

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

Injury No.: 03-144182

Employee: Anthony Darris
Employer: St. Louis Connect Care (Settled)
Insurer: Commerce & Industry Ins. Co. (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 July 9, 2010, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge John K. Ottenad, issued July 9, 2010, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 4th day of January 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest:

John J. Hickey, Member

Secretary

AWARD

Employee: Anthony Darris

Injury No.: 03-144182

Dependents: N/A

Employer: St. Louis ConnectCare (Settled)

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Commerce & Industry Insurance Company
C/O AIG Domestic Claims, Inc. (Settled)

Hearing Date: March 23, 2010

Checked by: JKO

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: (alleged) January 1, 2003
5. State location where accident occurred or occupational disease was contracted: St. Louis City
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? No
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 was a Security Officer for Employer, who allegedly injured his feet from walking and standing during the course of his workday.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: (alleged) Left Foot and Right Foot
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: \$0.00
16. Value necessary medical aid paid to date by employer/insurer? \$0.00

Employee: Anthony Darris

Injury No.: 03-144182

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$392.61
- 19. Weekly compensation rate: \$261.74 for TTD/ \$261.74 for PPD
- 20. Method wages computation: By agreement (stipulation) of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable:

Employer previously settled its risk of liability in this case

22. Second Injury Fund liability:

None	\$0.00
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TOTAL:	<u>\$0.00</u>
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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: Mark L. Akers and Greg Kloeppe.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Anthony Darris	Injury No.: 03-144182
Dependents:	N/A	Before the
Employer:	St. Louis ConnectCare (Settled)	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	Commerce & Industry Insurance Company C/O AIG Domestic Claims, Inc. (Settled)	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
		Checked by: JKO

On March 23, 2010, the employee, Anthony Darris, appeared in person and by his attorney, Mr. Mark L. Akers (on behalf of Mr. Greg Kloeppe), for a hearing for a final award on his claim against the Second Injury Fund. The employer, St. Louis ConnectCare, and its insurer, Commerce & Industry Insurance Company C/O AIG Domestic Claims, Inc., were not present or represented at the hearing since they had previously settled their risk of liability in this case. The Second Injury Fund was represented at the hearing by Assistant Attorney General Da-Niel Cunningham. At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of fact and rulings of law, are set forth below as follows:

STIPULATIONS:

- 1) On or about January 1, 2003, Anthony Darris (Claimant) has alleged an occupational disease claim.
- 2) Claimant was an employee of St. Louis ConnectCare (Employer).
- 3) Venue is proper in the City of St. Louis.
- 4) Employer received proper notice.
- 5) The Claim was filed within the time prescribed by the law.
- 6) At the relevant time, Claimant earned an average weekly wage of \$392.61, resulting in applicable rates of compensation of \$261.74 for total disability benefits and \$261.74 for permanent partial disability (PPD) benefits.
- 7) Employer paid no temporary total disability (TTD) benefits in this case.
- 8) Employer paid no medical benefits in this case.

ISSUES:

- 1) Did Claimant sustain an occupational disease?
- 2) Did the occupational disease arise out of and in the course of employment?
- 3) Are Claimant's injuries and continuing complaints, as well as any resultant disability, medically causally connected to his alleged exposure at work leading up to January 1, 2003?
- 4) What is the nature and extent of Claimant's permanent partial and/or permanent total disability attributable to this alleged injury?
- 5) What is the liability of the Second Injury Fund?

EXHIBITS:

The following exhibits were admitted into evidence:

Employee Exhibits:

- A. Deposition of Dr. Barry Feinberg dated March 6, 2009
- B. Medical treatment records of Dr. Thomas Kirisits
- C. Stipulation for Compromise Settlement for Injury Number 03-144182 (Date of Injury of January 1, 2003) between Claimant and Employer
- D. Claimant's performance appraisals from Employer
- E. Photographs of Claimant's feet
- F. Claimant's job description from Employer
- G. Certified medical treatment records of St. Mary's Health Center
- H. Report of Dr. Barry Feinberg dated April 23, 2007

Second Injury Fund Exhibits:

- I. Deposition of Dr. Stephen Schuman, with attachments, dated August 5, 2009
- II. Certified medical treatment records of Abbott & Associates, Inc.
- III. Deposition of Dr. Russell Cantrell dated March 12, 2008
- IV. Certified medical treatment records of Dr. John Mellas

Notes: 1) Unless otherwise specifically noted below, any objections contained in these Exhibits are overruled and the testimony fully admitted into evidence.

