

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

Injury No.: 00-129041

Employee: Murl L. Brown
Employer: Strong Alarm Company (Dismissed)
Insurer: American Motorist Insurance Co. (Dismissed)
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 April 21, 2010. The award and decision of Administrative Law Judge Robert B. Miner, issued April 21, 2010, 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 3rd day of September 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Murl L. Brown

Injury No.: 00-129041

Employer: Strong Alarm Company
(Dismissed January 2, 2003)

Before the
**Division of Workers'
Compensation**

Insurer: American Motorist Insurance Co.
(Dismissed January 2, 2003)

Department of Labor and Industrial
Relations of Missouri

Additional Party: The Treasurer of the State of Missouri as Custodian of the Second Injury Fund

Hearing Date: January 21, 2010

Checked by: RBM

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: November 16, 2000.
5. State location where accident occurred or occupational disease was contracted: Clay 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? 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: Employee was injured when the pickup truck he was driving struck a deer.
12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Neck and body as a whole.
14. Nature and extent of any permanent disability: 15% permanent partial disability of the body as a whole (400 week level) referable to the cervical spine, combining with preexisting disability to result in permanent and total disability.
15. Compensation paid to-date for temporary disability: \$14,156.95.
16. Value necessary medical aid paid to date by employer/insurer? \$39,378.43.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$435.71.
19. Weekly compensation rate: \$290.47 for temporary total disability, permanent partial disability, and permanent total disability.
20. Method wages computation: By agreement of the parties.

COMPENSATION PAYABLE

21. Amount of compensation payable: N/A as to Employer and Insurer. Employee's claim against Employer was dismissed on January 2, 2003.

22. Second Injury Fund liability:

Permanent total disability benefits from Second Injury Fund in the sum of \$290.47 per week beginning on December 16, 2002, and, thereafter, for claimant's lifetime.

23. Future requirements awarded: As awarded.

Said payments to begin immediately 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 E. Martin.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Murl L. Brown

Injury No.: 00-129041

Employer: Strong Alarm Company
(Dismissed January 2, 2003)

Before the
**Division of Workers'
Compensation**

Insurer: American Motorist Insurance Co.
(Dismissed January 2, 2003)

Department of Labor and Industrial
Relations of Missouri

Additional Party: The Treasurer of the State of Missouri as Custodian of the Second Injury Fund

Hearing Date: January 21, 2010

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PRELIMINARIES

A final hearing was held in this case on Employee's claim against The Treasurer of the State of Missouri as Custodian of the Second Injury Fund on January 21, 2010 in Gladstone, Missouri. Employee, Murl L. Brown, appeared in person and by his attorney, James E. Martin. Employer and Insurer did not appear. Employee's claim against Employer was dismissed on January 2, 2003. The Second Injury Fund appeared by its attorney, Kimberly Fournier. James E. Martin requested an attorney's fee of 25% from all amounts awarded.

STIPULATIONS

At the time of the hearing, the parties stipulated to the following:

1. On or about November 16, 2000, Murl L. Brown ("Claimant") was an employee of Strong Alarm Company ("Employer") and was working under the provisions of the Missouri Workers' Compensation Law.
2. On or about November 16, 2000, Employer was an employer operating under the provisions of the Missouri Workers' Compensation Law and was fully insured by American Motorist Insurance Co. ("Insurer").
3. On or about November 16, 2000, Claimant sustained an injury by accident in Excelsior Springs, Clay County, Missouri, arising out of and in the course of his employment.
4. Employer had notice of Claimant's alleged injury.

5. Claimant's Claim for Compensation was filed within the time allowed by law.
6. The average weekly wage was \$435.71, and the rate of compensation for temporary total disability, permanent total disability, and permanent partial disability is \$290.47.
7. Employer/Insurer has paid \$14,156.95 in temporary total disability at the rate of \$293.60 per week for 48 1/7 weeks from November 17, 2000.
8. Employer/Insurer has paid \$39,378.43 in medical aid.

ISSUES

The parties agreed that there were disputes on the following issues:

1. Liability of the Second Injury Fund for permanent disability benefits, including permanent partial disability and permanent total disability.

Claimant testified in person. In addition, Claimant offered the following exhibits which were admitted in evidence:

A—Deposition of Dr. James Stuckmeyer with deposition exhibits (the deposition was admitted subject to objections contained in the deposition)

B—Deposition of Michael Dreiling with deposition exhibits (the deposition was admitted subject to objections contained in the deposition)

C—Deposition of Michael Dreiling with deposition exhibits (the deposition was admitted subject to objections contained in the deposition)

E—Driver's Program Discharge Summary

The Second Injury Fund offered the following exhibits which were admitted in evidence:

Second Injury Fund Exhibit 1—Kansas worker's compensation settlement documents

Second Injury Fund Exhibit 2—Deposition of Claimant (the deposition was admitted subject to objections contained in the deposition)

Prior to the introduction of evidence, Claimant's attorney orally moved to amend the Claim for Compensation to allege permanent total disability against the Second Injury Fund. The Second Injury Fund's attorney had no objection to the motion, and Claimant's motion was granted.

Any objections not expressly ruled on during the hearing or in this award are now overruled. To the extent there are marks or highlights contained in the exhibits, those markings were made prior to being made part of the record, and were not placed thereon by the Administrative Law Judge.

The post-trial briefs have been considered.

Findings of Fact

Summary of the Evidence

Claimant testified at the hearing that he is 67 years old. In November 2000, he was employed by Strong Alarm Company. Employer was headquartered in Olathe, Kansas. Employer installed residential and commercial fire alarms. Claimant had worked for Employer on the alarm side of the business for three and one-half years. Claimant installed alarm systems for Employer. He pulled cables on tops of buildings and attics. Cables weighed between fifty and one hundred pounds. He mounted boxes on walls, and ran cables through ceilings and walls and into basements. He climbed ladders and carried boxes with alarms that weighed around forty-five pounds.

Claimant had also worked for Employer as a technician in a pawn shop repairing electronic devices including copy machines and air compressors. He worked on the pawn side for fifteen years and was then transferred to the alarm company side.

On November 16, 2000, while working for Employer, Claimant installed an alarm system in Liberty, Missouri. He finished that job and then began driving Employer's Nissan pickup truck to another job. Claimant was involved in a motor vehicle accident on Highway 52 in Clay County, Missouri while driving to the other job. He was traveling about seventy miles per hour when a large deer jumped out in front of him and his truck struck the deer. His truck came to rest in a ravine on the side of the road.

The pick-up Claimant was driving had a camper shell that held tools. The front end of the truck came off and the windshield came out as a result of the accident. Equipment from the back of the truck came inside the truck and struck Claimant. He was wearing his seat belt at the time of the accident. He was under the dash when the truck came to rest. Claimant said he hurt all over after the accident.

Claimant called 911 on his cell phone. Fire department personnel removed him from the vehicle. He was driven to North Kansas City Hospital where x-rays were taken and pain medication was prescribed. He did not stay at the hospital overnight.

Claimant was also injured on March 8, 2000 when he fell off a ladder while on the job. Claimant testified that he was injured on his right side above his waist in the March 2000 accident. Claimant's employer did not have worker's compensation when Claimant was injured in March 2000. Claimant went to Dr. Gamble on his own. He was already scheduled to see Dr. Reintjes when he had the accident on November 16, 2000.

Claimant said he had problems with his head, shoulders, and back after the accident of March 8, 2000. He was able to work, but he had problems. Claimant testified he did not miss work between March 2000 and November 2000. He agreed that in the thirteen weeks before his November 2000 accident, he worked one and a half hours overtime during one week and three overtime hours during two weeks. He had pain and issues after the March fall, but he did his job for Employer.

Claimant testified that he was not having any problems before the March 2000 ladder accident. He performed his job without difficulty. He was under no doctor's care and was under no doctor's restrictions before March 2000. He was not taking any medication at that time.

Claimant initially complained of problems with his right side after the March 2000 accident. He saw Dr. Gamble between the time of his fall and the time of his November 2000 automobile accident. Dr. Gamble prescribed medication. Claimant did not have physical therapy during that time. Dr. Gamble had not recommended surgery. Dr. Gamble recommended that he have an appointment with an orthopedic surgeon. He had no restrictions between the March accident and the November accident. Employer did not provide any additional help with his job between the March accident and the November accident. Claimant worked without assistance during that time, although he had some pain. Before November 2000, he did all of his own housework and cared for his home. Claimant did not have problems driving before November 2000. His leg did not give out before the November automobile accident.

Claimant saw Dr. Reintjes on November 29, 2000. He had neck surgery after the November 2000 accident. Dr. Reintjes treated Claimant for a year and then released him with restrictions of ten pounds lifting and no bending or stooping. Claimant has had surgery, medication, and occupational therapy. He said that treatment did not help him. He has continued to get worse as time has gone on.

