

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

Injury No.: 05-099198

Employee: John Bartley
Employer: Hawthorne Inn (Settled)
Insurer: Zenith 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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated September 5, 2008, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Kevin Dinwiddie, issued September 5, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 10th day of February 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: John Bartley

Injury No.05-099198

Dependents: N/A

Before

the

**DIVISION OF WORKERS'
COMPENSATION**

Employer: Hawthorne Inn (previously settled)

Department of Labor and Industrial

Additional Party: State Treasurer as custodian of the
Second Injury Fund

Relations of Missouri

Jefferson City, Missouri

Insurer: Zenith Insurance Company (previously settled)

Hearing Date: Tuesday, June 3, 2008

Checked by: KD/cmh

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? No
3. Was there an accident or incident of occupational disease under the Law? See award
4. Date of accident or onset of occupational disease: alleged April 30, 2005
5. State location where accident occurred or occupational disease was contracted: Franklin County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? See award
8. Did accident or occupational disease arise out of and in the course of the employment? See award
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:
Employee alleges to have suffered lower back injury by slipping on wet surface at work
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: alleged low back
14. Nature and extent of any permanent disability: See award
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None
17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: maximum rate
19. Weekly compensation rate: \$675.90 for ttd and ptd; \$354.05 for ppd
20. Method wages computation: by agreement of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable: The issues as to medical causation and compensability are found in favor the Second Injury Fund. The claim as against the Second Injury Fund is denied. All other issues are rendered moot.

Total: N/A

22. Future requirements awarded: N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee: John Bartley

Injury No.05-099198

Dependents: N/A
the

Before
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The claimant, Mr. John Bartley, and the State Treasurer, as Custodian of The Second Injury Fund, appeared at hearing by and through the following Attorneys; Kevin Dolley for the employee; Assistant Attorney General Jennifer Sommers for the Second Injury Fund. The claim as against the employer/insurer, Hawthorne Inn/Zenith Insurance Company, was previously settled. Mr. Bartley appeared at hearing, testified on his own behalf, and was the only witness to testify in person. The parties agreed that the issues to be resolved at hearing are:

Injury by accident arising out of and in the course of employment;
Notice;
Medical causation;
Nature and extent of permanent disability; and
Liability of the Second Injury Fund

The parties were able to agree that the claimant reached maximum medical improvement on February 1, 2007.

EXHIBITS

The following exhibits were received in evidence at hearing:

Claimant's Exhibits

- A. Claim for Compensation form
- B. Stipulation for Compromise Settlement between employee and employer/insurer in Injury Number 05-099198
- C. IME Report of Dr. Barry Feinberg
- D. IME report of Dr. Michael Chabot
- E. Vocational evaluation of Delores E. Gonzalez
- F. Medical records of Dr. David Robson, St. Louis Spine Care Alliance
- G. Medical records of Dr. Barry Feinberg
- H. Medical records of Dr. James Jansen
- I. Medical records of Des Peres Square Imaging Center
- J. Medical records of Des Peres Square Surgery Center
- K. Medical records of Missouri Baptist (Operative report dated 11/25/96 and MRI)
- L. not offered
- M. Deposition of Barry Feinberg, M.D. taken 10/12/07
- N. Deposition of Barry Feinberg, M.D. taken by telephone on 10/26/07
- O. Deposition of Delores Gonzalez taken on 11/14/07
- P. Withdrawn
- Q. Withdrawn

Second Injury Fund Exhibits

1. Deposition of Dr. David Robson taken on 4/30/08
2. Deposition of Dr. Michael C. Chabot taken on 6/8/07
3. Deposition of John Bartley taken on 12/8/05
4. Deposition of John Bartley taken on 9/21/07

FINDINGS OF FACT AND RULINGS OF LAW

On 4/30/05 Mr. John Bartley was a Vice President and working manager of the Hawthorne Inn, a restaurant located in Labadie, Missouri. Mr. Bartley worked “the front of the house”, and his duties included making reservations; scheduling larger parties; getting guests to their proper seating; coordinating bussers; ensuring food got to the correct tables; assisting bartenders; carrying trays of food from the kitchen weighing as much as to 30 to 35 pounds; manage the storing of beer, wine, and liquor in the kitchen; ensure proper storage of meat in a walk in refrigerator; carry up to 150 pounds of meat from cold storage to the meat table, and such items as cases of sour cream and butter weighing 30 to 40 pounds.