2) *Although Exhibits A and Roman Numeral III purported to have deposition exhibits attached to them, there were no such deposition exhibits attached to those two Exhibits when they were admitted into evidence at trial.*

3) *Some of the records submitted at hearing contain handwritten remarks or other marks on the Exhibits. All of these marks were on these records at the time they were admitted into evidence and no other marks have been added since their admission on March 23, 2010.*

FINDINGS OF FACT:

Based on a comprehensive review of the evidence, including Claimant's testimony, the expert medical opinions and depositions, the medical records, the Stipulation for Compromise Settlement between Claimant and Employer, and the other documentary evidence, as well as my personal observations of Claimant at hearing, I find:

- 1) **Claimant** is a 60-year-old, currently unemployed individual, who last worked for St. Louis ConnectCare (Employer) as a Security Officer until he left that employment in October 2005.
- 2) Claimant completed 1 ½ years of education in law enforcement at St. Louis Community College at Florissant Valley and Forest Park. He then graduated from the St. Louis Police Academy in 1970.
- 3) Following graduation from the St. Louis Police Academy, he worked for 11 years for the St. Louis Metropolitan Police Department. He first worked eight years as a Patrolman, and then the balance of his time there as a Detective. Claimant then went to work for the Pine Lawn Police Department. He worked two years as a Patrol Officer and in Traffic, and then worked the balance of his ten years in Pine Lawn in the Detective Bureau. He left Pine Lawn for more money, and became employed at the Breckenridge Hills Police Department. He worked there five years as a Patrol Officer. Then, Claimant spent six years at the Wellston Police Department. First, he worked a few months as a Patrol Officer, but then he spent the balance of his time there as a Detective. Claimant testified that after he left Wellston, he was unemployed for approximately six months, and then he became employed by St. Louis ConnectCare (Employer) in approximately January 2000.
- 4) Claimant testified that he suffered his first heart attack in 1996. He underwent an angioplasty procedure. He suffered his second heart attack in 1998, after which the doctors inserted a stent. Claimant had another heart attack in 2004, but was treated with only medications, no surgery. He also suffered three strokes in 1996, 1998 and 2008. He was diagnosed with high blood pressure in approximately 1998 and takes medications and aspirin for that condition. He also has a thyroid condition which was diagnosed in approximately 2002. Claimant has never been diagnosed with diabetes.
- 5) In approximately 2000, Claimant was diagnosed with chronic renal failure. About a year later he was put on a course of dialysis. Claimant said Employer put him on a

- day shift so that he could do the dialysis at night. Claimant testified that he did have neuropathy in his toes, but not in the rest of his legs or feet, that he first noticed ten years prior (in the early 1990s) to the diagnosis of chronic renal failure. The chronic renal failure resulted in a kidney transplant on January 24, 2006. Claimant testified that he has been doing well with the transplant.
- 6) Claimant testified that he was employed by Employer as a Security Officer beginning in 2000. He was responsible for covering six different posts, some of them in the hospital and others on the various parking lots. The **job description from Employer** (Exhibit F) details the various duties Claimant was responsible for on a daily basis while working for Employer. Of note, the job description, under "Work Conditions" lists prolonged standing and walking as a part of the job. Claimant also testified that, indeed, he performed a lot of walking and standing on the job. He noted that he was specifically assigned to pick up the money, and it was after he had been doing that assignment that his foot problems started. He said that he was assigned to walk the whole hospital, not just stay at one post, and he had been doing that for a year to a year and a half when he developed the progressive onset of foot symptoms. He admitted that in the summer he wore black tennis shoes and in the winter he wore black combat boots. He testified that he had no prior issues with his feet and no prior problems with walking before going to work for Employer.
- 7) **Claimant's performance appraisals from Employer** (Exhibit D) span the years of 2000 through 2003 while Claimant worked as a Security Officer for Employer. In the earlier evaluations, the form indicates that Claimant was required to walk/move about 76-100% of the time. In the first three years, Claimant received generally favorable ratings with comments that he was an outstanding officer and excellent report writer. His final evaluation contained in this exhibit for the year 2003 notes that he is only required to walk/move about 26-75% of the time. This evaluation noted that Claimant needed to work on getting along better with his fellow employees and to improve his personal appearance as it relates to uniform and grooming. Claimant wrote a response that he did not agree with the comments, since there was only one person he did not get along with and he believed the negative statements were a "lie."
- 8) Claimant testified that he developed large calluses and ulcers on his feet that bled. He noted that his toes were also hurting. He first sought medical treatment for his foot problems in early 2003. Claimant said that at first, his left foot was worse, then the right got bad, and then they were both equally bad. Claimant testified that he developed infections in the ulcerations on his feet and he also had pain with walking. Claimant said that he sought treatment with Dr. Kirisits, who trimmed his nails and then removed his right big toenail. **Photographs of Claimant's feet** (Exhibit E) document the problems Claimant was having with his feet at or around this time. The photographs show severely deformed, bleeding and misshapen toes and toenails. Claimant said the doctor asked him what he did that his feet were so bad. Eventually, on the left foot, Claimant testified that the doctor cut off the top half of the left big toe.