Claimant was not able to drive when he was released by Dr. Reintjes. He went to a driving school and learned to drive with his left leg and left hand. He now uses his left foot for the gas and brake, and only rarely drives on the interstate. He does not drive when there is snow.

Claimant testified he had problems with his legs after the second accident. His legs were weak. Claimant's right side became worse and his legs got wobbly after the November accident. He did not have problems with his leg giving out before November 2000. He said he began to have problems with his memory after the surgery. He testified he got worse after the second accident.

Claimant testified that he hurts from his head to his toes. His neck hurts and he cannot turn his head all the way. He said his shoulders, hand, legs, and back hurt every day. His feet go numb. He was wearing three shirts and a jacket during the hearing. He testified he cannot pick up things with his right hand. He wears gloves to support his hand. He said his legs and hand do not work if it gets cold. He cannot hold a cup of coffee or open a door with his right hand. He cannot button his buttons. Claimant testified he cannot be up too long before he needs to lie down.

Claimant testified he has difficulty sleeping because of pain. He gets to sleep at 4:30 or 5:00 and sleeps off and on. His difficulty sleeping began after his neck surgery. He has a difficult time taking a shower. He prepares his own meals with a microwave. He does not cook like he did before the November accident. It takes him forty-five minutes to get dressed. He has help with his laundry and home maintenance.

Claimant testified that he was not taking pain medication other than an occasional Tylenol that did not help. Dr. Reintjes had prescribed Neurontin, but Claimant stopped taking that. Claimant said he wears gloves daily. He said his right leg gives out at times and he occasionally falls. He uses a cane, but that was not prescribed by a doctor. He last saw a doctor for his neck injury one year after the automobile accident when he last saw Dr. Reintjes. He has not been injured since then. Claimant was on medication for depression after the surgery. He had not taken that medication before November 2000.

Claimant testified he did not work after he had the surgery provided by Dr. Reintjes. He said he was not able to go back to work for Employer. He said the doctor told him he could not go back to work and he quit his job. He applied for work in electronics but was not able to pass the physical.

Claimant spoke with the owner of Employer after Dr. Reintjes released him, and they agreed that there was nothing that Claimant could do either at the pawn shop or on the alarm side. Claimant testified that he has not been able to get a job since November 16, 2000. He has tried to find work. He went to a program with Social Security to try to

get a job but he was not successful. Claimant did not think he could do any job. He said he cannot lift or sit long and it hurts to lift one gallon of water. He testified he could not do electronics anymore.

Claimant is a high school graduate. He went to college and studied electronics. Claimant testified that he has a college degree and has two certificates. He came to Kansas City and worked in various jobs, including the sheriff's department and police department. He worked with the school district in Kansas City, Kansas for seventeen years driving trucks, cutting lawns, and doing labor. He has done construction work. Claimant testified he could not do any of that work now. He said he cannot lift anything. Most of the jobs he had before November 2000 involved a lot of lifting.

Claimant is a HAM operator and speaks on the radio daily. He used to hunt and fish, but has not since March 2000. He now watches TV for a while and uses the HAM radio. He said he cannot do anything for the pain. Exercise has not been recommended. Pain medication does not help.

Claimant's deposition taken on February 15, 2002 was admitted as Second Injury Fund Exhibit 2. Claimant testified then that he has a valid driver's license. He has a college degree. He received a bachelor's degree in roughly 1965 from Pine Bluff College, now known as the University of Arkansas. He testified he studied electronics and had grades over 3.5. He was certified in electronics after college. He had been a computer technician for a school district before working for Employer. He did programming and a lot of typing. He also repaired computers.

Claimant testified in his deposition that he had been with Employer for eleven years, and his last job was with Employer. His duties at Employer on a daily basis were repairs, installing alarm equipment, accessing controls, fire alarms, and doing fire inspections. He drove for his work. He was a service technician. Most of the work was commercial. He installed all the equipment. He lifted between fifty to one hundred pounds. He had to crawl through crawl spaces. He carried two fiberglass ladders. He carried tools on his tool belt. He always worked by himself.

Claimant testified in his deposition that since his accident, he does not remember as well as he used to. He did not have memory problems before the accident. Claimant testified his hands hurt every day. He said he has severe pain. He also is bothered with his neck, shoulders, arm and hands. He was wearing a cervical collar when his deposition was taken. He writes with his right hand. He testified his shoulders bother him all the time.

Claimant testified in his deposition that after his fall from the ladder, and before his November accident, when he reached above his head trying to pull cables, he would

have sharp pains. That did not prevent him from working. He handled the job with no problem.

Claimant testified in his deposition that he did not hurt his back when he fell from the ladder. He fell on the right side. He fell on some crates that broke his fall. Dr. Gamble gave him pain medication and injections in the left shoulder.

Claimant was asked in his deposition: "Q. Did you hurt your neck at all when you fell?" He answered, "No, not really. Just in my shoulders. I just had problems up there when I fell. When you fall, you don't know what you damage. I'm not a doctor so I don't know."

Claimant testified in his deposition that he did not have any of the complaints with his hands that he had at the time of the deposition when he fell in March. He never stopped working after the March 8, 2000 accident. He did not have any problem doing the things he had to do for the company. He did not have any problems traveling or lifting, except "only if I reached over my head I would get a sharp pain."

Claimant testified in his deposition that he last worked on November 16, 2000. He was asked if that was because of all the physical problems he had now and he answered: "Yeah. I can't do anything no more." He said he had not looked for work at any place since November 16, 2000 because he was not able to. He answered, "What can I do with these hands?" He had not driven since November 16, 2000. He takes care of himself with difficulty. He cooks with difficulty.

Claimant testified in his deposition that he took care of yard work and snow removal "real well" before the November accident. He said he could not fish because he could not use his wrists. He had injured his low back on the job before March 2000. He did not have surgery. He was taking anti-depressants at the time of the deposition. Those had not been prescribed before November 2000. He was also taking codeine and a muscle relaxer prescribed by Dr. Reintjes. He uses Aspercreme and Formula 454 for pain in his hands.

Claimant testified in his deposition that there was nothing that he thought he could do for a living, given his background and experience. He said that he needed his hands and he cannot use his hands. He said his right leg gives out on him, and if he is not close to something he falls. He said his physical complaints have gotten worse since his accident.

Claimant testified approximately one hour and twenty minutes after the commencement of the hearing that the bottoms of his feet were numb. Claimant drove himself to court from Kansas for the hearing.

I find this trial testimony and deposition testimony of Claimant to be credible unless noted otherwise later in this Award. It is noted that Claimant sat continuously during the trial which lasted approximately one hour and thirty minutes.

Exhibit A is the deposition of Dr. James Stuckmeyer taken on June 1, 2006 with Stuckmeyer Exhibit 1, his Curriculum Vitae, and Stuckmeyer Exhibit 2, his medical report dated February 28, 2005 pertaining to Claimant and addressed to Claimant's attorney. Objections contained in Dr. Stuckmeyer's deposition to the opinions of Dr. Prostic are sustained.

Dr. Stuckmeyer's Curriculum Vitae notes that he was Board Certified by the American Board of Orthopedic Surgeons in 1989. No current hospital affiliations are noted.

Dr. Stuckmeyer's February 28, 2005 report notes that he evaluated Claimant on February 21, 2005. He reviewed records identified in the report. The report notes Claimant sustained two occupational injuries. The first occurred on March 8, 2000 when Claimant was on a ladder that tipped over and caused him to fall to a floor. Claimant reported the accident and continued to work with ongoing symptoms of diffuse upper extremity weakness and ongoing symptoms of neck pain. He denied radicular symptoms into the lower extremities.

Dr. Stuckmeyer's report summarizes Claimant's treatment following the March 2000 injury (injury number one.) His report notes Claimant was evaluated by Dr. Nathan Schechter on September 21, 2000. Claimant informed Dr. Schechter that he fell approximately ten feet to the ground and complained at that time of constant pain in the posterior aspect of the cervical spine with intermittent aching in the right shoulder and numbness of all fingers of the right hand. Dr. Stuckmeyer's report also notes Claimant complained of weakness of grip in the right hand and constant aching in the fingers of the right hand and numbness of the thumb and index finger of the left hand that was constant. The report notes Claimant had seen Dr. John Gamble in consultation and had received medication and heat and massage to the neck region. Claimant denied previous involvement to the cervical spine and upper extremities prior to March 8, 2000.

Dr. Stuckmeyer notes Dr. Schechter opined Claimant had marked degenerative changes in the cervical spine with narrowing of the disc spaces between C3-4, C5-6, and C6-7.

