

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

Injury No.: 04-120480

Employee: Orville Caupp
Employer: American Airlines (Settled)
Insurer: American Home Assurance (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 20, 2010. The award and decision of Administrative Law Judge John A. Tackes, issued May 20, 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 4th day of November 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

FINAL AWARD

Employee:	Orville Caupp	Injury No.:	04-120480
Dependents:	N/A		Before the
Employer:	American Airlines (Settled)		Division of Workers'
Additional Party:	Second Injury Fund		Compensation
Insurer:	American Home Assurance (Settled)		Department of Labor and Industrial
Hearing Date:	February 3, 2010 ¹	Checked by:	JAT

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: October 21, 2004
5. State location where accident occurred or occupational disease was contracted: St. Louis County
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: Lifting and moving boxes .
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Low back
14. Nature and extent of any permanent disability: 20% (BAW)
15. Compensation paid to-date for temporary disability: n/a
16. Value necessary medical aid paid to date by employer/insurer? n/a

¹ The record was closed on February 10, 2010.

Employee: Orville Caupp

Injury No.: 04-120480

- 17. Value necessary medical aid not furnished by employer/insurer? n/a
- 18. Employee's average weekly wages: \$855.49
- 19. Weekly compensation rate: \$570.33/\$354.05
- 20. Method wages computation: Agreement

COMPENSATION PAYABLE

21. Amount of compensation payable: Settled	(\$15,062.00)
22. Second Injury Fund liability:	
16 weeks of permanent partial disability from Second Injury Fund	\$5,664.80
TOTAL:	\$5,664.80
23. Future requirements awarded: None	

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: Dean Christianson

FINDINGS OF FACT and RULINGS OF LAW

Employee:	Orville Caupp	Injury No.:04-120480
Dependents:	N/A	Before the
Employer:	American Airlines	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	American Home Assurance	Department of Labor and Industrial
Hearing Date:	February 3, 2010	Relations of Missouri
		Jefferson City, Missouri
		Checked by: JAT

INTRODUCTION

On February 3, 2010, a hearing in this Matter was held in the City of St. Louis at the Division of Workers' Compensation by Administrative Law Judge John A. Tackes. Orville Caupp (Claimant) personally appeared and testified. Claimant was represented by attorney Dean Christianson. Assistant Attorney General Kevin Nelson appeared on behalf of the Second Injury Fund. The Employer /Insurer did not appear. The record of the hearing was left open for certification of exhibits H, I, and J. The record was closed on February 10, 2010.

Claimant Exhibits A-L and SIF Exhibit Roman Number I were admitted.

All objections not expressly ruled upon in this award are overruled to the extent they conflict with this award.

STIPULATIONS

The parties stipulated prior to hearing that the Missouri Division of Workers' Compensation has jurisdiction to hear this matter; Venue in the City of St. Louis is proper; Claimant's average weekly wage is the maximum rate (\$855.49) resulting in a compensation rate of \$570.33 for temporary benefits (TTD), and permanent partial disability rate of \$354.05.

ISSUES

The parties stipulated the issues to be resolved are as follows:

1. What is the nature and extent of the PPD?
2. Does the Second Injury Fund have any liability?

FINDINGS OF FACT

Based on the competent and substantial evidence and my observations of Claimant at trial, I find:

Claimant was born November 14, 1948, and currently lives in St. Charles, Missouri. He worked with Employer forty years at Lambert International Airport in St. Louis. In December 2004 he became a Crew Chief. His duties included the supervising and directing of items being loaded on and taken off airplanes.

On November 23, 2004, Claimant filed an original Claim for Compensation with the Division for an injured back occurring October 21, 2004 while working for American Airlines. He filed a claim against the Fund for PPD based on pre-existing disabilities to his left arm (1962); left foot (1963); concussion (1964); left arm (1988); broken cheek bone (1992); and neck (2000).