- 9) Medical treatment records from **Dr. Thomas Kirisits** (Exhibit B) begin with an office note dated February 4, 2003, in which Claimant was following up for an ulceration of the sub IPJ left hallux. Dr. Kirisits performed a debridement and cleaning of the ulceration. He recommended that Claimant obtain custom made Plastizote PPT orthotics with a depression for the ulcer, and shoes. By February 18, 2003, Claimant had obtained the shoes and orthotics, but Dr. Kirisits had to again debride the ulceration. Claimant continued to follow-up in the following months for additional debridements, until July 22, 2003, when Dr. Kirisits first suggested surgery. That same note also contained the first mention that Claimant “ambulates a great deal on his toe at work.” In discussing the possible need for the surgery, the record also notes that Claimant cannot take off work for quite some time because he has already used his vacation. On August 19, 2003, his ulceration was described as “healed,” but by September 9, 2003 it was back and by September 23, 2003 the doctor was again discussing the need for surgery. The last office note from Dr. Kirisits is dated November 18, 2003. In it, the doctor comments that Claimant does a great deal of standing and walking as a security guard, and he has been unable to set aside time for the IPJ arthroplasty to offload the area. Dr. Kirisits comments that the ulcer will not heal under the current circumstances. He again debrides the ulceration of the left hallux and diagnoses peripheral neuropathy and a Wagner Grade 1 ulceration. The last note in Dr. Kirisits’ records is a handwritten note dated May 17, 2004 which reads, “Mr. Darris has been under lot of stress and anxiety for the last six months. We had to continue to increase his Clonazepam and Atenolol.” Other than the few comments about the nature of Claimant’s work, Dr. Kirisits provided no opinions in any of his reports on whether the foot problems were related to Claimant’s employment or not.
- 10) Medical treatment records from **St. Mary’s Health Center** (Exhibit G) initially document an admission on February 2, 2004 for severe shortness of breath, diagnosed as acute pulmonary edema and respiratory failure. He was noted to have a past medical history of end-stage renal disease on hemodialysis, hypertensive cardiovascular and renal disease, and coronary artery disease. In his past history, he was also noted to have had a heart attack in 1996 for which he had an arteriovenous graft and a stroke in 1989 from which he recovered without any deficits. During this three-day admission, Claimant was dialyzed, medicated and intubated to help with his breathing.
- 11) The medical treatment records from **St. Mary’s Health Center** (Exhibit G) next contain a series of admissions from July 10, 2004 through September 2, 2004 for Claimant’s foot condition. The Admission Record for the July 10, 2004 admission has a box entitled “ACCIDENT WK REL” in which there is a “NO.” Claimant was admitted on that date for an interphalangeal joint arthroplasty of the left hallux and debridement of ulcerations of the left and right hallux, skin and subcutaneous tissues. That surgery was performed by Dr. Thomas Kirisits. The records describe the ulceration of the left hallux as “long-standing” and also confirm diagnoses of renal failure and peripheral neuropathy. By July 29, 2004, when Claimant sought follow-up care from his prior foot surgery, he was also now complaining of a loose right great toenail, which was removed on that date. An evaluation for loss of sensory protection

in the feet conducted on that date showed loss of sensation on various parts of both feet. By August 19, 2004, Claimant was described as having healed ulcerations and healed surgical sites of both great toes. The last admission to the hospital for the foot condition contained in these records is dated September 2, 2004. The Admission Record again indicates this admission is not because of a work-related accident. The note indicates that Claimant is working 40 hours a week light duty for Employer at the dispatch desk. He complained of some occasional burning, tingling and shooting in both great toes. It also notes Claimant has had peripheral neuropathy for at least seven years. Dr. Kirisits debrided an inflamed hyperkeratosis and recommended another evaluation in three weeks.

- 12) The final admission documented in the **St. Mary's Health Center** records (Exhibit G) was from March 7, 2005 through March 11, 2005 when Claimant again presented to the hospital in acute respiratory failure. He complained of progressively worsening shortness of breath for the prior 11 days. The records recount his prior history of hypertension, end-stage renal disease, coronary artery disease and two myocardial infarctions. Claimant was diagnosed with acute respiratory failure, pneumonia and congestive heart failure with pulmonary edema. He was again intubated, dialyzed and treated with medications for his pneumonia.
- 13) Claimant testified that when he went back to work, he went back on light duty as a dispatcher. He, then, went back to regular duty after a couple of months. He left Employer in October 2005. Claimant admitted that he left his employment because of a combination of everything going on with him at that time, his pain in his feet, as well as his other problems like the chronic renal failure.
- 14) In terms of his current complaints referable to his foot condition, Claimant testified that when he walks long distances, such as a couple blocks, he develops bunions and ulcers. He said that his right foot starts hurting first, but then both eventually hurt if he keeps walking. Claimant testified that he still sees a podiatrist because his feet still hurt him. The podiatrist also trims his nails and deals with the calluses.
- 15) Medical treatment records from **Dr. John Mellas** (SIF Exhibit IV) and **Abbott & Associates, Inc.** (SIF Exhibit II) document the extensive medical problems and treatment that Claimant had from June 27, 2005 through November 5, 2008. The records contain comments concerning his long history of treatment for hypertension since at least 1978; coronary artery disease including myocardial infarction in 1996, PTCA of the circumflex in 1996 and PTA with stent LAD in 1998; hemorrhagic thalamic stroke in May 1998; peripheral vascular disease; lower extremity neuropathy; and end-stage renal disease. They document treatment Claimant received for renal osteodystrophy and severe hyperparathyroidism, status post parathyroidectomy with autoimplantation in the right forearm in 2004; an angioplasty on August 25, 2005 following a positive stress test; his kidney transplant on January 24, 2006; a CVA in April 2008 resulting in right facial droop, right arm weakness and slurred speech with a brain MRI showing extensive white matter changes; an admission for pleuritic chest pain on May 30, 2006; and right leg deep vein thrombosis in June 2006 which was treated with Coumadin.