Dr. Stuckmeyer's report notes Claimant saw Dr. Stephen Reintjes on November 29, 2000. Dr. Reintjes is noted to have recorded that Claimant stated he fell approximately ten feet from the ladder and landed on concrete on March 8, 2000. Dr.

Reintjes is also noted to have recorded that Claimant stated he had an injury on November 16, 2000 while driving a company truck and striking a deer. Claimant reported that before striking the deer he did have neck pain and shooting pain throughout the upper arms with diffuse weakness of the right hand. Claimant had also described increased pain with extension of the neck and had complained of diffuse upper extremity weakness and that he could not walk right and his legs did not work right. Dr. Reintjes noted that since the motor vehicle accident on November 16, 2000, Claimant had increase in neck pain, weakness, and new complaints of low back pain.

Dr. Stuckmeyer's report describes the course of Claimant's treatment after his November 16, 2000 injury. His report notes that on December 4, 2000, an MRI scan at North Kansas City Hospital of the cervical spine revealed severe degenerative disc disease in the cervical spine with severe spinal stenosis at C3-4 and C4-5. At the C3-4 level there was osteophytosis with facet arthropathy and disc bulging. There was also a small central disc protrusion at C5-6 causing impingement on the central aspect of the cord and generalized disc bulging at C5-6, C6-7 and C7-T1. Cervical spine x-rays revealed severe cervical spondylosis but no acute fracture.

Dr. Stuckmeyer's report notes Claimant followed with Dr. Reintjes on December 21, 2000 after cervical myelogram and post-myelographic CT scan. That revealed severe concentric cervical stenosis at C3-4 with a central disc herniation at C4-5 and a left sided C5-6 foraminal stenosis. Claimant underwent a decompressive cervical laminectomy at C3-4 and was seen in follow-up post-operative on February 7, 2001. Claimant reported on March 7, 2001 to Dr. Reintjes that his right hand hurt, that he could not use his right hand, and that he had decreased dexterity. Physical therapy and occupational therapy were recommended.

Dr. Stuckmeyer's report notes that on March 21, 2001, Dr. Reintjes wrote a letter stating that the result of Claimant's injury was a spondylitic myelopathy with primarily a spastic right upper extremity. Claimant is noted to have followed with Dr. Reintjes on April 9, 2001, May 7, 2001 and June 15, 2001, when Neurontin was noted to have caused swelling in the arms and legs, and Claimant was placed on Relafen. Ongoing occupational therapy was recommended to improve dexterity of the right hand. On July 16, 2001, Dr. Reintjes noted Claimant still complained of right hand pain. He recommended Claimant return to work at a supervisory position, and felt he could lift up to ten pounds, and that he should not work at any height.

Dr. Stuckmeyer's report notes that on August 24, 2001, Dr. Reintjes' impression was that Claimant had cervical spinal stenosis at C3-4 which preexisted either accident, but was made symptomatic by the fall of March 8, 2000, and was exacerbated by the motor vehicle accident on November 16, 2000. Dr. Reintjes is noted to have attributed 60% of the symptoms to the fall off the ladder and 40% of the symptoms due to the motor

vehicle accident. Dr. Reintjes is noted on January 21, 2002 to have recommended that Claimant not drive as a part of any occupation, and that he not drive in high traffic situations or adverse weather conditions.

Dr. Stuckmeyer's report notes that Claimant had a functional capacity evaluation on September 14, 2001 that revealed Claimant did not meet the overall physical demand level required for consideration of safe work performance at the job of driver/security alarm installer. Claimant completed a lift and carry test demonstrating the ability to carry and lift ten, twenty, and thirty pounds a twenty foot distance.

Dr. Stuckmeyer's report notes that on December 8, 2001, vocational consultant, Mr. Dreiling, saw Claimant and stated: "I do not believe that he is realistically employable in the labor market." Dr. Stuckmeyer's report notes Mr. Dreiling also commented, "I do not believe any employer in the usual course of business, seeking persons to perform duties of employment in the usual and customary way would reasonably be expected to employ this individual in his existing physical condition."

Dr. Stuckmeyer's report notes that on February 18, 2002, an independent medical evaluation was performed by Dr. Eden Wheeler. Dr. Wheeler is noted to have commented that Claimant had "severe spinal stenosis at C3-4 level status post decompressive laminectomy with neurological sequelae of the right upper extremity, motor, and sensory deficit and associated disc coordination." Dr. Wheeler is noted to have found no clinical evidence of neurological deficit involving the lower extremities or associated gait impairment. Dr. Wheeler is noted to have believed that Claimant had chronic pain syndrome involving the right upper extremity secondary to cervical stenosis and non-vocational issues of hypertension.

Dr. Wheeler is also noted to have stated that in terms of ability to return to work, the functional capacity evaluation dated September 14, 2001 "would be an appropriate model on which to base recommendation." Dr. Wheeler is noted to have stated that despite documented evidence, there was self-limitation and increased coefficient variation on certain testing, and that based on the evaluation, "The patient would be able to lift and carry thirty pounds on an occasional basis with overhead lifting to ten pounds on an occasional basis. Limitation also would be placed on the ability to perform fine motor skills with the right upper extremity."

Dr. Stuckmeyer's February 28, 2005 report notes Claimant's current complaints and conditions. Claimant reported he was not employed and had been off work since November 16, 2000 and was receiving Social Security disability. Claimant stated he was having ongoing "significant symptoms of neck pain with no feeling in the right hand, numbness and tingling into the left arm with weakness in both of the upper extremities, bilateral decreased grip strength." Claimant related difficulty with any attempts at

overhead utilization of either arm and poor motor control and a “shaky” gait. Claimant stated his ongoing neck symptoms interfered with his sleep patterns.

Dr. Stuckmeyer’s report notes Claimant reported neck pain and pain with extension and neurological complaints prior to November 16, 2000, and those symptoms “were markedly exacerbated and aggravated with the November 16, 2000 injury.” The report notes Claimant’s March 8, 2000 injury appeared to have initiated his cervical complaints and pathology.

Dr. Stuckmeyer’s report sets forth results of his physical examination of Claimant. The report notes Claimant had “rather diffuse tenderness from the mid-cervical region to the upper thoracic region however no evidence of spasm.” He had limited range of motion lacking approximately 50% of flexion and extension and 50% of side bending and lateral rotation. Claimant was noted to have decreased fine motor control and difficulty picking a coin up from the desktop. Dr. Stuckmeyer reported Claimant had a gait asymmetry and slight instability.

Dr. Stuckmeyer’s report sets forth the following conclusion (pp. 7-8):

In summary, I feel within reasonable medical certainty that Mr. Brown represents a very complicated orthopedic/spinal patient. It is the opinion of this examiner within reasonable medical certainty that Mr. Brown did have preexisting asymptomatic degenerative arthritis of the cervical spine. As a direct result of the accident of March 8, 2000, it appears that the patient developed symptoms of neck pain and radicular symptoms into the upper extremities. The patient was appropriately managed conservatively; however, he was then involved in another work-related injury of November 16, 2000, which markedly exacerbated and aggravated these neurological complaints. From an orthopedic standpoint I do feel the patient’s treatment to date has been appropriate and indicated. I do not feel that further diagnostic studies are indicated nor do I feel that the patient would benefit from any further surgical spinal procedures.

Taking into consideration the objective findings as well as ongoing subjective complaints, it would be the opinion of this examiner within reasonable medical certainty that based on the ongoing symptoms of pain and dysfunction and neurological impairment in both the right and left upper extremity that Mr. Brown is permanently and totally disabled.

Specific to the cervical spine I would render a 15% preexisting disability to the accident date of March 8, 2000, based on the diagnosis of advanced cervical degenerative arthritis, multi-level cervical spine. I would

assess an additional 25% disability to the cervical spine causally related to the accident date of March 8, 2000, and another 15% disability to the accident date of November 16, 2000.

I concur with . . . Mr. Dreiling that the patient is incapable of obtaining gainful employment due to his diagnosis of cervical myelopathy with obvious neurological impairment of upper and lower extremities and chronic cervical pain.

Dr. Stuckmeyer's report notes that his opinions are rendered within a reasonable degree of medical certainty.

Dr. Stuckmeyer testified on June 2006 that he examined Claimant on February 21, 2005. He described the records he reviewed prior to preparing his report. He discussed the history of Claimant's March 8, 2000 and November 16, 2000 accidents, Claimant's course of treatment after the accidents, Claimant's complaints, social history, the effect on ordinary pursuits of life, and his physical examination of Claimant. Dr. Stuckmeyer's testimony is consistent with his report.

Dr. Stuckmeyer testified that the significance of Claimant's decreased motor control and difficulty picking up a coin off a desktop indicated that Claimant had difficulty utilizing his fingers for even fine motions that was obviously limiting. Claimant also had decrease in grip strength of sixteen kilograms on the right and twenty kilograms on the left. Normal range would be forty to sixty kilograms on the dominant side and a percentage on the non-dominant side. Dr. Stuckmeyer testified regarding the conclusions set forth in the report, and his testimony is generally consistent with his report. He testified that Claimant was suffering from cervical myelopathy, which he stated is spinal cord damage as opposed to nerve root damage.