Primary Injury (2004)

On October 21, 2004, Claimant was at work organizing and sorting baggage on a departing flight when he felt a pain on the left side of his **low back**. Claimant felt his back tighten as he continued to work and his pain and numbness was felt down his left leg to his toes. Claimant was prescribed medication at the emergency room of Barnes-Jewish hospital. He received more treatment including physical therapy for several weeks.

On November 18, 2004, Claimant was sent to Gateway Spine, LLC where he was seen by orthopedic specialist Tom Reinsel, M.D. In November he complained of low back and left buttock pain with radiating pain to his calf and toes as well as left leg weakness. An MRI from a week earlier revealed a small herniated disc on the left side at L2-3. The symptoms were resolving and Claimant was put on light duty with physical therapy.

On December 2, 2004, Claimant reported that his complaints continued to improve but he still had left side low back pain. Dr. Reinsel assessed the herniated disc was resolving and Claimant was released to return to full duty work at maximum medical improvement (MMI) on December 7, 2004. After this injury Claimant stopped working overtime. He worked a full forty hour week with no extensions.

Prior to his last injury, Claimant had pre-existing injuries to his cervical spine, left wrist, and left foot.

Neck (2000)

In 2000, Claimant injured his neck at a non work related sporting event. Claimant experienced an acute onset of neurological symptoms. On August 28, 2000, anterior cervical discectomy and fusion at C5-C6 was performed by Dr. Carl Laurysen. The next day, a cervical spine exam post fusion revealed essentially no change in the appearance of cervical spine. In September, 2001 an examination of the cervical spine exam fusion at C5-6 revealed partial resorption with no motion of the fused segment.

In September, 2002, a cervical spine exam revealed anterior fusion at C5-6 with increased incorporation of the bone graft and no abnormal motion. Claimant still complains of periodic numbness in his hands and has some fine motor skills problems in his thumb, index and middle

finger. He complains of some neck discomfort and weakness in his hands. Claimant cannot do his work as quickly because of his condition and sometimes seeks help from others. As of October 21, 2004 and February 1, 2007, Claimant was working full duty without any restrictions referable to his neck and was able to perform his physically demanding work duties.

Left Wrist

Claimant first broke his left arm when he was about 14 years old. His arm healed with no lasting problem. In May, 1989 he broke his left arm again playing in a non work related sporting event. The bone was reset by an orthopedic surgeon and had a 20 degree offset. The arm was put in a cast and then a splint before undergoing physical therapy and returning to work on August 1, 1989. He complains of weakness greater in his left wrist compared to the right wrist.

In his report of October 5, 2005, Dr. Cohen provided no permanent disability rating referable to the left wrist. On his February 2, 2009 report, he rated the PPD of the left wrist at 35%.

Left Foot (1963)/ Facial Fractures (1996)

While in high school during the mid-1960's, Claimant injured his foot (3 metacarpals) which was cast without surgical intervention. Claimant developed plantar fasciitis. He sought periodic medical care for his foot which still angled outward toward the left. Claimant complaints of lost flexibility and range of motion in his left foot. No disability rating was given by Dr. Cohen referable to the left foot in his October 5, 2005 report. Dr. Cohen however rated 35% PPD at left foot in his February 2, 2009 report. There was no change to the foot medically between 2005 and 2009.

Claimant lists among his pre-existing injuries a concussion in 1964 and facial fractures in 1996. Claimant recovered from both injuries with no evidence of any permanency. Claimant was able to work full duty without restriction. There is no competent evidence that either injury caused a hindrance or obstacle to employment or re-employment. There is no competent evidence of permanent percentage of disability for either of these injuries.

Expert Opinions

On June 25, 2009 the deposition of Raymond F. Cohen, D.O. was taken on behalf of the employee. Dr. Cohen evaluated Claimant on October 5, 2005 and February 2, 2009. Regarding the October 21, 2004 injury, Dr. Cohen diagnosed the injury to the low back as a lumbar disc herniation on the left at L2-3-4, and lumbar radiculopathy on the left. Claimant had pre-existing disabilities status post cervical surgery for cervical myelopathy with persistent upper extremity upper motor neuron findings.