- 16) Claimant testified that he is currently not able to go to work. He described himself as tired and out of shape. He noted, however, that he would be willing to try a security job, if someone would hire him.
- 17) Claimant was sent by his attorney for an examination with **Dr. Barry Feinberg** (Exhibit H). Dr. Feinberg examined Claimant on one occasion, April 20, 2006, and provided no medical treatment. According to Dr. Feinberg's report dated April 23, 2007, Claimant provided a history of the gradual, progressive onset of foot pain, left greater than right, as he was always walking every day on his feet as a security guard for Employer except breaks. Dr. Feinberg had a history of the treatment Claimant received for his feet. Claimant told Dr. Feinberg he left his work for Employer "because of continued problems associated with his supervisor." Claimant complained of continued pain in the left foot but said that his right foot was better. Claimant had also just had his kidney transplant a few months prior to this examination with Dr. Feinberg. The review of medical records and the physical examination sections of the report really contained nothing about the treatment Claimant had received for the right foot. Everything seemed to be concentrated on the left. Additionally, while Dr. Feinberg had some history of Claimant's cardiac, pulmonary and endocrine issues, he apparently did not have a complete history, because his report had no mention of the 2005 cardiac cath procedure that was performed after a positive stress test or the 2004 diagnosis of severe hyperparathyroidism, status post parathyroidectomy with autoimplantation in the right forearm in 2004.
- 18) Dr. Feinberg's physical examination revealed lateral scarring on the left first toe and bruising along the left 5th metatarsal. He had decreased sensation to pin and temperature in the dorsum of the left foot, primarily along the lateral aspect of the foot overlying digits 4 and 5. He also had a full range of motion in the ankles. He had a normal gait and was able to walk without assistance. Dr. Feinberg diagnosed bilateral foot pain, left much greater than right. He opined that as a result of Claimant's neuropathy and continued repetitive standing and walking as a requirement of his job, he developed blistering and ulcerations that required multiple debridements of the left foot. He also reported Claimant's co-existing vascular insufficiency (neuropathy), cardiovascular disease, hypertension resulting in renal failure, dialysis and kidney transplant, and pulmonary problems. Dr. Feinberg recommended a work restriction of non-weight bearing, as well as limited exercise tolerance because of his hypertension and cardiovascular disease and isolation while he recovers from the kidney transplant. He opined that Claimant's walking at work exacerbated his pre-existing peripheral neuropathy, resulting in the foot pain and treatment, and, thus, the foot problems were medically causally related to his work. He rated Claimant as having permanent partial disabilities of 30% of the left foot and 10% of the right foot as a result of his work injury. He rated pre-existing disabilities of 25% of the body as a whole for his renal disease and 20% of the body as a whole for his cardiovascular problems. Finally, he opined, "Patient is permanently and totally disabled as a result of the combination of primarily his cardiovascular problems and kidney problems. The result of these

problems has caused patient significant decrease in exercise tolerance, peripheral neuropathy, and kidney failure with the need for transplantation and dialysis.”

- 19) The deposition of **Dr. Russell Cantrell** (SIF Exhibit III) was taken by Employer on March 12, 2008 to make his opinions in this case admissible at trial. Dr. Cantrell is board certified in physical medicine and rehabilitation (physiatry) as well as in electrodiagnostic medicine. He examined Claimant on one occasion, July 3, 2007, at the request of Employer’s attorney, and he provided no medical treatment to Claimant. Dr. Cantrell testified that Claimant had no specific pain complaints at the time of this examination, and Claimant was uncertain whether he had any ulcerations in his feet at that time. Dr. Cantrell had a detailed description of Claimant’s work activities, including the various posts where the security guards rotated and the standing and walking requirements that went with each post. He also had a description of the shoes that Claimant wore on the job. Claimant reported to Dr. Cantrell that he quit working for Employer because of the side effects associated with his dialysis. Dr. Cantrell reviewed medical records regarding Claimant’s treatment for his feet and other conditions and was aware of his significant history of cardiac and renal problems. Upon his physical examination, Dr. Cantrell found that Claimant had multiple hammertoes in the right foot, thickened nail beds in the right great, second and third toes, thickened hyperkeratotic skin in the left 5th metatarsal phalangeal junction, and a well healed surgical scar overlying the left great toe. He had markedly decreased light touch and pinprick sensation in a stocking glove distribution over both legs, left greater than right.
- 20) Dr. Cantrell diagnosed severe peripheral polyneuropathy related to his chronic renal disease, and a longstanding history of hypertension and chronic renal disease. He opined that neither these diagnoses, nor the multiple foot ulcerations or other foot problems, were related to Claimant’s work as a Security Officer for Employer. He explained that ulcerations, such as those described in the medical records, are commonly seen in individuals with these medical conditions whether they have a standing or sedentary job. He explained that the real causes of the ulcerations were the microvascular disease from the hypertension and the peripheral edema from the chronic renal disease along with the reduction in sensation from the peripheral polyneuropathy that adversely affects an individual’s ability to feel pain and, thus, allows the ulcerations to form and progress. He opined that Claimant had no restrictions attributable to his work activities for Employer, but he definitely had work restrictions attributable to his other medical conditions. He further opined that Claimant had sustained no permanent partial disability on account of his work activities for Employer. On cross-examination, Dr. Cantrell confirmed that Claimant’s polyneuropathy would have caused the pain, ulcerations and other symptoms Claimant suffered even absent his work activities. He also confirmed that while Claimant does have disability related to the peripheral polyneuropathy, he did not believe there was any disability attributable to the ulcerations because they have healed and are no longer evident. He agreed that the ulcerations could come back from time to time but that would be because of the underlying peripheral neuropathy. Dr. Cantrell refused to make any specific opinion on Claimant’s overall ability to