The claimant is 50 years old; is married to his current wife, Jane Marie; has three children for whom he no longer is providing support; is a high school graduate with some college credits; and has taken instruction and gotten certification in food safety, food handling, food temperatures, and so on, and also manages kitchen cooking, food preparation, and is responsible for all maintenance of the building and grounds.

The first thing the claimant was to do on the day of his accident was to count the money drawer at the back of the kitchen, carry it to the bar, then to the hostess stand to work on charts. Claimant recalls that as he pushed open the swinging doors from the kitchen he slipped on ceramic tile that had been previously washed, with his left leg sliding out, resulting in an audible snap. Mr. Bartley recalls that he continued to slip, and was able to catch himself on a stack of highchairs.

Claimant recalls that he slid 10 feet; that he continued on to the bar to get the money drawer to the register; and that he felt really bad pain, like an instant jab. Claimant recalls that the onset of pain in his back and buttock was immediate and constant, and that left and right steps each caused pain in the opposing sides of the buttock muscles.

Mr. Bartley recalls that he took pain medication, as pain began to radiate into his legs. Mr. Bartley recalls that the injury occurred around 10:00 a.m. that morning, and that by 3:00 p.m., near the end of the work day, he was feeling incapable of the car ride home as he got up from sitting at a bar stool for over an hour and suffered severe pain.

Claimant recalls lying on a heating pad in bed all that night with the pain getting worse and worse. Mr. Bartley acknowledged a prior history of back pain in 1998 that came and went in the area just above the area of the more current injury at issue. Claimant recalls seeing Dr. Robson; being diagnosed as having a broken facet joint; having a fusion surgery performed in October of 1998; feeling a "pop" in the back 6 months after physical therapy; and having corrective surgery to the fusion in March of 1999.

The claimant recalls that on 5/1/05 he had a meeting with his three partners as to the feasibility of opening a second restaurant; that he attended that meeting; that he was asked why he was hobbling about; advised the partners as to where and when he slipped on the flooring; and was advised to use Blue Cross-Blue Shield insurance. Mr. Bartley recalls that he requested a partner to file a report of the injury, and after the employer declined to file a report the claimant chose to file a claim for compensation on 9/19/05, roughly one month after he received no cooperation from the owners. Claimant acknowledges that he ultimately resolved his claim as against Hawthorne Inn for 12 and ½% permanent partial disability as to the low back, with an addendum to amortize the settlement amount.

Claimant recalls seeking medical treatment by telephone call to Dr. Robson on 5/1/05, the physician who provided the prior treatment to the low back. Claimant acknowledges he gave no comment as to the nature of the injury alleged, and spoke to Dr. Robson again on 5/4/05 to complain of further pain radiating down the legs from center of the back pain at the mid buttock, feeling like an electric shock down the left leg in particular. Claimant recalls seeing Dr. Hurford on 5/09/05 and receiving an epidural injection to the sacroiliac for inflammation. Mr. Bartley notes he received some relief, with the pain returning that same evening, and returning all together the next day. Claimant recalls returning to Dr. Robson on 5/17/05, having x-rays, and was to have another injection to see if the problem was just inflammation. Mr. Bartley alleges to have had some occasional muscle spasm prior to his 4/30/05 injury, aggravating his pain but not preventing him from doing his work. Claimant relates that he had no formal weight restrictions, other than to lift only to his comfort level.

Claimant complains that after his 4/30/05 injury he suffered new symptoms of pain constant and severe, down his legs and making his toes numb. Claimant notes that he suffered more new complaints from constipation, and eventually from erectile dysfunction. Mr. Bartley alleges that pain and numbness radiating into the legs is a new complaint, and that prior to his slip a bad pain day was at level 2 or 3 with muscle spasm.