On October 5, 2005, Dr. Cohen gave Claimant a physical and neurological exam. He noted bilateral loss of sensation on both C6 and C7 dermatomes to pain and temperature. The C6 dermatome primarily innervates the bicep muscles in addition to the brachial radialis muscle in the forearm below the elbow. Based on his exam he found the results not profound but significant because of the complaints. No loss of range of motion of the cervical spine was noted *other than where the segment was fused* (emphasis mine).

In his report dated October 5, 2005, Dr. Cohen noted complaints of deep pain in Claimant's low back, bilateral knee pain, plantar fasciitis in the left foot and a left heel spur. On examination

Claimant had full range of motion with no weakness or impingement in either shoulder. He was working full duty with no restrictions up to the 2004 injury. Claimant was taking no prescription medication or muscle relaxers. His grip strength was the same in both but he complained of weakness in the left.

Dr. Cohen opines 30% PPD of the body as a whole referable to the low back. In his February 2, 2009 report however, he lowered this rating to 20% PPD based on the Lump Sum Settlement.

In his report of October 5, 2005, Dr. Cohen also gave an opinion of 40% PPD referable to the cervical spine. Dr. Cohen had not reviewed medical records referable to the neck but based his rating on "other factors". He did not state what other factors he used.

In a subsequent report dated February 2, 2009, Dr. Cohen affirmed his finding of disability referable to the cervical spine after he reviewed medical records and post-operative cervical films. The films revealed that the surgery had been successful. Dr. Cohen reviewed a radiologists report dated September 11, 2002 which reflect no complaints of pain, numbness, tingling or weakness in Claimant's neck where surgery was performed. Claimant however complained of weakness in his hands but was able to lift 50 pounds bilaterally.

There were five pre-existing injuries addressed by Dr. Cohen in his February 2, 2009 report which were not addressed on October 5, 2005. Pre-existing conditions known to Dr. Cohen at the first evaluation but not rated including the left wrist (1963/1989), left foot (1963), ankle, head (concussion 1964), and facial (cheekbone 1996). Of these pre-existing conditions, only two were rated with permanent disabilities in his February 2, 2009 report. He rated 35% PPD at the left wrist and 35% PPD at the left foot.

When Dr. Cohen saw Claimant in October, 2005 Dr. Cohen was aware of the pre-existing claims contained in Claimant's claim for compensation. He acknowledges that his standard procedure is to ask about those conditions to see how they affect his work for synergistic purposes. There were no ratings of the conditions other than the low back and cervical spine.

He opined that the pre-existing conditions and disabilities combine with the February 1, 2007 work related injury to create a greater disability than their sum alone. He opines the pre-existing conditions or disabilities are a hindrance or obstacle to his employment or re-employment.

In his report of February 2, 2009, Dr. Cohen provides the following relevant disability ratings:

Primary injury:

- Lumbar spine (04-029234) 20% PPD

Pre-existing:

- Cervical spine 40% PPD
- Left wrist 35% PPD
- Left foot 35% PPD

Whereas his medical opinion with regard to diagnosis and condition are competent and persuasive, Dr. Cohen's evaluation of disability for purposes of this award is not found credible or persuasive. He has formed an initial opinion of significant disability referable to the cervical

spine without the aid of medical records. Although he did not rely on the settlements for his opinions, he did conform his opinion to the settlements. He did not provide ratings for several pre-existing conditions in 2005 which he later found to be significantly permanently disabled.

RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented and the applicable law, I find the following:

A claimant in a worker's compensation proceeding has the burden of proving all elements of his claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 911 (Mo.App. 2008). In order for a claimant to recover against the SIF, he must prove that he sustained a compensable injury, referred to as "the last injury," which resulted in permanent partial disability. Section 287.220.1 RSMo. Claimant must prove the nature and extent of disability by a reasonable degree of certainty. *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 640, 655 (Mo.App. 1995).