work because he did not feel comfortable assessing his renal, cardiac, pulmonary and vascular status and trying to determine his ability to work with those conditions.

- 21) The deposition of **Dr. Barry Feinberg** (Exhibit A) was taken by Claimant on March 6, 2009 to make his opinions in this case admissible at trial. Dr. Feinberg is board certified in anesthesiology and pain management. He examined Claimant on one occasion, April 20, 2006, at the request of Claimant's attorney. Dr. Feinberg testified consistent with his opinions contained in his report and described above. He specifically opined that the work for Employer was a substantial factor in the cause of the bilateral foot pain. He did somewhat alter his opinion on the cause of Claimant's permanent total disability between what he wrote in the report and his testimony. While his combination opinion in his report does not mention the foot problems at all, in his deposition testimony, Dr. Feinberg said that his permanent total disability was the result of the combination of the foot problems as well as the cardiovascular disease and kidney problems, including the peripheral neuropathy, dialysis and transplant. Then in the next question, Dr. Feinberg agreed that the renal failure and cardiac problems were "primarily the combining factor of disability."
- 22) On cross-examination, Dr. Feinberg agreed that he was unaware of any medical treatment or problems Claimant may have had since he examined Claimant in 2006. He admitted that the only history he had concerning Claimant's job duties came from Claimant and were repeated in his report. He had no job description or any other documentation regarding those job duties. His understanding was that he was basically on his feet all day, but he also had no idea how far he might have to walk over the course of the day, and no idea what type of shoes he was wearing during the workday. He also did not know the extent, if any, of the walking Claimant did outside of work. Dr. Feinberg agreed that without the peripheral neuropathy, Claimant would not have developed the blistering and ulcerations, but he believed work increased the probability of him developing the foot problems because of the weight bearing. On cross-examination, Dr. Feinberg again confirmed a couple times that Claimant's permanent total disability was primarily as a result of the renal and cardiovascular problems.
- 23) The Second Injury Fund forwarded Claimant's medical treatment records and deposition to **Dr. Stephen Schuman** (SIF Exhibit I) and requested that he conduct a medical records review. Dr. Schuman prepared a report dated March 11, 2009. In that report, Dr. Schuman concluded that given his multiple medical problems, Claimant is not employable due to his prior stroke and renal failure. From a cardiac standpoint, Dr. Schuman found that Claimant had near normal left ventricular function and no recent anginal-type complaints, so he could probably work in a sedentary or supervisory capacity, just based on cardiac limitations. However, considering also his neurological and renal diagnoses, Claimant would be considered permanently and totally disabled.
- 24) The deposition of **Dr. Stephen Schuman** (SIF Exhibit I) was taken by the Second Injury Fund on August 5, 2009 to make his opinions in this case admissible at trial. Dr. Schuman is board certified in cardiology and internal medicine. He never

examined Claimant, but only performed a records review at the request of the Second Injury Fund. Dr. Schuman testified consistent with his opinions contained in his report and described above. He went to great lengths to explain the various medical conditions and treatments that Claimant had received for his systemic cardiac, pulmonary and renal problems. He confirmed in the deposition that due to the stroke and renal failure, Claimant was unemployable. He further opined that the hypertension, peripheral neuropathy and many other conditions would add to that, but it was simply the stroke (neurological) and renal failure that would make him unemployable. Finally, he confirmed that even if Claimant had not had the foot problems, he would still be permanently and totally disabled based on the prior problems alone. On cross-examination, Dr. Schuman agreed with Dr. Cantrell that the most likely etiology for the peripheral neuropathy was Claimant's chronic renal disease. He agreed that it was not unusual for Claimant to develop peripheral polyneuropathy in light of his medical history, regardless of his job activities.