Claimant further alleges that prior to 4/30/05 his pain was higher up in the back, with leg pain and numbness relieved by surgery. Claimant alleges that after his slip his pain level reaches 8 for days, a deep and constant pain whether standing or walking. He recalls that after 5/17/05 the pain returned within hours, and he refused another pain injection until returning to see Dr. Robson on 5/24/05. Claimant relates that he had increasing pain; leg weakness; onset of severe constipation, and was obliged to walk with a cane.

Claimant recalls that in August of 2005 Dr. Robson recommended a surgery to locate nerve impingement in the back. Mr. Bartley recalls that on 10/28/05 he had surgery that "cleaned up" ragged joints and included further surgery to extend the hardware from the prior fusion. Claimant recalls pain improvement for a week, before the original pain from 4/30/05 returned. Claimant recalls pain into the buttock and down the legs, with weakness in the legs to the point that it was hard to walk.

Claimant recalls that in January of 2006 he was referred to Dr. Feinberg for pain management, and received a long series of epidural injections, followed by a return to Dr. Robson for further imaging to see if the fusion had taken. Claimant recalls that after epidural injections his pain would return anywhere from a day to 3 weeks thereafter. Claimant notes that Dr. Robson then performed a new procedure that involved

going in from the side of the abdomen, which was believed to be a better approach to the spine to insert cages. Surgery was performed on 12/30/06, and claimant recalls suffering from post operative pain before the pain prior to surgery began to come back. Claimant recalls having a subsequent surgery to repair a herniated abdominal muscle at the site of the surgery. Claimant continued to treat with Dr. Feinberg, and received transdermal pain killing patches, with the dosages changing from time to time.

Mr. Bartley recalls a prior history of pain complaint involving the use of a power washer, where the claimant suffered muscle spasms in early 2000. Claimant recalls having no medical treatment to his back from April of 2000 to September of 2004, when he had an injection for persistent back spasm lasting 4-5 days. Mr. Bartley recalls that the pain abated after the epidural injection, and that he had no further treatment until April of '05.

The claimant recalls having further surgery in September of '04 to repair a torn rotator cuff in the right shoulder, and a left foot surgery thereafter. Mr. Bartley notes that post surgery the left shoulder is weaker and lacks the full range of motion had in the opposite shoulder, and that rainy days and changes in weather affect his foot and back.

Mr. Bartley recalls that he continued to work from April of '05 to prior to surgery in October of '05. Claimant recalls that he continued to walk customers to their tables at the front of the house, but did not bus tables, did no carrying, and did not perform kitchen work.

Since his surgeries the claimant has not worked, and complains the pain medication makes it difficult to stay on task. He relates that he is unable to be on his feet for two hours, and must get up after sitting for a half an hour. Mr. Bartley notes that a typical day he will drive his wife to work; return home and lie down for a half an hour; walk on a walking trail for 45 minutes; lay down; empty the dishwasher, dust, and such other household chores that do not require bending or twisting; and will lie down three times a day.

Mr. Bartley complains to date of the same pain in the center back and into both legs. He relates that he is unable to drive a car or sit or stand for more than a half hour; that he leaves the lifting and the yard work to his wife; and that he takes narcotics to sleep at night, and wakes up in a sweat.

Mr. Bartley relates that he has restaurant, sales, and construction experience, noting he has limited sales experience, and performed light construction such as installing kitchens and baths, and doing some remodeling. Claimant relates that he has limited accounting and computer skills, and does not believe that he is capable of competing for employment.

Claimant testified that he did not work after his surgery in October of 2005, but remained an employee until his partners chose to buy him out, and after being in business together for eleven years. Mr. Bartley notes that he currently is taking the transdermal patch and Percocet, the same medications that he has been taking since the summer of '05.

Mr. Bartley shared a prior history of back fusion, rotator cuff repair, and foot fracture, but did not offer any testimony at hearing as to whether and to what extent those prior conditions limited his work activity or were otherwise disabling.