A claimant must also prove that he had a pre-existing permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment should he become unemployed; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15% for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo.App. 2008)(Citations omitted). In order for a claimant to be entitled to recover permanent partial disability benefits from the Second Injury Fund, he must prove that the last injury, combined with his pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. *Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 138 S.W.3d 714, 717-18 (Mo. banc 2004).

For pre-existing disabilities not rated by an expert and not addressed in the initial evaluation by Dr. Cohen in October, 2005, I find the conditions were not a hindrance or obstacle to Claimant's employment or re-employment. Specifically, Claimant's broken foot (1963), concussion (1964), and nasal/cheekbone injury (1996) were not rated by Dr. Cohen in October, 2005. The head and face injuries in fact were not rated at all. In February, 2009 the foot was rated at 35% but there had been no change medically from the earlier evaluation to justify the increased disability rating. To the extent he was disabled by those pre-existing injuries, I find the percentages of disability do not rise to the threshold level required to reach Fund liability.

Claimant had two injuries to his left wrist (1963/1989). I find the earlier fracture resolved with no long term disability. In 1989 his wrist was treated and he was able to return to work August 1, 1989 without any restrictions. This condition was not rated by Dr. Cohen in

October, 2005 but given a 35% PPD rating four years later. Claimant was able to work full duty without restrictions and I find this condition was not a hindrance or obstacle to his employment or re-employment. Dr. Cohen's rating is not credible. To the extent Claimant is disabled, the percentage of disability is less than 10% and therefore does not reach the threshold for Fund liability.

With respect to the Claimant's pre-existing cervical spine condition (2000), Dr. Cohen's rating is given little weight having almost no probative value regarding the nature and extent of Claimant's permanent partial disability. Initially the doctor evaluated the Claimant and opined a 40% disability referable to the neck without benefit of medical records. When he re-evaluated Claimant in February, 2009, he reviewed medical records but conformed his rating to the value of the stipulated settlement amount. I find that Dr. Cohen had enough information to provide an opinion regarding disability but that his opinion has diminished value because of the methods and circumstances he used to reach that opinion as described above. I find that the Claimant did have permanent disability resulting from the cervical fusion. I find 20% PPD of the body as a whole referable to the cervical spine.

Claimant's pre-existing cervical spine injury (2000) is an obstacle or hindrance to employment or re-employment. Although he was able to work full time with no medical restrictions or prescription medication, the pre-existing neck condition is a hindrance or obstacle to his employment or re-employment because it affected his ability to move, lift with his hands, and pick up small objects. He performed his duties but because of the numbness and weakness in his hands could not grip as well and needed help with some objects. Claimant has shown by competent and substantial evidence that his primary injury of 2004 combined with his pre-existing injuries to create a greater disability than a simple sum of the disabilities added together.

Claimant sustained a workplace injury to his low back in 2004 which resulted in permanent partial disability to his low back. The fact that Dr. Cohen changed his PPD rating to conform to the settlement weighs against the credibility of his rating, not against the existence of disability. There is disability and I find there is sufficient competent and substantial evidence to support a 20% PPD of the BAW at the low back.

A loading factor of 10% is appropriate and results in the following weeks of permanency:

Low back (2004)	20% at the 400 level is 80 weeks; 10% is 8 weeks.
Neck (2000)	20% at the 400 level is 80 weeks; 10% is 8 weeks or 16 total.

CONCLUSION

The synergistic effect between the primary injury (04-120480) and the pre-existing condition are supported by competent and substantial evidence. Applying a load factor of 10% results in an additional 16 weeks PPD benefits at \$354.05 or \$5,664.80 for which the Second Injury Fund is liable.