- 25) Claimant and Employer entered into an agreement to resolve their portion of the January 1, 2003 claim (Injury No. 03-144182) by **Stipulation for Compromise Settlement** (Exhibit C) for \$2,160.00 or 5% permanent partial disability of the left foot and 1.5% permanent partial disability of the right foot. According to the Stipulation, Employer paid no medical benefits or temporary total disability benefits. The addendum to the stipulation indicated that based on Claimant's attorney's fee and reimbursable expenses incurred while prosecuting this case, Claimant actually received no money on account of the settlement. It essentially paid for the fees and expenses in the case. The Second Injury Fund portion of the case was left open on the stipulation.

RULINGS OF LAW:

Based on a comprehensive review of the above-stated evidence, including Claimant's testimony, the expert medical opinions and depositions, the medical records, the Stipulation for Compromise Settlement between Claimant and Employer, and the other documentary evidence, as well as my personal observations of Claimant at hearing, and based upon the applicable laws of the State of Missouri, I find:

Given that these three issues are so inter-related in this Claim, I will address these three issues together.

Issue 1: Did Claimant sustain an occupational disease?

Issue 2: Did the occupational disease arise out of and in the course of employment?

Issue 3: Are Claimant's injuries and continuing complaints, as well as any resultant disability, medically causally connected to his alleged exposure at work leading up to January 1, 2003?

Since this is a Second Injury Fund only case, it is important to note that under **Mo. Rev. Stat. § 287.220.1 (2000)**, in order to qualify for Second Injury Fund benefits, Claimant must prove the presence of pre-existing permanent partial disability, along with a “subsequent *compensable injury* resulting in additional permanent partial disability... [emphasis added].” In other words, if the primary injury against Employer is not a *compensable* injury, then the Second Injury Fund claim fails.

Claimant bears the burden of proof on all essential elements of his Workers’ Compensation case. *Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute*, 793 S.W.2d 195 (Mo. App. E.D. 1990) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). The fact finder is charged with passing on the credibility of all witnesses and may disbelieve testimony absent contradictory evidence. *Id.* at 199.

Claimant alleges that he sustained an occupational disease involving both feet that was medically causally related to his employment for Employer. Under **Mo. Rev. Stat. § 287.067.1 (2000)**, occupational disease is defined as “an identifiable disease arising with or without human fault out of and in the course of the employment.” Additionally, under **Mo. Rev. Stat. § 287.067.2 (2000)**, “an occupational disease is compensable if it is clearly work related and meets the requirements of an injury which is compensable as provided in subsections 2 and 3 of section 287.020. An occupational disease is not compensable merely because work was a triggering or precipitating factor.” An injury is defined as clearly work related under **Mo. Rev. Stat. § 287.020.2 (2000)** “if work was a substantial factor in the cause of the resulting medical condition or disability.”

The Court in *Kelley v. Banta & Stude Construction Co., Inc.*, 1 S.W.3d 43 (Mo. App. E.D. 1999), explained the proof the employee must provide in order to make an occupational disease claim compensable under the statute. The Court held that first, the employee must provide substantial and competent evidence that he contracted an occupationally induced disease rather than an ordinary disease of life. There are two considerations to that inquiry: (1) whether there was an exposure to the disease greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee’s job which is common to all jobs of that sort. The Court then held that the employee must also establish, usually with expert testimony, the probability that the claimed occupational disease was caused by the conditions in the work place. More specifically, employee must prove “a direct causal connection between the conditions under which the work is performed and the occupational disease.” *Id.* at 48. Finally, the Court noted, “where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible.” *Id.*

Having thoroughly reviewed all of the evidence regarding Claimant’s bilateral foot conditions, including Claimant’s testimony, the medical treatment records from Dr. Kirisits and St. Mary’s Health Center, and the independent medical report and testimony from Dr. Feinberg and Dr. Cantrell, I find that Claimant has failed to meet his burden of proving the presence of an occupational disease that arose out of and in the course of his employment. I further find that he has failed to prove that his foot conditions and continuing complaints are medically causally related to his employment leading up to January 1, 2003.

The medical treatment records on the feet in evidence cover a period of time of approximately 19 months, from February 4, 2003 until September 2, 2004. Having conducted an exhaustive review of those records, I find no indication in any of the records, from the treating doctors, that Claimant's foot conditions are causally connected to his employment for Employer. There are admittedly a couple references to Claimant doing a great deal of standing and walking as a security guard, but there is no causal connection made between his foot complaints and his employment. Additionally in the Admission Records at St. Mary's Health Center, Claimant consistently reports that there was no injury, and he never indicates the complaints were related to any injury at work. Neither he nor the doctors question the work-relatedness of his foot condition during that whole period of time. Instead, what is consistently mentioned is the peripheral neuropathy and his significant history of hypertension and chronic renal failure for which he was receiving dialysis. He apparently submitted all of his medical bills through his personal health insurance, since Employer paid no medical, according to the stipulations and medical records. Further, he never received TTD for any period of time off work while treating for the feet.