Mr. Bartley also testified twice by deposition, and his deposition testimony was generally consistent with his testimony at hearing, although his deposition testimony was somewhat more detailed and informative. For example, at his deposition Mr. Bartley explained the injury history and course of treatment for his rotator cuff tear and foot fracture, and testified that neither injury was particularly disabling to him either at work or at home. Mr. Bartley testified at hearing as to his duties "at the front of the house" and his maintenance duties, and by deposition noted that he was an assistant chef to one of his two equal partners working maybe three days a week at the front of the house.

The claimant has been seeing Dr. Robson for his back complaints since having his first lumbar fusion at L4-5 and L5-S1 in September of 1998. Dr. Robson followed that surgery up with a second fusion surgery in March of 1999 when the first fusion failed to take. The claimant did not receive further treatment from 2000 to 2004 until 9/30/04, when he returned to Dr. Robson with increasing low back and bilateral hip pain. Dr. Robson prescribed prednisone and Vicodin, and the claimant returned on 10/13/04 with complaints of low back ache, bilateral leg tightness, and walking with a bit of a limp. A CT myelogram was scheduled. After the myelogram Mr. Bartley returned on 10/21/04 and had an epidural scheduled with Dr. Hurford. In the 10/21/04 note Dr. Robson notes that the CT showed "pretty ragged-looking (sp) facet joints bilaterally at L3-4,

with some mild stenosis but not significant”.

On 10/26/04 Dr. Hurford administered an epidural steroid, followed up with another on 1/07/05. The claimant relates at hearing that he telephoned the office of Dr. Robson on 5/1/05 to seek medical treatment after his slip on 4/30/05. A note in the records of Dr. Robson dated 5/4/05 states that the claimant contacted the office with increased symptoms, and was scheduled for an epidural steroid injection. An epidural was administered on 5/10/05, and the claimant followed up with Dr. Robson on 5/17/05. There is no history of injury in the 5/17/05 note. Claimant returned to Dr. Robson on 5/24/05 with “significant low back pain” and the note includes the sentence, “He did have a slip injury after the first of the year and things have gotten significantly worse since then”. Dr. Robson ordered another CT scan, but was attributing most of the symptoms to the L3-4 level. On 6/1/05 Dr. Robson noted that the facet joints were very ragged appearing, and was to try bilateral L3-4 injections. Claimant continued to receive pain relief from Dr. Hurford in June and July of '05. Dr. Robson met with Mr. Bartley one more time in June, and on the second visit in August, on 8/23/05, a CT myelogram showed “large facet hypertrophy and juxtapositional stenosis at L3-4”. Dr. Robson recommended hardware removal, lumbar laminectomy, and extension of the fusion to L-3, which he performed on 10/28/05.

Mr. Bartley continued to treat with Dr. Robson post the surgery, before being referred to Dr. Feinberg on 1/17/06 for pain management. Drs. Robson and Feinberg provided Mr. Bartley with a total of 13 injections from 1/04/06 to 5/24/06. When Mr. Bartley was referred to Dr. Feinberg on 1/17/06, he continued to name his commercial insurer as his primary insurer, and he checked the “no” box to the question “Are you here for injuries sustained in a work -related accident? Dr. Feinberg provided pain management through 5/10/06, followed by epidurals provided by Drs. Robson and Feinberg on 5/24/06 and on 6/2/06 respectively. On 7/6/06 claimant was sent to Dr. Chabot for an IME, and Dr. Chabot noted that the claimant may require further treatment for his back complaints, and rendered a causation opinion and concluded that an injury in April of 2005 was not a substantial factor in causing the condition in need of treatment and surgical intervention.

Approximately nine months post surgery, Dr. Robson determined on 7/17/06 that there was no fusion at L3-4, and a second fusion was performed on 10/20/06. The claimant followed up with Dr. Robson until 12/20/06. On that date Dr. Robson noted bowel and left leg complaint, provided the claimant with Elavil for his leg pain, and planned to see the claimant again in 6 weeks for x-rays. Claimant did not return to Dr. Robson thereafter.