Date: _____

John A. Tackes
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest

Naomi Pearson
Division of Workers' Compensation

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

Injury No.: 07-029234

Employee: Orville Caupp
Employer: American Airlines (Settled)
Insurer: American Home Assurance (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 20, 2010. The award and decision of Administrative Law Judge John A. Tackes, issued May 20, 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 4th day of November 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

FINAL AWARD

Employee:	Orville Caupp	Injury No.:	07-029234
Dependents:	N/A		Before the
Employer:	American Airlines		Division of Workers'
			Compensation
Additional Party:	Second Injury Fund		Department of Labor and Industrial
			Relations of Missouri
			Jefferson City, Missouri
Insurer:	American Home Assurance		
Hearing Date:	February 3, 2010 ¹	Checked by:	JAT

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: February 1, 2007
5. State location where accident occurred or occupational disease was contracted: St. Louis County
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: Claimant twisted his left knee when he slipped on an icy ramp
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Left Knee
14. Nature and extent of any permanent disability: 25% (160 level)
15. Compensation paid to-date for temporary disability: n/a
16. Value necessary medical aid paid to date by employer/insurer? n/a

¹ The record was closed on February 10, 2010.

Employee: Orville Caupp

Injury No.: 07-029234

- 17. Value necessary medical aid not furnished by employer/insurer? n/a
- 18. Employee's average weekly wages: \$855.49
- 19. Weekly compensation rate: \$570.33/\$376.55
- 20. Method wages computation: Agreement

COMPENSATION PAYABLE

21. Amount of compensation payable: Settled	(\$28,324.00)
22. Second Injury Fund liability:	
20 weeks of permanent partial disability from Second Injury Fund	\$7,531.00
TOTAL:	\$7,531.00
23. Future requirements awarded: None	

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: Dean L. Christianson

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Orville Caupp	Injury No.:	07-029234
Dependents:	N/A	Before the	
Employer:	American Airlines (Settled)	Division of Workers'	
Additional Party:	Second Injury Fund	Compensation	
Insurer:	American Home Assurance (Settled)	Department of Labor and Industrial	
Hearing Date:	February 3, 2010	Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	JAT

INTRODUCTION

On February 3, 2010, a hearing in this Matter was held in the City of St. Louis at the Division of Workers' Compensation by Administrative Law Judge John A. Tackes. Orville Caupp (Claimant) personally appeared and testified. Claimant was represented by attorney Dean Christianson. Assistant Attorney General Kevin Nelson appeared on behalf of the Second Injury Fund. The Employer and Insurer did not appear. The record of the hearing was left open for certification of exhibits H, I, and J. The record was closed on February 10, 2010

Claimant Exhibits A-L and SIF Exhibit Roman Number I were admitted.

All objections not expressly ruled upon in this award are overruled to the extent they conflict with this award.

STIPULATIONS

The parties stipulated prior to hearing that the Missouri Division of Workers' Compensation has jurisdiction to hear this matter; Venue in the City of St. Louis is proper; Claimant's average weekly wage is the maximum rate (\$855.49) resulting in a compensation rate of \$570.33 for temporary benefits (TTD), and permanent partial disability rate of \$376.55.

ISSUES

The parties stipulated the issues to be resolved are as follows:

1. What is the nature and extent of the PPD?
2. Does the Second Injury Fund have any liability?

FINDINGS OF FACT

Based on the competent and substantial evidence and my observations of Claimant at trial, I find:

Claimant was born November 14, 1948, and currently lives in St. Charles, Missouri. He worked with Employer forty years at Lambert International Airport in St. Louis. In December 2004 he became a Crew Chief. His duties included the supervising and directing of items being loaded on and taken off airplanes.

On November 23, 2004, Claimant filed an original Claim for Compensation with the Division for an injured back occurring October 21, 2004 while working for American Airlines. He filed a claim against the Fund for PPD based on pre-existing disabilities to his left arm (1962); left foot (1963); concussion (1964); left arm (1988); broken cheek bone (1992); and neck (2000).