Dr. Stuckmeyer testified regarding Claimant's disability, and his testimony is consistent with his report. He testified that he did not feel that Claimant was capable of gainful employment.

Dr. Stuckmeyer was asked if Claimant's disability following the March 8, 2000 accident would have caused a hindrance or an obstacle in becoming reemployed if he became unemployed. Dr. Stuckmeyer answered "Yes" and testified:

I felt that the patient had ongoing symptoms of neck pain and radicular symptoms in the upper extremity. These injuries are relatively close in proximity and he was under, as I recall, neurosurgical consultation with Dr. Reintjes. And to answer your question, yes, I think his ongoing symptoms would have been a hindrance to employment after the first injury.

Dr. Stuckmeyer testified that the 55% disability rating would be to the cervical spine. He further stated:

However, when you take the overall impact and based on Dreiling's report and the fact this patient is 62 years of age, he has significant motor function loss with limitation of range of motion.

When you take the global picture, which is what you really have to do in dealing with these individuals, I didn't feel that he was capable of gainful employment and that was in agreement with other examining physicians.

Dr. Stuckmeyer testified on cross-examination that he did not recall reviewing any medical records prior to March 8, 2000 with regard to Claimant's cervical condition.

Dr. Stuckmeyer gave the 15% rating for preexisting based on Claimant's "significant spinal stenosis." He noted Claimant was not really complaining of neck pain and was not really having any arm pain prior to March 8, 2000, but that did not mean that there was not a problem. He agreed that Claimant was asymptomatic preexisting March 8, 2000. He agreed Claimant was gainfully employed and that there was no indication that he had missed any time from work at that time. Claimant was working full time without complaints. He agreed that Claimant was having no hindrance or obstacle to his employment at that time prior to March 8, 2000.

Dr. Stuckmeyer agreed that the only treatment records he had relating to Claimant's March 8, 2000 incident were the records of Dr. Gamble who was the only treating physician between March 8, 2000 and November 16, 2000. The treatment Claimant received during that time was conservative with hot packs, a little pain medicine, therapy but no MRI or CT. Dr. Stuckmeyer believed Claimant continued to work during that time on a full time basis without restrictions.

Dr. Stuckmeyer testified that the MRI after November 16, 2000 showed evidence of a high signal within the cord that suggested edema. He stated there was also evidence of a disc protrusion. Dr. Stuckmeyer testified: "I think it would be somewhat speculative to say that was the cord edema due to November or was it really due to the initial March injury because there clearly was evidence on Dr. Schechter's commentary that there was something going on with this gentleman." Dr. Stuckmeyer noted Claimant went to a driving school after the November 2000 injury to work with some adaptive devices because of problems that he was having after the November 2000 injury.

Dr. Stuckmeyer testified that Claimant was having “relatively significant complaints of neurological problems based on what Dr. Schechter commented on” prior to the November 2000 accident. He noted Dr. Schechter had stated that “the patient was having numbness of all fingers of the right hand, weakness of the grip, frequently dropping objects, lack of feeling, numbness, left-hand constant. Stated when he extended the cervical spine he got a tingling down the right arm.” That was prior to the November accident.

Dr. Stuckmeyer also testified (pp. 46-47) that Dr. Schechter had commented:

He has neurological changes in the right upper extremity with associated numbness of the entire right upper extremity and weakness of grip of the right-hand as compared to the left. The patient definitely has neuropathy of the right upper extremity. The patient should have further examination, namely an MRI scan of the cervical spine and electrodiagnostic follow up by a neurosurgical treatment.

Dr. Stuckmeyer testified that Dr. Schechter is an orthopedic surgeon.

Dr. Stuckmeyer testified at pages 50-51:

As I opined, this individual had a bad spine, but was working. He injures himself in March, had significant problems going on based on review of Dr. Schechter’s commentary and what the patient was complaining on. And it’s my opinion that the patient most likely had a cervical cord, not nerve root, cord problem with a diffused numbness and tingling. There are recommendations by two specific physicians, Dr. Gamble and Dr. Schechter, that the guy had problems, most likely a myelopathic condition, which is a contused cord. And there was [*sic*] recommendations for treatment, MRI scan and electrodiagnostic studies, as well as orthopedic spine and neurosurgical consultation. It was never obtained, although recommended prior to accident no. 2.

After accident no. 2, he was ultimately referred to Dr. Reintjes and all these things were discussed. I think in my opinion, it was speculative to state whether it was accident no. 1 or accident no. 2 that caused the contused cord. However, based on review of Dr. Schechter’s commentary and my extensive experience as a spine surgeon, this guy had a bad problem after accident no. 1. It just had not been addressed, although it was discussed. And based on my opinion and all the review of the medical records and the fact this

gentleman has ongoing myelopathic problems with an antalgic gait, I rendered the opinion that he was permanently and totally disabled.

Dr. Stuckmeyer was asked the following question at page 51:

Q. And my question to you then is, is it one accident, an injury that caused him to be permanently and totally disabled, or the other or a combination of both?"

Dr. Stuckmeyer provided the following answer to that question at pages 51-52:

A. It's my opinion, getting back to my example that I tried to give with the pipe, the first injury caused a significant problem based on Dr. Schechter's commentary. And the second injury just made matters worse. I think it would be speculative. However, I could speculate that the first injury in and of itself probably would have necessitated the surgery based on just the complaints that he was having to Dr. Schechter, and the fact that he had recommended. And that the second injury probably just caused more contusion and further problems to the cord.

Dr. Stuckmeyer testified that Claimant has problems with his gait because he got a cord contusion along with the myelopathic condition. The difficulty with the gait was subsequent to November 16, 2000. Problems with his gait would mean he would have difficulty with prolonged walking. It would make him unsteady. He would have difficulty traversing steps. Claimant was not using a cane when he saw Dr. Stuckmeyer.

Claimant's Exhibit B is the deposition of Michael Dreiling taken April 4, 2006 with Deposition Exhibit 1, Mr. Dreiling's Curriculum Vitae. Mr. Dreiling's Curriculum Vitae notes that he is a vocational consultant with thirty-one years experience in the field of vocational rehabilitation. He is a Diplomat of the American Board of Vocational Experts. He has a Master's of Science degree in guidance and counseling from Ft. Hays State University. He worked from 1975 to 1984 as a vocational rehabilitation counselor/supervisor/administrator. The CV notes that Mr. Dreiling was Director, Projects with Industry/Menninger Return to Work Center from 1984 to 2001.

Exhibit C is Volume II of the deposition of Michael Dreiling taken on May 30, 2006. Dreiling Deposition Exhibit 2 is the report of Michael Dreiling dated December 8, 2001. Dreiling Deposition Exhibit 3 is the medical report of Dr. Eden Wheeler dated February 18, 2002 pertaining to Claimant. Dreiling Deposition Exhibit 4 is the Functional Capacity Evaluation report of Daniel Fischer, Rehabilitation Consultants' Supervisor, dated September 14, 2001 pertaining to Claimant.

Mr. Dreiling's December 8, 2001 report notes Claimant acknowledged he has pain in the right hand, right arm, right leg, neck area and in the upper portion of the back area on a daily basis. The report states that Claimant "acknowledged that this pain is quite debilitating and it significantly impacts on his overall physical functioning abilities." Claimant reported that he can sit for about an hour and has difficulty with using his right hand, due to poor dexterity, poor grip and the fact that his right hand is quite tender. The report notes Claimant takes anti-depressants on a daily basis as well as muscle relaxers. Claimant acknowledged poor sleep at night due to pain and was constantly up and down. He described having a poor memory since his last injury.

Mr. Dreiling's December 8, 2001 report states that Claimant was referred for purposes of participating in a vocational assessment. Mr. Dreiling interviewed Claimant on December 3, 2001. Mr. Dreiling's report identifies portions of the reports of Edward Prostic dated November 6, 2001, Steven Reintjes dated October 12, 2001, and Nathan Schechter dated September 21, 2000 which identified functional limitations. Mr. Dreiling's report discusses Claimant's educational background, social background, prior medical information, work background, Claimant's perspective of injury, and results of vocational testing including Wunderlich personnel test. Mr. Dreiling's report sets forth the following conclusions (pages 8-9):

When I consider this gentleman's vocational profile, which includes an individual who is now 58-years of age and soon to be 59; he has significant medical restrictions advised by his treating physician; and he has been indicated unable to work by several other physicians; he describes difficulties with functioning on a day in, day out basis; and he has cognitive abilities identified in the vocational testing section, it would be my opinion that I do not believe that any employer in the usual course of business, seeking persons to perform duties of employment in the usual and customary way, would reasonably be expected to employ this individual in his existing physical condition.