On 1/25/07 Dr. Feinberg met with the claimant at the request of claimant’s attorney to perform an IME. Dr. Feinberg reviewed certain of the medical records and the IME of Dr. Chabot; took an injury and treatment history from Mr. Bartley, and elicited his current complaints; reviewed the claimant’s deposition; provided his diagnosis of lumbar radiculopathy; post laminectomy syndrome of the lumbar spine; sacroiliac dysfunction, and musculoskeletal pain syndrome of the lumbar spine; and provide his causation opinion, concluding that the work related injury in April of 2005 “represents a substantial factor in patient’s exacerbation of his pre-existing lumbar pain; patient’s inability to work since October, 2005, and the patient’s need for surgeries number three and four.” Dr. Feinberg further concluded that complaints of chronic pain since April of 2005 were causally related to the April, 2005 incident, believed by Dr. Feinberg to be a substantial factor in the causation of these pain problems.

Subsequent to the report of Dr. Feinberg, on 4/04/07 Dr. Arenos performed a repair of a flank hernia located at the incisional site. On 5/9/07 Delores E. Gonzalez, a certified Rehabilitation Counselor, met with Mr. Bartley to perform a vocational evaluation as to the ability of Mr. Bartley to compete for employment on the open labor market. Ms. Gonzalez provided an accurate summary of the medical history; elicited a social and vocational history; rendered her opinion as to transferability of skills acquired by Mr. Bartley; and concluded that Mr. Bartley was not a candidate for vocational rehabilitation; that due to his impairments he was incapable of performing even a sedentary work on a sustained basis; and that his permanent disabilities prevent him from performing any job on the open labor market. The deposition of Ms. Gonzalez was taken on 11/14/07, and she provided her opinion as to employability consistent with her report. Ms. Gonzalez further noted that any employer attempting to hire Mr. Bartley would have to make an accommodation, further precluding him from being able to find employment on the open labor market. Ms. Gonzalez rendered

her report and deposition testimony after the deposition of Dr. Chabot on 6/8/07 but prior to that of Dr. Robson on 4/30/08. Ms. Gonzalez did have the benefit of the opinion of Dr. Chabot through his written report, but Dr. Robson prepared no final report, and Ms. Gonzalez offered no subsequent amendment or update to her written report, or in her deposition testimony, which suggests that Ms. Gonzalez did not have the benefit of the opinion testimony of Dr. Robson bearing on maximum medical improvement; need for medical treatment; permanent disability; final diagnosis; and as to medical causation.

Further, in his written report Dr. Feinberg did not render an opinion as to combination effect of disabilities or as to permanent partial disability due to the rotator cuff injury, but provided same in his deposition taken on 10/12/07. Since the 10/12/07 deposition was taken some 5 months after the vocational evaluation on 5/9/07, the expert vocation opinion of Ms. Gonzalez did not include an expert medical opinion as to permanent disability at the shoulder or as to combination effect of disabilities.

INJURY BY ACCIDENT/MEDICAL CAUSATION

Doctors Chabot and Robson both deny any medical causal relationship between the claimant's complaints of ill being in the low back and a slip on 4/30/05 resulting in a traumatic insult to a lumbar spine that had been previously fused by Dr. Robson at L4-5 and L5-S1 on two separate occasions in 1998 and 1999. Dr. Chabot is a doctor of osteopathy, and specializes in orthopedic spine surgery. Dr. Robson is board certified in orthopedic surgery, and is obviously a practicing orthopedic surgeon. Dr. Feinberg testified that he interned in the field of internal medicine; is board certified in both anesthesiology and pain management; and has been in the practice of pain management since 1988.

Dr. Robson denies a medical causal relationship for two reasons. His first reason is based on his history with Mr. Bartley as a treating physician; his memory as to events involving reports of injury by Mr. Bartley; the failure of Mr. Bartley to request that his treatment be provided through a workers' compensation insurer as opposed to the employer's commercial insurance carrier; and the absence of any documentation by his staff or by his partner, Dr. Hurford, of any history by Mr. Bartley as to an injury in April of 2005.