Primary Injury (2007)

On February 1, 2007, while at work, Claimant slipped on an icy ramp and twisted his **left knee**. He was seen by Herbert Haupt, M.D., at Orthopedic Associates on April 4, 2007 for left knee discomfort from work injuries on February 1, 2007 and March 11, 2007. Dr. Haupt assessed left knee torn medial meniscus and treated with left knee arthroscopy on April 10, 2007. Surgery confirmed comminuted posterior horn tear of the medial meniscus. Claimant reported that surgery helped his knee but that he continues to have minor discomfort with kneeling and squatting which he does at work. He was no longer able to work on his knees as he had before the injury and does not pivot on his left foot when turning. Dr. Haupt placed Claimant at maximum medical improvement (MMI) on May 30, 2007 and released him for full duty.

Pre-Existing/lumbar spine (2004)

Prior to the last injury, Claimant had pre-existing injuries to his lumbar spine (04-120480), cervical spine, left wrist, and left foot. On October 21, 2004, Claimant was at work organizing and sorting baggage on a departing flight when he felt a pain on the left side of his low back. Claimant felt his back tighten as he continued to work and his pain and numbness was felt down his left leg to his toes. Claimant was prescribed medication at the emergency room of Barnes-Jewish hospital. He received more treatment including physical therapy for several weeks.

On November 18, 2004, Claimant was sent to Gateway Spine, LLC where he was seen by orthopedic specialist Tom Reinsel, M.D. In November he complained of low back and left buttock pain with radiating pain to his calf and toes as well as left leg weakness. An MRI from a week earlier revealed a small herniated disc on the left side at L2-3. The symptoms were resolving and Claimant was put on light duty with physical therapy.

On December 2, 2004, Claimant reported that his complaints continued to improve but he still had left side low back pain. Dr. Reinsel assessed the herniated disc was resolving and Claimant was released to return to full duty work at MMI on December 7, 2004. After this injury Claimant stopped working overtime. He worked a full forty hour week with no extensions.

Neck (2000)

In 2000, Claimant injured his neck at a non work related sporting event. Claimant experienced an acute onset of neurological symptoms. On August 28, 2000, anterior cervical discectomy and fusion at C5-C6 was performed by Dr. Carl Laurysen. The next day, a cervical spine exam post fusion revealed essentially no change in the appearance of cervical spine.

In September, 2001 an examination of the cervical spine exam fusion at C5-6 revealed partial resorption with no motion of the fused segment. In September, 2002, a cervical spine exam revealed anterior fusion at C5-6 with increased incorporation of the bone graft and no abnormal motion. Claimant still complains of periodic numbness in his hands and has some fine motor skills problems in his thumb, index and middle finger. He complains of some neck discomfort and weakness in his hands. Claimant cannot do his work as quickly because of his condition and sometimes seeks help from others. As of October 21, 2004 and February 1, 2007, Claimant was working full duty without any restrictions referable to his neck and was able to perform his physically demanding work duties.

Left Wrist

Claimant first broke his left arm when he was about 14 years old. His arm healed with no lasting problem. In May, 1989 he broke his left arm again playing in a non work related sporting event. The bone was reset by an orthopedic surgeon and had a 20 degree offset. The arm was put in a cast and then a splint before undergoing physical therapy and returning to work on August 1, 1989. He complains of weakness greater in his left wrist compared to the right wrist.

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Claimant lists among his pre-existing injuries a concussion in 1964 and facial fractures in 1996. Claimant recovered from both injuries with no evidence of any permanency. Claimant was able to work full duty without restriction. There is no competent evidence that either injury caused a hindrance or obstacle to employment or re-employment. There is no competent evidence of permanent percentage of disability for either of these injuries.

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disabilities status post cervical surgery for cervical myelopathy with persistent upper extremity upper motor neuron findings.

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In his report dated October 5, 2005, Dr. Cohen noted complaints of deep pain in Claimant's low back, bilateral knee pain, plantar fasciitis in the left foot and a left heel spur. On examination Claimant had full range of motion with no weakness or impingement in either shoulder. He was working full duty with no restrictions up to the 2004 injury. Claimant was taking no prescription medication or muscle relaxers. His grip strength was the same in both but he complained of weakness in the left.