Pain appears to be a significant issue for this gentleman, along with a limited ability, in terms of performing either prolonged sitting or standing activities, or using his right upper extremity, which is his dominant side.

There also appears to be some significant issues surrounding his cognitive ability, given the results of the vocational testing, and his stated academic achievements, going back to the early 1960's.

This client is going to be 59-years of age in several days, and given his current vocational profile, it does not appear realistic to refer him to the State Vocational Rehabilitation Program for any type of job-placement services or further vocational-training services.

If this individual was a younger individual and had more years remaining in his work-life expectancy pattern, it may be advisable to pursue further extensive vocational testing to identify actual vocational capacities pertaining to returning to the classroom, but given his advanced age, I do not believe that is warranted or realistic.

Given this gentleman's description of his work background and his academic achievement levels, he would have obviously acquired job skills that would transfer to a sedentary level of activity. Given his limited level of functioning to a less than sedentary level and difficulty with using his dominant right upper extremity, I do not believe that he is realistically employable in the labor market.

In summary, I do not believe that any employer in the usual course of business, seeking persons to perform duties of employment in the usual and customary way, would reasonably be expected to employ this individual in his existing physical condition.

Mr. Dreiling testified by deposition on May 30, 2006. He had reviewed the medical report of Dr. James Stuckmeyer dated February 20, 2005. He noted that report indicated Claimant's medical difficulties began with the first injury and continued and were basically aggravated through the second injury. He testified he had reviewed medical reports, including the report of Dr. Edward Prostic dated November 6, 2001. He testified Dr. Prostic "commented on the spasticity of the dominant right upper extremity, limited mobility from the spastic and weak right lower extremity. He testified at that point the doctor felt that it [*sic*] was functionally unable to return to gainful employment."

Mr. Dreiling noted Dr. Reintjes, on October 12, 2001, felt Claimant was capable of sedentary work with stand/walk, zero to two hours at a time, stand/walk six to eight hours a day, sit for up to two hours at a time, sit for six to eight hours a day and could not use his hands for repetitive fine manipulation, and had restricted Claimant to occasionally bend, squat, kneel, and did not want Claimant climbing or reaching, and that Dr. Reintjes felt those restrictions or limitations were permanent.

Mr. Dreiling also testified Dr. Stuckmeyer felt Claimant was permanently and totally disabled and agreed with his vocational report that Claimant was incapable of obtaining gainful employment based upon his diagnosis of cervical myelopathy with the

obvious neurological impairment of the upper and lower extremities and chronic cervical pain. Mr. Dreiling testified regarding Claimant's educational background, social background, prior medical history, military background, and work history, and his testimony is consistent with his report. Mr. Dreiling was aware that Claimant had two injuries, one when he fell off a ladder, and the second when he struck a deer while driving to a jobsite.

Mr. Dreiling testified regarding Claimant's perspective of injury. His testimony is consistent with his report. He stated the results of the Wunderlich test show Claimant was at the third percentile and was basically functioning at a very low level of academics, considering a high school graduate has twenty-one correct answers compared to his eight correct answers. Mr. Dreiling did not think formal vocational training would be of significance for Claimant.

Mr. Dreiling testified that considering the medical information he reviewed, the interview process, the findings from testing, and Claimant's age, he did not believe Claimant was capable of acquiring or maintaining any type of employment in the labor market. He did not feel that employers would be in a position to employ Claimant in his current condition. He understood Claimant returned to work after his first injury. He testified that all of his opinions given that day were to a reasonable degree of vocational certainty.

Mr. Dreiling said he was aware Claimant injured his right side in the first injury in March 2000. He was not aware of what kind of treatment Claimant received between March 2000 and November 2000. He was not aware if Claimant had any limitations at work between March 2000 and November 2000. He understood Claimant never looked for work after his second injury of November 2000. He testified that there was a pretty substantial difference between what Claimant reported doing educationally and what the Wunderlich test reported.

Mr. Dreiling was shown Exhibit 4, the Functional Capacity Evaluation done September 14, 2001. The FCE indicated Claimant lifted twenty pounds six times from floor to waist height of thirty-two inches, twenty pounds nine times from waist to shelf height of sixty-seven inches, and did a lift and carry, ten, twenty, and thirty pounds a distance of twenty feet.

Mr. Dreiling was asked about Dr. Eden Wheeler's restrictions of lifting, carrying thirty pounds occasional basis, overhead lifting ten pounds occasional, limitation placed on ability to perform fine motor skills with the right upper extremity and with accommodations, as outlined by the driver's evaluation, no restrictions in terms of driving with an automatic vehicle.

Mr. Dreiling testified that after considering the additional information of the FCE and Dr. Wheeler's report, his opinions were not changed about Claimant's ability to work. He also stated Claimant needs accommodations to drive.

Dr. Eden Wheeler's February 18, 2002 report, Dreiling Deposition Exhibit 3, includes a rating of Claimant based upon the American Medical Association Guide to Evaluation of Permanent Impairment, Fourth Edition, of 25% whole person. Dr. Wheeler's report addresses vocational impairment, and states at page 12:

In terms of the ability to return back to vocational impairment, I do feel that the Functional Capacity Evaluation dated September 14, 2001 would be an appropriate model on which to base recommendations. This is despite documented evidence that there was self-limitation as well as increased coefficient variations on certain testing. Therefore, based upon this evaluation, lifting carry would be limited to 30 pounds on an occasional basis with overhead lifting to 10 pounds on an occasional basis. Limitations also would be placed on the ability to perform fine motor skills with the right upper extremity. Additionally, with the accommodations as outlined by the driver's evaluation, I do not see other restrictions in terms of driving either vocational or non-vocational with an automatic vehicle.

The September 14, 2001 Functional Capacity Evaluation, Dreiling Deposition Exhibit 4, states that Claimant "does not meet the overall physical demand level required for consideration of safe work performance at the job of Driver/Security Alarm Installer. He does not have the adequate strength to perform his essential job functions." The FCE notes Claimant lifted twenty pounds, six times from floor to waist height at thirty-two inches and twenty pounds, nine times from waist to shelf height, nine times from waist to shelf height of sixty-seven inches. Claimant also was noted to have completed a lift and carry test and demonstrated the ability to lift/carry ten, twenty, and thirty pounds a twenty feet distance. Grip strength was noted to be considered to be normal for the left hand and "significantly low" for the right hand.

Exhibit E is a Driver's Program Discharge Summary of the Rehabilitation Institute dated December 13, 2001 pertaining to Claimant. The Summary notes that based on six hours of behind the wheel training, Claimant demonstrated the ability to resume driving with the following equipment restrictions: 1. Left footed accelerator pedal and right foot accelerator block. 2. Spinner knob at the ten o'clock position. 3. Crossover turn signals.

Second Injury Fund Exhibit 1 is a Kansas Worker's Compensation Director Worksheet for Settlements with a copy of transcript of proceedings. The Worksheet recites in part: "Basis of Settlement: \$85,000.00 on a full and basis of all issues, including nature and extent, past and future benefits including medical (except any valid

and authorized incurred up to today's date), and review and modification. Settlement is equivalent to 75% work disability."

Rulings of Law

Based on a comprehensive review and consideration of the substantial and competent evidence, including the testimony of Claimant, the medical reports and records, the depositions, the vocational evidence, the stipulations of the parties, and my personal observations of Claimant at the hearing, I make the following Rulings of Law:

Liability of the Second Injury Fund for permanent partial disability and permanent total disability benefits.

Section 287.190, RSMo¹ provides for permanent partial disability benefits. The determination of the degree of disability sustained by an injured employee is not strictly a medical question. *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 284 (Mo.App. 1997), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 230 (Mo. banc 2003)²; *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 908 (Mo.App. 2008); *Sellers v. Trans World Airlines, Inc.*, 776 S.W.2d 502, 505 (Mo.App. 1989). While the nature of the injury and its severity and permanence are medical questions, the impact that the injury has upon the employee's ability to work involves factors, which are both medical and nonmedical. Accordingly, the Courts have repeatedly held that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission. *Sharp v. New Mac Elec. Co-op*, 92 S.W.3d 351, 354 (Mo.App. 2003); *Elliott v. Kansas City, Mo., School District*, 71 S.W.3d 652, 656 (Mo.App. 2002); *Sellers*, 776 S.W.2d at 505; *Quinlan v. Incarnate Word Hospital*, 714 S.W.2d 237, 238 (Mo. App. 1985); *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983); *Barrett v. Bentzinger Bros.*, 595 S.W.2d 441, 443 (Mo.App. 1980); *McAdams v. Seven-Up Bottling Works*, 429 S.W.2d 284, 289 (Mo.App.