Dr. Robson notes that he was unable to agree when in November of 2005 the claimant asked if he could turn his claim into a workers' compensation claim for an injury that occurred in April of 2005. Dr. Robson believes there was no specific incident; notes that on 5/24/05 the claimant first complained of a slip injury "after the first of the year"; and states that he did not question the claimant as to the particulars of such injury at the time because he was aware of having treated the claimant in January of 2005 for complaints of worsening complaints. Dr. Robson acknowledges that as far as he is concerned, he was treating the claimant since the fall of 2004 for off and on flare-ups. He concludes, with a reasonable degree of medical and orthopedic certainty, that the third surgery performed by him on the claimant's low back in October of 2005 had no basis on any event that would constitute a traumatic insult to the spine (Second Injury Fund Exhibit No. I, at page 15).

Dr. Robson further denies work relatedness of injury by suggesting that when he performed surgery he found no evidence of trauma to the lumbar spine. He notes that the claimant suffered from spondylolisthesis as a child; that suffering back complaints due to such a condition by the age of 40 or so was a usual and anticipated development; that the claimant suffered facet joint changes and degenerative changes at the L3-4 level and spinal stenosis; that the claimant suffered hypertrophy of the facet joints, and that the joints looked ragged; acknowledges that hypertrophy of the joints can be triggered by trauma, and that it takes years for the bones to grow and result in hypertrophy. Doctor Robson and Mr. Bartley both acknowledge that the condition leading to the first two fusions in 1998 and 1999 was not precipitated by any particular event, and Dr. Robson advises that the first surgeries were necessary due to the degenerative condition in the claimant's lumbar spine, and that the surgery above the level of his prior surgeries was the result of degenerative changes and arthritis of the facet joints of L3-4 above the level of the previous fusion.

Dr. Chabot reaches the same conclusion as to medical causation as does Dr. Robson, and his opinion is based on an extensive and accurate history as to the history of complaint and medical treatment. Dr. Chabot

states that the alleged injury in April of 2005 was not a substantial factor in causing the condition that required treatment. (Claimant's Exhibit D, at page 10.) Further, it is apparent that Drs. Chabot and Robson come to the same medical conclusion independently from one another, inasmuch as Dr. Robson acknowledges in his deposition that the IME report of Dr. Chabot was never shared with him.

Dr. Feinberg does not suggest that the slip and subsequent complaint of pain resulted in some sort of change in the pathology of the back such as a disk herniation, but rather concludes "Patient's work related injury of April 2005 represents a substantial factor in patient's exacerbation of his pre-existing lumbar pain, patient's inability to work since October, 2005, and patient's need for surgeries number three and four." (Claimant's Exhibit C. at page 4). The report of Dr. Feinberg, as with his conclusion as to medical causation, is based on an accurate but limited review of the pertinent medical records. Dr. Feinberg acknowledges in the course of his deposition testimony that he did not review certain of the medical records immediately prior to the 4/30/05 slip event as described by Mr. Bartley, such the records of Dr. Robson documenting treatment, including injections, to the low back in the fall of 2004 and into January of 2005. The testimony as to the failure to review such records is consistent with the summary of the medical record review in the written report of Dr. Feinberg dated 1/25/07, where no mention is made of any treatment records prior to 2005, and the earliest record from Dr. Robson that Dr. Feinberg claims to have reviewed are from May of 2005 (although it is readily apparent that Dr. Feinberg was aware of the prior history of surgery in 1998-1999). Further, Dr. Feinberg is not directly asked, and does not comment on the history of complaint; the lack of specific reference in the medical records to a slip in April of '05; the significance of the claimant pursuing his treatment under his commercial insurance carrier, and subsequently asking Dr. Robson in November of 2005 as to the possibility of changing the treatment to that for a workers' compensation injury in April of 2005. All of these facts in evidence form a credible basis for the ultimate conclusion of Dr. Robson as to medical causal relationship, and are not discredited by Dr. Feinberg as factors to consider in determining causation.