Dr. Cohen opines 30% PPD of the body as a whole referable to the low back. In his February 2, 2009 report however, he lowered this rating to 20% PPD based on the Lump Sum Settlement.

In his report of October 5, 2005, Dr. Cohen also gave an opinion of 40% PPD referable to the cervical spine. Dr. Cohen had not reviewed medical records referable to the neck but based his rating on "other factors". He did not state what other factors he used.

In a subsequent report dated February 2, 2009, Dr. Cohen affirmed his finding of disability referable to the cervical spine after he reviewed medical records and post-operative cervical films. The films revealed that the surgery had been successful. Dr. Cohen reviewed a radiologists report dated September 11, 2002 which reflect no complaints of pain, numbness, tingling or weakness in Claimant's neck where surgery was performed. Claimant however complained of weakness in his hands but was able to lift 50 pounds bilaterally.

In his February, 2009 report, Dr. Cohen evaluated pre-existing injury which may have combined with the last primary injuries which had not been addressed in the previous report of October 5, 2005. Dr. Cohen opines 25% PPD referable to the left knee. This is the amount used in the Compromised Lump Sum Settlement of which Dr. Cohen was aware.

There were five pre-existing injuries addressed by Dr. Cohen in his February 2, 2009 report which were not addressed in October 5, 2005. Pre-existing conditions known to Dr. Cohen at the first evaluation but not rated including the left wrist (1963/1989), left foot (1963), ankle, head (concussion 1964), and facial (cheekbone 1996). Of these pre-existing conditions, only two were rated with permanent disabilities in his February 2, 2009 report. He rated 35% PPD at the left wrist and 35% PPD at the left foot.

When Dr. Cohen saw Claimant in October, 2005 Dr. Cohen was aware of the pre-existing claims contained in Claimant's claim for compensation. He acknowledges that his standard procedure is to ask about those conditions to see how they affect his work for synergistic purposes. There were no ratings of the conditions other than the low back and cervical spine.

He opined that the pre-existing conditions and disabilities combine with the February 1, 2007 work related injury to create a greater disability than their sum alone. He opines the pre-existing conditions or disabilities are a hindrance or obstacle to his employment or re-employment.

In his report of February 2, 2009, Dr. Cohen provides the following disability ratings:

Primary injury:

- Left knee (2/1/07) 25% PPD

Pre-existing:

- Lumbar spine (04-029234) 20% PPD
- Cervical spine 40% PPD
- Left wrist 35% PPD
- Left foot 35% PPD

Whereas his medical opinion with regard to diagnosis and condition are competent and persuasive, Dr. Cohen’s evaluation of disability for purposes of this award is not found credible or persuasive. He has formed an initial opinion of significant disability referable to the cervical spine without the aid of medical records. Although he did not rely on the settlements for his opinions, he did conform his opinion to the settlements. He did not provide ratings for several pre-existing conditions in 2005 which he later found to be significantly permanently disabled.

RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented and the applicable law, I find the following:

A claimant in a worker's compensation proceeding has the burden of proving all elements of his claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 911 (Mo.App. 2008). In order for a claimant to recover against the SIF, he must prove that he sustained a compensable injury, referred to as “the last injury,” which resulted in permanent partial disability. Section 287.220.1 RSMo. Claimant must prove the nature and extent of disability by a reasonable degree of certainty. *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 640, 655 (Mo.App. 1995).

A claimant must also prove that he had a pre-existing permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment should he become unemployed; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15% for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo.App. 2008)(Citations omitted). In order for a claimant to be entitled to recover permanent partial disability benefits from the Second Injury Fund, he must prove that the last injury, combined with

his pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. *Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 138 S.W.3d 714, 717-18 (Mo. banc 2004).