¹ All statutory references are to the Revised Statutes of Missouri 2000, unless otherwise noted. See *Lawson v. Ford Motor Co.*, 217 S.W.3d 345 (Mo.App. 2007) where the Eastern District Court of Appeals held that the 2005 amendments to Sections 287.020, RSMo and 287.067, RSMo do not apply retroactively. In a workers' compensation case, the statute in effect at the time of the injury is generally the applicable version. *Chouteau v. Netco Construction*, 132 S.W.3d 328, 336 (Mo.App. 2004); *Tillman v. Cam's Trucking Inc.*, 20 S.W.3d 579, 585-86 (Mo.App. 2000).

² Several cases are cited herein that were among many overruled by *Hampton* on an unrelated issue (*Id.* at 224-32). Such cases do not otherwise conflict with *Hampton* and are cited for legal principles unaffected thereby; thus *Hampton's* effect thereon will not be further noted.

1968). The fact-finding body is not bound by or restricted to the specific percentages of disability suggested or stated by the medical experts. *Cardwell*, 249 S.W.3d at 908; *Lane v. G & M Statuary, Inc.*, 156 S.W.3d 498, 505 (Mo.App. 2005); *Sharp*, 92 S.W.3d at 354; *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 885 (Mo.App. 2001); *Landers*, 963 S.W.2d at 284; *Sellers*, 776 S.W.2d at 505; *Quinlan*, 714 S.W.2d at 238; *Banner*, 663 S.W.2d at 773. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences in arriving at the percentage of disability. *Cardwell*, 249 S.W.3d at 908; *Fogelsong v. Banquet Foods Corporation*, 526 S.W.2d 886, 892 (Mo.App. 1975).

The finding of disability may exceed the percentage testified to by the medical experts. *Quinlan*, 714 S.W.2d at 238; *McAdams*, 429 S.W.2d at 289. The Commission “is free to find a disability rating higher or lower than that expressed in medical testimony.” *Jones v. Jefferson City School Dist.*, 801 S.W.2d 486, 490 (Mo.App. 1990); *Sellers*, 776 S.W.2d at 505. The Court in *Sellers* noted that “[t]his is due to the fact that determination of the degree of disability is not solely a medical question. The nature and permanence of the injury is a medical question, however, ‘the impact of that injury upon the employee's ability to work involves considerations which are not exclusively medical in nature.’” *Sellers*, 776 S.W.2d at 505. The uncontradicted testimony of a medical expert concerning the extent of disability may even be disbelieved. *Gilley v. Raskas Dairy*, 903 S.W.2d 656, 658 (Mo.App. 1995); *Jones*, 801 S.W.2d at 490.

Prior to August 28, 2005, Section 287.800, RSMo provided in part: “Law to be liberally construed.—All of the provisions of this chapter shall be liberally construed with a view to the public welfare. . . .” The fundamental purpose of the Workers' Compensation Law is to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment. The law is to be broadly and liberally interpreted with a view to the public interest, and is intended to extend its benefits to the largest possible class. Any doubt as to the right of an employee to compensation should be resolved in favor of the injured employee. *West v. Posten Const. Co.*, 804 S.W.2d 743, 745-46 (Mo. 1991). Although all doubts should be resolved in favor of the employee and coverage in a workers' compensation proceeding, if an essential element of the claim is lacking, it must fail. *Thorsen v. Sachs Elec. Co.*, 52 S.W.3d 616, 618 (Mo.App.2001); *White v. Henderson Implement Co.*, 879 S.W.2d 575, 579 (Mo.App. 1994).

The quantum of proof is reasonable probability. *Thorsen*, 52 S.W.3d at 620; *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo.App. 1995); *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 199 (Mo.App. 1990). “Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt.” *Thorsen*, 52 S.W.3d at 620; *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 329 (Mo.App 1986); *Fischer*, 793 S.W.2d at 198. Such proof is made only

by competent and substantial evidence. It may not rest on speculation. *Griggs v. A. B. Chance Company*, 503 S.W.2d 697, 703 (Mo.App. 1974). Expert testimony may be required where there are complicated medical issues. *Goleman v. MCI Transporters*, 844 S.W.2d 463, 466 (Mo.App. 1992). “Medical causation of injuries which are not within 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.” *Thorsen*, 52 S.W.3d at 618; *Brundige v. Boehringer Ingelheim*, 812 S.W.2d 200, 202 (Mo.App. 1991). Compensation is appropriate as long the performance of usual and customary duties led to a breakdown or a change in pathology. *Bennett v. Columbia Health Care*, 134 S.W.3d 84, 87 (Mo.App. 2004).

Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *Kelley v. Banta & Stude Constr. Co. Inc.*, 1 S.W.3d 43, 48 (Mo.App. 1999); *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo.App. 1992), 29; *Hutchinson v. Tri-State Motor Transit Co.*, 721 S.W.2d 158, 162 (Mo.App. 1986). The Commission's decision will generally be upheld if it is consistent with either of two conflicting medical opinions. *Smith v. Donco Const.*, 182 S.W.3d 693, 701 (Mo.App. 2006). The acceptance or rejection of medical evidence is for the Commission. *Smith*, 182 S.W.3d at 701; *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 263 (Mo.App. 2004). The testimony of Claimant or other lay witnesses as to facts within the realm of lay understanding can constitute substantial evidence of the nature, cause, and extent of disability when taken in connection with or where supported by some medical evidence. *Pruteanu v. Electro Core, Inc.*, 847 S.W.2d 203, 206 (Mo.App. 1993), 29; *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 367 (Mo.App. 1992); *Fischer*, 793 S.W.2d at 199. The trier of facts may also disbelieve the testimony of a witness even if no contradictory or impeaching testimony appears. *Hutchinson*, 721 S.W.2d at 161-2; *Barrett v. Bentzinger Brothers, Inc.*, 595 S.W.2d 441, 443 (Mo.App. 1980). The testimony of the employee may be believed or disbelieved even if uncontradicted. *Weeks v. Maple Lawn Nursing Home*, 848 S.W.2d 515, 516 (Mo.App. 1993).

The claimant in a workers' compensation proceeding has the burden of proving all elements of the claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 912 (Mo.App. 2008); *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo.App. 1997).

“In cases in which more than one event could have caused a condition but only one is compensable, a claimant has the burden of proving the nature and extent of disability attributable to his or her job duties or workplace.” *Decker v. Square D Co.*, 974 S.W.2d 667, 670 (Mo. App. 1998) (citing *Bruflat v. Mister Guy, Inc.*, 933 S.W.2d 829, 835 (Mo.App.1996).

Section 287.220. 1, RSMo provides in part:

All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for. If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury or a major extremity injury shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the

compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the 'Second Injury Fund' hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in section 287.141.

In deciding whether the fund has any liability, the first determination is the degree of disability from the last injury considered alone. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. banc 2003); *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo.App. 2000). Accordingly, pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined. If the last injury in and of itself renders the employee permanently and totally disabled, then the fund has no liability and the employer is responsible for the entire amount of compensation. *Landman*, 107 S.W.3d at 248; *Hughey*, 34 S.W.3d at 847.

The court in *Knisley v. Charleswood Corp.*, 211 S.W.3d 629 (Mo. App. 2007) states at 634-35:

To prevail against the SIF on a claim for permanent total disability, a claimant must establish that: (1) she had a permanent partial disability at the time she sustained the work-related injury and (2) the pre-existing permanent partial disability was of such seriousness as to constitute a hindrance or obstacle to her employment. Section 287.220.1 RSMo 2000; *Motton v. Outsource Intern.*, 77 S.W.3d 669, 673 (Mo.App. E.D.2002). "The test for permanent total disability is the worker's ability to compete in the open labor market in that it measures the worker's potential for returning to employment." *Sutton v. Vee Jay Cement Contracting Co.*, 37 S.W.3d 803, 811 (Mo.App. E.D.2000) (overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003)); *Garrone v. Treasurer of State of Missouri*, 157 S.W.3d 237, 244 (Mo.App. E.D.2004). The primary determination is whether an employer can reasonably be expected to hire the employee, given his or her present physical condition, and reasonably expect the employee to successfully perform the work. 157 S.W.3d at 244.

Section 287.020.7, RSMo provides: “The term ‘total disability’ as used in this chapter shall mean inability to return to any employment and not merely inability to return to the employment in which the employee was engaged at the time of the accident.” The phrase “inability to return to any employment” has been interpreted as “the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment.” *Kowalski v. M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922 (Mo.App. 1982). The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. *Knisley*, 211 S.W.3d at 635; *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 884 (Mo.App. 2001); *Reiner v. Treasurer of the State of Mo.*, 837 S.W.2d 363, 367 (Mo.App.1992); *Lawrence v. Joplin R-VIII School Dist.*, 834 S.W.2d 789, 792 (Mo.App. 1992).