The claimant has the burden of proving all the essential elements of the claim for compensation. It is noted that the proof as to medical causation need not be by absolute certainty, but rather by a reasonable probability. "Probable" means founded on reason and experience which inclines the mind to believe but leaves room for doubt. Tate v. Southwestern Bell Telephone Co., 715 S.W.2d 326, 329 (Mo.App. 1986). "Medical causation, not within the common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause". Brundige v. Boehringer Ingelheim, 812 S.W. 2d 200, 202 (Mo.App. 1991); McGrath v. Satellite Sprinkler Systems, Inc., 877 S.W.2d 704, 708 (Mo.App. E.D. 1994). The ultimate importance of expert testimony is to be determined from the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. Choate v. Lily Tulip, Inc., 809 S.W. 2d 102, 105 (Mo.App.1991).

Drs. Chabot and Robson disagree with Dr. Feinberg as to whether there is a medical causal relationship between an injury in April of 2005 and the claimant's complaints of a marked increase in his low back complaints. Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. Hawkins v. Emerson Electric Co., 676 S.W.2d 872, 877 (Mo. App.1984). "A medical expert's opinion must be supported by facts and reasons proven by competent evidence that will give the opinion probative force to be substantial evidence." Silman v. Montgomery & Associates, 891 S.W.2d 173, 176 (Mo. App. 1995); Pippin v. St. Joe Minerals Corp., 799 S.W.2d 898, 903 (Mo. App. 1990).

At issue is whether the claimant has proved, as a matter of a reasonable degree of probability, that the claimant suffered an exacerbation of a preexisting condition that follows as a consequence of the work injury and that the employment is a substantial factor in causing the injury, Section 287.020.3(2) RSMo 2000. That same section, at 287.020.3(1) specifically provides that "Ordinary, gradual deterioration or progressive degeneration of the body caused by aging shall not be compensable, except where the deterioration follows as an incident of employment."

The expert medical causal opinions of Drs. Robson and Chabot, the two spinal surgeons to render an opinion in the matter, are found more credible than that of Dr. Feinberg; to be more supported by the evidence as a whole than that of Dr. Feinberg; and to be more worthy of belief. For example, Dr. Feinberg

opines that the complaints of ill being in the back are related to an exacerbation of the pre-existing condition; acknowledges that the prior condition was degenerative; and that the ill being in the low back suffered by Mr. Bartley in the late 1990's was not attributable to any specific event or series of events other than gradual deterioration of the degenerative condition. More particularly, Dr. Feinberg was unaware of the claimant's history of treatment for low back complaints from the fall of 2004 to early January of 2005, while the expert medical opinions of Drs. Chabot and Robson were based on an understanding of the complete course of medical treatment. The history of treatment a matter of months prior to April of 2005 supports the conclusions of Drs. Robson and Chabot that the claimant had a progressive and degenerative condition that was symptomatic and in need of treatment prior to the work injury at issue.

The claimant has failed to persuade, as a matter of a reasonable probability, that there is a medical causal relationship between a work injury on 4/30/05 and a condition of ill being in the low back, or that the employment is a substantial factor causing the complaints of ill being. The issue as to medical causation is found in favor of the Second Injury Fund, and the claim for compensation is found not compensable.

LIABILITY OF THE SECOND INJURY FUND

Second Injury Fund liability under Section 287.220 RSMo 2000 for a combination of permanent disability is premised on a finding that the underlying work injury is compensable. A finding in favor of the Second Injury Fund as to medical causation and compensable injury is also necessarily a finding in favor of the Second Injury Fund on the issue as to liability for a combination of permanent disability. The issue as to liability is found in favor of the Second Injury Fund, and the claim for compensation must be denied.

A finding in favor of the Second Injury Fund as to medical causation and compensability renders moot all other issues, including as to notice and as to nature and extent of permanent disability.

Date: September 5, 2008

Made by: /s/ KEVIN DINWIDDIE
KEVIN DINWIDDIE
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ JEFFREY W. BUKER
Jeffrey W. Buker
Director
Division of Workers' Compensation