I find that Claimant has 25% PPD of the left knee following surgery to repair a torn meniscus and he continues to have pain and discomfort. After the surgery Claimant was unable to work as he did before the injury. He does not kneel, or work on his knees as he once had.

For pre-existing disabilities not rated by an expert and not addressed in the initial evaluation by Dr. Cohen in October, 2005, I find the conditions were not a hindrance or obstacle to Claimant's employment or re-employment. Specifically, Claimant's broken foot (1963), concussion (1964), and nasal/cheekbone injury (1996) were not rated by Dr. Cohen in October, 2005. The head and face injuries in fact were not rated at all. In February, 2009 the foot was rated at 35% but there had been no change medically from the earlier evaluation to justify the increased disability rating. To the extent he was disabled by those pre-existing injuries, I find the percentages of disability do not rise to the threshold level required to reach Fund liability.

Claimant had two injuries to his left wrist (1963/1989). I find the earlier fracture resolved with no long term disability. In 1989 his wrist was treated and he was able to return to work August 1, 1989 without any restrictions. This condition was not rated by Dr. Cohen in October, 2005 but given a 35% PPD rating four years later. Claimant was able to work full duty without restrictions and I find this condition was not a hindrance or obstacle to his employment or re-employment. Dr. Cohen's rating is not credible. To the extent Claimant is disabled, the percentage of disability is less than 10% and therefore does not reach the threshold for Fund liability.

With respect to the Claimant's pre-existing cervical spine condition (2000), Dr. Cohen's rating is given little weight having almost no probative value regarding the nature and extent of Claimant's permanent partial disability. Initially the doctor evaluated the Claimant and opined a 40% disability referable to the neck without benefit of medical records. When he re-evaluated Claimant in February, 2009, he reviewed medical records but conformed his rating to the value of the stipulated settlement amount. I find that Dr. Cohen had enough information to provide an opinion regarding disability but that his opinion has diminished value because of the methods and circumstances he used to reach that opinion as described above. I find that the Claimant did have permanent disability resulting from the cervical fusion. I find 20% PPD of the body as a whole referable to the cervical spine.

Claimant's pre-existing cervical spine injury (2000) is an obstacle or hindrance to employment or re-employment. Although he was able to work full time with no medical restrictions or prescription medication, the pre-existing neck condition is a hindrance or obstacle to his employment or re-employment because it affected his ability to move, lift with his hands, and pick up small objects. He performed his duties but because of the numbness and weakness in his hands could not grip as well and needed help with some objects. Claimant has shown by competent and substantial evidence that his primary injury of 2004 combined with his pre-existing injuries to create a greater disability than a simple sum of the disabilities added together.

Claimant sustained a workplace injury to his low back in 2004 which resulted in permanent partial disability to his low back. The fact that Dr. Cohen changed his PPD rating to conform to the settlement weighs against the credibility of his rating, not against the existence of disability. There is disability and I find there is sufficient competent and substantial evidence to support a 20% PPD of the BAW at the low back.

Claimant sustained a workplace injury to his left knee in 2007 which resulted in permanent partial disability. I find there is sufficient competent and substantial evidence to support a 25% PPD of the lower extremity at the left knee. I further find that the combination of the last injury (07-029234) to the low back combines with the pre-existing injuries to create a greater disability than a sum of the two together.

A loading factor of 10% is appropriate and results in the following weeks of permanency:

Left knee (2007)	25% at the 160 level is 40 weeks; 10% is 4 weeks.
Low back (2004)	20% at the 400 level is 80 weeks; 10% is 8 weeks.
Neck (2000)	20% at the 400 level is 80 weeks; 10% is 8 weeks or 20 total.

CONCLUSION

The synergistic effect between the primary injury (07-029234) and the pre-existing condition are supported by competent and substantial evidence. Applying a load factor of 10% results in an additional 20 weeks PPD benefits at \$376.55 or \$7,531.00 for which the Second Injury Fund is liable.

Date: _____

 John A. Tackes
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest

 Naomi Pearson
Division of Workers' Compensation