Total disability means the “inability to return to any reasonable or normal employment.” *Lawrence*, 834 S.W.2d at 792; *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 483 (Mo.App.1990); *Kowalski*, 631 S.W.2d at 992. An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Gordon v. Tri-State Motor Transit Co.*, 908 S.W.2d 849, 853 (Mo.App. 1995); *Brown*, 795 S.W.2d at 483. The key question is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person's present physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Knisley*, 211 S.W.3d at 635; *Brown*, 795 S.W.2d at 483; *Reiner*, 837 S.W.2d at 367; *Kowalski*, 631 S.W.2d at 922. See also *Thornton v. Hass Bakery*, 858 S.W. 2d 831, 834 (Mo.App. 1993).

The court in *Knisley*, 211 S.W.3d stated at 635:

Section 287.200.1 does not require a claimant to distinguish each disability and assign a separate percentage for each of several pre-existing disabilities to prevail on a claim for permanent total disability. Section 287.200.1; *See Vaught v. Vaughns, Inc.*, 938 S.W.2d 931, 942 (Mo.App. S.D.1997) (overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003)). Rather, a claimant must establish the extent, or percentage, of the permanent partial disability resulting from the last injury only, and prove that the combination of the last injury and the pre-existing disabilities resulted in permanent total disability. *Id.*

The court in *Vaught*, 938 S.W.2d 931, stated at 939:

As explained in *Stewart, id.* at 854, § 287.220.1 contemplates that where a partially disabled employee is injured anew and sustains

additional disability, the liability of the employer for the new injury “may be at least equal to that provided for permanent total disability.” Consequently, teaches *Stewart*, where a partially disabled employee is injured anew and rendered permanently and totally disabled, the first step in ascertaining whether there is liability on the Second Injury Fund is to determine the amount of disability caused by the new accident alone. *Id.* The employer at the time of the new accident is liable for that disability (which may, by itself, be permanent and total). *Id.* If the compensation to which the employee is entitled for the new injury is *less* than the compensation for permanent and total disability, then in addition to the compensation from the employer for the new injury, the employee (after receiving the compensation owed by the employer) is entitled to receive from the Second Injury Fund the remainder of the compensation due for permanent and total disability. § 287.220.1

“For Second Injury Fund liability, a preexisting disability must combine with a disability from a subsequent injury in one of two ways: (1) the two disabilities combined result in a greater overall disability than that which would have resulted from the new injury alone and of itself; or (2) the preexisting disability combined with the disability from the subsequent injury to create permanent total disability.” *Uhlir v. Farmer*, 94 S.W.3d 441, 444 (Mo.App. 2003).

The Court in *Uhlir v. Farmer*, 94 S.W.3d 441 (Mo.App. 2003) stated at 444-45:

For Second Injury Fund liability, a preexisting disability must combine with a disability from a subsequent injury in one of two ways: (1) the two disabilities combined result in a greater overall disability than that which would have resulted from the new injury alone and of itself; or (2) the preexisting disability combined with the disability from the subsequent injury to create permanent total disability. *Reese v. Gary & Roger Link, Inc.*, 5 S.W.3d 522, 526 (Mo.App. E.D.1999), citing *Searcy*, 894 S.W.2d at 177-78. In the instant case, the Commission found the former. Appellant argues, however, that *Searcy* does not allow recovery from The Second Injury Fund when the injuries are to the same part of the body.

In *Searcy*, we stated that, as a general rule, where the first and second injuries are to the same part of the body, the second supplements the first rather than combining to create a greater disability than the sum of the two. 894 S.W.2d at 178. However, no such limitation is present within the text of Section 287.220 itself.

Section 287.220 provides that when a worker's preexistent injury, in combination with the primary work injury;

is substantially greater than that which would have resulted from the last injury, considered alone and of itself, ... the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as The Second Injury Fund....

No same body part limitation is present within the statute.

The Court in *Garibay v. Treasurer of Missouri*, 930 S.W.2d 57 (Mo. App. 1996) stated at 60:

In order to maintain the purpose of the Second Injury Fund and initiate the changes as directed by the legislature, the Commission's inquiry into prior injuries should focus on the *potential* that the preexisting injury may combine with a future work related injury to result in a greater degree of disability than would have resulted if there were no such prior condition. *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo.App. E.D.1995). If a cautious employer could reasonably foresee that there is the potential for the preexisting injuries to combine with a work related injury and that combination would have a greater degree of disability than without the prior condition, then the preexisting injury would constitute "a hindrance or obstacle to employment or reemployment if the employee became unemployed." *Id.* We "expect that any preexisting injury which could be considered a hindrance to an employee's competing for employment in the open labor market should trigger second injury fund liability." *Leutzinger*, 895 S.W.2d at 593.

Based on the competent and substantial evidence, and based on the application of the Workers' Compensation Law, I find that Claimant sustained 15% permanent partial disability of the body as a whole (400 week level) as a result of the November 16, 2000 injury. I also find that Claimant's last injury on November 16, 2000, considered alone and in isolation, did not render Claimant permanently and totally disabled. I further find that Claimant met his burden to prove that he had permanent partial disability at the time that he sustained his November 16, 2000 work-related injury and that the pre-existing permanent partial disability was of such seriousness to constitute a hindrance or obstacle to his employment or reemployment if he became unemployed. I also find that the

combination of the November 16, 2000 injury and the pre-existing disabilities resulted in Claimant's permanent total disability. I find that Claimant is not able to compete in the open labor market. These findings and conclusions are supported by the following.

The parties stipulated, and I find, that on or about November 16, 2000, Claimant sustained an injury by accident arising out of and in the course of his employment.

Dr. Stuckmeyer's report notes that on August 24, 2001, Dr. Reintjes' impression was that Claimant had cervical spinal stenosis at C3-4 which preexisted either accident, but was made symptomatic by the fall of March 8, 2000, and was exacerbated by the motor vehicle accident on November 16, 2000. Dr. Reintjes attributed 60% of Claimant's symptoms to his fall off the ladder and 40% of the symptoms due to the motor vehicle accident.

Dr. Stuckmeyer's report notes Claimant reported neck pain and pain with extension and neurological complaints prior to November 16, 2000, and that those symptoms "were markedly exacerbated and aggravated with the November 16, 2000 injury." Dr. Stuckmeyer stated that specific to the cervical spine he rendered a 15% preexisting disability to the accident date of March 8, 2000, based on the diagnosis of advanced cervical degenerative arthritis, multi-level cervical spine. Dr. Stuckmeyer assessed an additional 25% disability to the cervical spine causally related to the accident date of March 8, 2000. Dr. Stuckmeyer assessed a 15% disability to the accident date of November 16, 2000. He testified his total rating of 55% disability was to the cervical spine.

I find Dr. Stuckmeyer's ratings of disability are reasonable and credible. I find that Claimant sustained 15% permanent partial disability of the body as a whole (400 week level) as a result of the November 16, 2000 injury. That represents 60 weeks of compensation.

I further find that Claimant met his burden to prove that he had permanent partial disability at the time that he sustained his November 16, 2000 work-related injury and that the pre-existing permanent partial disability was of such seriousness to constitute a hindrance or obstacle to his employment or reemployment if he became unemployed. The evidence convincingly demonstrates that before the primary injury, Claimant had a serious cervical condition that was a hindrance and obstacle to his employment or reemployment if he became unemployed.

Claimant was injured on March 8, 2000 when he fell off a ladder while on the job. He had pain and problems with his head, shoulders and back after the accident of March 8, 2000, but was able to work. He was already scheduled to see Dr. Reintjes when he had the accident on November 16, 2000. Claimant testified that after his fall from the ladder,

and before his November accident, when he reached up above his head trying to pull cables, he would have sharp pains. I find this testimony to be credible.

Dr. Stuckmeyer's report summarizes medical records that document Claimant's treatment and complaints. Dr. Stuckmeyer noted that Dr. Nathan Schechter, an orthopedic surgeon, evaluated Claimant on September 21, 2000. Claimant informed Dr. Schechter that he fell approximately ten feet to the ground and complained at that time of constant pain in the posterior aspect of the cervical spine with intermittent aching in the right shoulder and numbness of all fingers of the right hand. Claimant complained of weakness of grip in the right hand and constant aching in the fingers of the right hand and numbness of the thumb and index finger of the left hand that was constant. Claimant had received medication and heat and massage to the neck region. Dr. Schechter noted Claimant had marked degenerative changes in the cervical spine with narrowing of the disc spaces between C3-4, C5-6, and C6-7.