Claimant suggests that since he had peripheral neuropathy for a number of years prior to working for Employer, and he had no foot complaints or ulcerations, therefore, it must have been the amount of walking and standing he was doing for Employer that caused the onset of foot complaints. However, that assertion overlooks the fact that, by the accounts of all the doctors, the peripheral neuropathy is a progressive disease, especially if the root cause of it, in this case the chronic renal failure, is also continuing to progressively worsen. It seems appropriate, based on the accounts of the medical experts, to find that the hypertension, cardiovascular condition and chronic renal failure conditions were all inter-related, in that, the conditions were dependent on each other and all contributed to the peripheral polyneuropathy. There can be no doubt upon reviewing the medical records in evidence that these conditions continued to progress during this time resulting in renal osteodystrophy and severe hyperparathyroidism, status post parathyroidectomy with autoimplantation in the right forearm in 2004, an angioplasty on August 25, 2005 following a positive stress test, and ultimately his kidney transplant on January 24, 2006. In that respect then, I find that Claimant had documented evidence of these progressive, debilitating conditions suggesting a systemic disease (peripheral neuropathy) as opposed to an occupational exposure as the cause of the foot conditions when, in fact, they finally surfaced.

The first and only physician to medically causally connect Claimant's foot problems to his work for Employer was Dr. Barry Feinberg, who only examined Claimant one time at the request of his attorney on April 20, 2006. As documented in his report and testimony, I find that Dr. Feinberg had a rather limited understanding of Claimant's work activities for Employer. The only thing he had to rely on in that regard was Claimant's own statement to the doctor. He had no job description or any other documentation regarding those job duties. His understanding was that he was basically on his feet all day, but he also had no idea how far he might have to walk over the course of the day, and no idea what type of shoes he was wearing during the workday. He also did not know the extent, if any, of the walking Claimant did outside of work. Dr. Feinberg did have some idea of the extent of Claimant's progressive medical conditions, but he apparently did not have a complete history, because his report had no mention of the 2005 cardiac cath procedure that was performed after a positive stress test or the 2004 diagnosis of severe hyperparathyroidism, status post parathyroidectomy with autoimplantation in the right

forearm in 2004. Additionally, he apparently did not have an accurate history of Claimant's right foot problems because a review of medical records and the physical examination sections of the report really contained nothing about the treatment Claimant had received for the right foot, nor any positive findings on the physical examination of the right foot. On the basis of these omissions, inaccuracies or incomplete histories, I find that Dr. Feinberg's medical causation opinion on Claimant's bilateral foot condition is not competent, credible or reliable, and cannot be used as a basis for an award of compensation in this case.

On the other hand, I find that the testimony of Dr. Russell Cantrell regarding the medical causation of Claimant's bilateral foot condition is competent, credible and reliable. Dr. Cantrell had a much more detailed understanding of Claimant's work activities for Employer. He had a good understanding of Claimant's other progressive medical conditions that affected the peripheral neuropathy in the lower extremities, and his physical examination clearly revealed findings in both lower extremities and feet that were apparently left out of Dr. Feinberg's report. Additionally, I find that Dr. Cantrell provided a solid explanation for his opinion that the foot problems and ulcerations were related to Claimant's peripheral neuropathy even absent any work exposure. He explained that ulcerations, such as those described in the medical records, are commonly seen in individuals with these medical conditions whether they have a standing or sedentary job. He explained that the real causes of the ulcerations were the microvascular disease from the hypertension and the peripheral edema from the chronic renal disease along with the reduction in sensation from the peripheral polyneuropathy that adversely affects an individual's ability to feel pain, and, thus, allows the ulcerations to form and progress. Also, while Dr. Stephen Schuman did not specifically make a medical causation opinion on the bilateral foot condition, he did indicate in his testimony that he agreed with Dr. Cantrell's opinion and explanation of this condition.

As Dr. Feinberg was the only physician to find an occupational disease and medically causally relate that condition to Claimant's employment for Employer, and as Dr. Feinberg's opinions in that regard are not competent, credible or persuasive for the reasons listed above, I find that Claimant has failed to meet his burden of proving the presence of an occupational disease that arose out of or in the course of employment, or that was medically causally related to it.

Given Claimant's failure to provide credible medical evidence or testimony regarding any occupational disease while working for Employer, I find that he has failed to show whether there was an exposure to an occupational disease greater than or different from that which affects the public generally. Furthermore, he has failed to prove whether there was a recognizable link between any occupational disease and some distinctive feature of his job which is common to all jobs of that sort. Therefore, I find Claimant has been unable to provide substantial and competent evidence that he contracted an occupationally induced disease rather than an ordinary disease of life. I further find that he has failed to meet his burden of showing that the disease was medically causally connected to his employment for Employer, by failing to provide competent and credible medical evidence that there is "a direct causal connection between the conditions under which the work is performed and the occupational disease."

Since Claimant has failed to prove the presence of a compensable underlying primary Claim in this case regarding the bilateral foot condition, Claimant's Claim against the Second Injury Fund also then fails for that lack of proof. The Second Injury Fund Claim is denied.

While this ruling on these issues is dispositive of this case, I do want to address the remaining issues in this case because there is yet another reason why, even if his bilateral foot condition was compensable, he would not have a valid Second Injury Fund Claim.

Issue 4: What is the nature and extent of Claimant's permanent partial and/or permanent total disability attributable to this alleged injury?

