1, RSMo.

⁴¹ *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo.App. E.D. 2008) (Citations omitted).

⁴² *Treasurer of State of Mo. v. Witte*, 414 S.W. 3d 455, 467 (Mo. 2013); *Elrod v. Treasurer of Mo.*, 138 S.W.3d 714 (Mo. banc 2004);

⁴³ Section 287.220.1, RSMo.; *Anderson v. Emerson Elec. Co.*, 698 S.W.2d 574, 576 (Mo.App. 1985).

⁴⁴ *Elrod v. Treasurer of Mo.*, 138 S.W.3d 714 (Mo. banc 2004); *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo.App. 1990).

⁴⁵ 414 S.W.3d 455, 466 (Mo. 2013)

⁴⁶ Section 287.430, RSMo.

⁴⁷ 8 CSR 50-2.010(12)(A).

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because it was voluntarily dismissed and not re-filed within two years from the date of injury or within one year from the claim against the employer. Claimant argues that the settlement between Claimant and the employer/insurer counts as a claim under the statute, and thus, his re-filed claim against the Fund was timely.⁴⁸ A summary of relevant dates and filings is as follows:

<u>Date</u>	<u>Event</u>
2/23/2011	Work Injury.
5/06/2011	Employee filed claim against employer and against the Fund.
1/24/2013	Employee submitted a dismissal of the Second Injury Fund claim.
2/01/2013	Employee settled claim against employer/insurer.
2/04/2013	Division of Workers' Compensation issued Order of Dismissal of Second Injury Fund claim.
12/05/13	Employee filed a revised Claim for Compensation against the Second Injury Fund only.

The re-filing of the claim on December 5, 2013 was more than two years after the injury and more than one year after the original claim against the employer/insurer. The re-filed claim date, however, is within one year after the settlement between the employee and the employer/insurer. Claimant argues that this settlement is a "claim" under the law, and thus the re-filing of the claim against the Fund was timely. This is a question of law subject to interpretation. Although Claimant relies on several cases that are somewhat similar to this case, the facts do differ from the case at hand.⁴⁹ For example, in *Treasurer of the State of Missouri v. Cook*, the employee did not file a Claim for Compensation before settling with the employer/insurer.⁵⁰ The employee then filed a Claim for Compensation against the Second Injury Fund and that claim was filed more than two years after the date of injury. The Court found that for purposes of the statute of limitations, the settlement between the employer/insurer and the employee was a "claim." As such, the Court determined that the Claim for Compensation against the Second Injury Fund was timely filed. In the case at hand, however, the employee, Mr. Winingear, did file an actual "claim" against the employer/insurer – a fact that could be viewed as a pivotal distinction. However, I do not need to decide this question because no matter which way I find regarding the statute of limitations, benefits will not be awarded for the reasons set forth below.

**Issue 2: Nature and extent of Claimant's permanent partial disability, and
Issue 3: Liability, if any, of the Second Injury Fund.**

In this case, Dr. Cohen opines that Claimant's primary injury to his cervical spine resulted in a permanent partial disability (PPD) of 10%. Claimant and the employer/insurer settled this issue for 4% PPD of the body as a whole (spine). Claimant testified as to the extent

⁴⁹ *Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 138 S.W.3d 714 (Mo. 2004); *Treasurer of State of Missouri, Custodian of the Second Injury Fund v. Cook*, 323 S.W.3d 105 (Mo.App. W.D. 2010); and *Grubbs v. Treasurer as Custodian of the Second Injury Fund*, 298 S.W.3d 907 (Mo.App. E.D. 2009). It should also be noted that the *Cook* case involved an injury that occurred prior to the 2005 amendments to the workers' compensation statutes, before the changes to the law involving strict construction.

⁵⁰ 323 S.W.3d 105 (Mo.App. W.D. 2010).

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of his ongoing problems related to this injury. Based on the evidence as a whole, I find that the primary injury (February 2011) resulted in permanent partial disability of 4% of the body as a whole (referable to the spine).

As to the pre-existing injuries, Dr. Cohen opined that the December 2010 injury to Claimant's left hand and head resulted in no permanent disability. The doctor further opined that the September 2010 work injury resulted in PPD of 40% of the left shoulder and 5% of the body as a whole referable to the chest. Claimant settled this claim (September 2010 injury) against the employer/insurer for 20% PPD of the left shoulder and 3% of the body as a whole. Based upon the entire record, I find that the September 2010 work injury resulted in permanent partial disability of 20% of the left shoulder and 3% of the body as a whole.

The record does contain some information regarding additional pre-existing injuries. Dr. Cohen indicated that he agreed with the resolution (apparently a settlement) of the December 1, 2009 injury; that case settled for 12.5% of the body as a whole referable to the head/neck. Dr. Cohen also agreed with a prior resolution (apparently a settlement) that Claimant had a permanent partial disability of 12% of the body as a whole referable to the neck for a 1993 work injury. These settlements or "resolutions" were not offered into evidence. And in his brief, Claimant did not clearly advocate that these injuries (1993 and December 2009) should be considered when determining Second Injury Fund liability.

Based on the entire record, I find that Claimant has met his burden of proof that he had the following pre-existing permanent partial disabilities that were a hindrance or obstacle to his employment: 20% of the left shoulder and 3% of the body as a whole (December 2010 injury).

The next question is whether the disability from the primary work injury (4% of the body as a whole referable to the spine) combined with the pre-existing disabilities or conditions (20% of the left shoulder and 3% of the body as a whole) to create a greater overall disability than their simple sum. Such a finding of a synergistic effect is required in order for the Second Injury Fund to be liable for benefits in this case.

At trial, Claimant did not testify as to a synergistic effect; at least, he did not do so clearly and convincingly. Dr. Cohen, in his report, opined that the "pre-existing conditions or disabilities combine with the primary work-related injuries to create a greater overall disability than their simple sum. Due to the multiplistic effect, there is a load factor of 15%. His pre-existing conditions or disabilities are industrially disabling."⁵¹ Although his report contains his opinion that there is a greater overall disability, Dr. Cohen does not explain how the conditions or disabilities combined to create the greater overall disability. Moreover, Claimant's testimony does not support Dr. Cohen's opinion that the primary injury combined synergistically with the pre-existing injury. Claimant did not testify to an enhanced or synergistic effect, and the medical records (other than those of Dr. Cohen) do not reflect that there was such an effect. Claimant's primary injury in this case resulted in just 4% permanent partial disability (PPD), although Dr. Cohen had rated it at 2½ times that amount (i.e. a rating of 10% PPD). Claimant settled the primary injury for a permanent partial disability amount that was rather small – just 16 weeks – and which was considerably less than his doctor's rating of 10% of the body (40 weeks). And

⁵¹ Exh. 5, report p. 10.

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although the primary injury is not subject to a threshold number, in this case the credible and convincing evidence does not establish that there was the required synergy between the primary injury and the pre-existing condition(s). I do *not* find Dr. Cohen's opinion in this case as to the synergistic effect to be credible or persuasive. Claimant's claim for compensation fails and all other issues are moot.

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

Made by: Vicky Ruth
Vicky Ruth
Administrative Law Judge
Division of Workers' Compensation

I certify that on 11/7/14,
I delivered a copy of the foregoing award
to the parties to the case. A complete
record of the method of delivery and date
of service upon each party is retained with
the executed award in the Division's case file.

By CP