Dr. Stuckmeyer noted that prior to November 2000, Dr. Schechter had stated that Claimant was having numbness of all fingers of the right hand, weakness of the grip, frequently dropping objects, lack of feeling, numbness, left-hand constant, and got a tingling down the right arm when he extended the cervical spine. Dr. Stuckmeyer also testified that Dr. Schechter had commented that Claimant had neuropathy of the right upper extremity and should have an MRI scan of the cervical spine and electrodiagnostic follow-up by a neurosurgeon.

Claimant reported to Dr. Reintjes on November 29, 2000 that before striking the deer on November 16, 2000, he had neck pain and shooting pain throughout the upper arms with diffuse weakness of the right hand, increased pain with extension of the neck, diffuse upper extremity weakness, and difficulty walking. Dr. Reintjes noted that since the motor vehicle accident on November 16, 2000, Claimant had increase in neck pain and weakness and new complaints of low back pain.

Dr. Stuckmeyer testified Claimant's disability following the March 8, 2000 accident would have caused a hindrance or an obstacle in becoming reemployed if he became unemployed. He felt Claimant had ongoing symptoms of neck pain and radicular symptoms in the upper extremity, and that his ongoing symptoms would have been a hindrance to employment after the first injury. I find these opinions to be credible.

Dr. Stuckmeyer stated that specific to the cervical spine he rendered a 15% preexisting disability to the accident date of March 8, 2000, based on the diagnosis of advanced cervical degenerative arthritis, multi-level cervical spine. Dr. Stuckmeyer assessed an additional 25% disability to the cervical spine causally related to the accident date of March 8, 2000.

I find Dr. Stuckmeyer's ratings of preexisting disability are reasonable and credible, and I find that Claimant had 40% permanent partial disability of the body as a whole referable to his cervical spine prior to his November 16, 2000 injury.

Claimant's testimony, the medical evidence, and the vocational evidence convincingly demonstrate that Claimant became permanently and totally disabled after his November 16, 2000 injury, and that his permanent and total disability is the result of a combination of his November 16, 2000 injury and preexisting disabilities. I find that the combination of the November 16, 2000 injury and the pre-existing disabilities resulted in Claimant's permanent total disability. I find that Claimant is not able to compete in the open labor market.

Claimant, age 67 at the time of the hearing, had neck surgery after the November 2000 accident. Claimant has not worked since he had the surgery provided by Dr. Reintjes in 2001. He has tried to find a job but has not been able to do so. Claimant did not think he could do any job.

The September 14, 2001 functional capacity evaluation revealed Claimant did not meet the overall physical demand level required for the job of driver/security alarm installer.

Dr. Stuckmeyer noted Claimant saw Dr. Reintjes on December 21, 2000. Testing revealed severe cervical stenosis at C3-4 with a central disc herniation at C4-5 and a left sided C5-6 foraminal stenosis. Claimant underwent a decompressive cervical laminectomy at C3-4 and was seen in follow-up post-operative on February 7, 2001. Dr. Stuckmeyer noted on March 21, 2001 that Dr. Reintjes stated the result of Claimant's injury was a spondylitic myelopathy with primarily a spastic right upper extremity.

Mr. Dreiling noted Dr. Reintjes, on October 12, 2001, felt Claimant was capable of sedentary work with stand/walk, zero to two hours at a time, stand/walk six to eight hours a day, sit for up to two hours at a time, sit for six to eight hours a day and could not use his hands for repetitive fine manipulation, and had restricted Claimant to occasionally bend, squat, kneel, and did not want Claimant climbing or reaching, and that Dr. Reintjes felt those restrictions or limitations were permanent.

On January 21, 2002, Dr. Reintjes recommended Claimant not drive as a part of any occupation, and not drive in high traffic situations or adverse weather conditions. Employer did not bring Claimant back to work.

Claimant has continued to get worse since his surgery. He has difficulty sleeping because of pain. He has difficulty taking a shower, cooking, getting dressed, doing laundry and doing home maintenance. Claimant wears gloves daily. His right leg gives

out at times and he occasionally falls. He uses a cane. He hurts from his head to his toes. His cannot turn his head all the way. His shoulders, hand, legs, and back hurt every day. His feet go numb. He cannot pick up things with his right hand. He wears gloves to support his hand. His legs and hand do not work if it gets cold. He cannot hold a cup of coffee or open a door with his right hand. He cannot button his buttons. He has problems with his memory. He cannot lift or sit long. It hurts to lift one gallon of water. He is not able to be up long before he needs to lie down.

Claimant saw Dr. Stuckmeyer on February 21, 2005. Dr. Stuckmeyer reported Claimant was having ongoing significant neck pain with no feeling in the right hand, numbness and tingling into the left arm with weakness in both of the upper extremities, bilateral decreased grip strength. Claimant related difficulty with overhead use of either arm and poor motor control, and a “shaky” gait. Claimant’s neck symptoms interfered with his sleep patterns.

Dr. Stuckmeyer testified the second injury made matters worse and probably caused more contusion and further problems to the cord. He noted Claimant had difficulty with his gait after the November 16, 2000 injury. Dr. Stuckmeyer concluded within reasonable medical certainty that based on the ongoing symptoms of pain and dysfunction and neurological impairment in both the right and left upper extremity, Claimant is permanently and totally disabled. He also stated Claimant is incapable of obtaining gainful employment due to his diagnosis of cervical myelopathy with obvious neurological impairment of upper and lower extremities and chronic cervical pain. I find these opinions of Dr. Stuckmeyer to be credible.

Dr. Stuckmeyer was asked if Claimant’s permanent and total disability was caused by one accident or a combination of both. He responded that “the first injury caused a significant problem. . . .” “And the second injury just made matters worse.” He did not conclude that one injury, considered alone, caused Claimant’s permanent and total disability. No other doctor concluded that one injury, considered alone, caused Claimant’s permanent and total disability.

Michael Dreiling, Claimant’s vocational expert, stated he did not believe that any employer in the usual course of business, seeking persons to perform duties of employment in the usual and customary way, would reasonably be expected to employ Claimant in his existing physical condition. He did not believe that Claimant was realistically employable in the labor market. I find these opinions to be credible. Mr. Dreiling’s vocational opinions were not controverted by other vocational opinions.

I find no employer in the usual course of business, seeking persons to perform duties of employment in the usual and customary way, would reasonably be expected to

employ Claimant in his existing physical condition. I find Claimant is not realistically employable in the labor market.

Since Claimant's permanent and total disability is the result of the combination of his disabilities, the Second Injury Fund is liable for Claimant's permanent total disability. Dr. Reintjes assigned permanent work restrictions on October 12, 2001. The parties stipulated that Employer/Insurer has paid Claimant \$14,156.95 in temporary total disability at the rate of \$293.60 per week for 48 1/7 weeks from November 17, 2000. Temporary disability benefits were paid for the period from November 17, 2000 through October 20, 2001 (48 1/7 weeks, or 337 days.) Those benefits were paid in Claimant's Kansas workers' compensation case. I find that Claimant reached maximum medical improvement on October 20, 2001. I find that Claimant became permanently and totally disabled as of October 20, 2001.

The parties stipulated that the rate of compensation is \$290.47 per week for temporary total disability, permanent total disability, and permanent partial disability. I have found that Claimant sustained 15% permanent partial disability of the body as a whole (400 week level) as a result of the November 16, 2000 injury, which represents 60 weeks of compensation.

I find that Employer's liability for payment of permanent partial disability benefits for 60 weeks commenced on October 21, 2001 until December 15, 2002, and that the Second Injury Fund's liability for permanent total disability begins on December 16, 2002 at the rate of \$290.47 per week for Claimant's lifetime.

I therefore order and direct the Treasurer of the State of Missouri as Custodian of the Second Injury Fund to pay to Claimant the sum of \$290.47 per week beginning December 16, 2002, and, thereafter, for the remainder of Claimant's lifetime, subject to review and modification as provided by law.

Attorneys Fees.

Claimant's attorney is entitled to a fair and reasonable fee in accordance with Section 287.260, RSMo. An attorney's fee may be based on all parts of an award. *Page v. Green*, 758 S.W.2d 173, 176 (Mo.App. 1988). Claimant's attorney did not offer a written fee agreement in evidence at the hearing. However, during the hearing, and in Claimant's presence, Claimant's attorney requested a fee of 25% of the benefits to be awarded. Claimant did not object to that request. I find Claimant's attorney, James E. Martin, is entitled to and is awarded an attorney's fee of 25% of all amounts awarded for necessary legal services rendered to Claimant. The compensation awarded to Claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to Claimant: James E. Martin.

Made by: /s/ Robert B. Miner
Robert B. Miner
Administrative Law Judge
Division of Workers' Compensation

This award is dated and attested to this 21st day of April, 2010.

/s/ Naomi Pearson
Naomi Pearson
Division of Workers' Compensation