Issue 5: What is the liability of the Second Injury Fund?

Given that these two issues are so inter-related in this Claim, and, further, given Claimant's allegation that he is permanently and totally disabled, I will address these two issues together.

Claimant again bears the burden of proof on all essential elements of his Workers' Compensation case. *Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute*, 793 S.W.2d 195 (Mo. App. E.D. 1990) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). The fact finder is charged with passing on the credibility of all witnesses and may disbelieve testimony absent contradictory evidence. *Id.* at 199.

Under **Mo. Rev. Stat. § 287.190.6 (2000)**, "permanent partial disability" means a disability that is permanent in nature and partial in degree..." The claimant bears the burden of proving the nature and extent of any disability by a reasonable degree of certainty. *Elrod v. Treasurer of Missouri as Custodian of Second Injury Fund*, 138 S.W.3d 714, 717 (Mo. banc 2004). Proof is made only by competent substantial evidence and may not rest on surmise or speculation. *Griggs v. A.B. Chance Co.*, 503 S.W.2d 697, 703 (Mo. App. 1973). Expert testimony may be required when there are complicated medical issues. *Id.* at 704. Extent and percentage of disability is a finding of fact within the special province of the [fact finding body, which] is not bound by the medical testimony but may consider all the evidence, including the testimony of the claimant, and draw all reasonable inferences from other testimony in arriving at the percentage of disability. *Fogelson v. Banquet Foods Corp.*, 526 S.W.2d 886, 892 (Mo. App. 1975) (citations omitted).

Under **Mo. Rev. Stat. § 287.020.7 (2000)**, "total disability" is defined as the "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 test for permanent total disability is claimant's ability to compete in the open labor market. The central question is whether any employer in the usual course of business could reasonably be expected to employ claimant in her present physical condition. *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173 (Mo. App. E.D. 1995) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003).

In cases such as this one where the Second Injury Fund is involved, we must also look to **Mo. Rev. Stat. § 287.220 (2000)** for the appropriate apportionment of benefits under the statute. In order to recover from the Fund, Claimant must prove a pre-existing permanent partial disability, that existed at the time of the primary injury, and which was of such seriousness as to constitute a hindrance or obstacle to employment or reemployment should employee become unemployed. *Messex v. Sachs Electric Co.*, 989 S.W.2d 206 (Mo. App. E.D. 1999) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). Then to have a valid Fund claim, that pre-existing permanent partial disability must combine with the primary disability in one of two ways. First, the disabilities combine to create permanent total disability, or second, the disabilities combine to create a greater overall disability than the simple sum of the disabilities when added together.

In the second (permanent partial disability) combination scenario, pursuant to **Mo. Rev. Stat. § 287.220.1 (2000)**, the disabilities must also meet certain thresholds before liability against the Second Injury Fund is invoked. The pre-existing disability and the subsequent compensable injury each must result in a minimum of 12.5% permanent partial disability of the body as a whole or 15% permanent partial disability of a major extremity. These thresholds are not applicable in permanent total disability cases.

It is first necessary to determine whether Claimant is permanently and totally disabled, and then the nature and extent of the permanent partial and/or permanent total disability against Employer. Based on the evidence referenced above, including the medical treatment records, the expert opinions from the doctors, as well as based on my personal observations of Claimant at hearing, I find that Claimant is permanently and totally disabled under the statute, but that permanent total disability would not be against Employer as a result of the last injury alone. If it were an otherwise compensable injury, Employer would only have liability in this case for permanent partial disability related to the bilateral foot condition allegedly from January 1, 2003.

In reviewing the medical records and reports in evidence, I found that Dr. Feinberg and Dr. Schuman both provided opinions that Claimant was unable to continue working, and, thus, essentially permanently and totally disabled. Neither of those experts indicated that the permanent total disability was the result of the last injury alone. Therefore, I find there is no evidence in the record to substantiate a finding of permanent total disability against Employer.

I find that the central issue in this case, as far as Second Injury Fund liability is concerned, revolves around the symptomology attributable to his multiple disease processes (neurological, hypertension, cardiovascular, chronic renal failure) and the extent to which those disease processes affect Claimant's ability to compete in the open labor market and be employable without any combination from the alleged bilateral foot condition. In other words, are these multiple disease processes responsible for Claimant's permanent total disability by themselves (without any combination with the alleged bilateral foot conditions)?

Now, I recognize that some of the medical records seemingly document a subsequent deterioration of these debilitating conditions resulting in multiple hospitalizations and surgical procedures including an angioplasty and kidney transplant after the alleged exposure to the bilateral foot condition had occurred. However, even if I did consider this to be a subsequent deterioration case, I would still find that the Second Injury Fund has no liability for the

permanent total disability because Claimant's permanent total disability would then be based on the subsequent deterioration of pre-existing conditions unrelated to the alleged primary bilateral foot condition. Either way, Claimant would have failed to prove that it was a combination of his alleged primary and pre-existing disabilities that resulted in permanent total disability. The other difficulty with looking at this as a subsequent deterioration case, regardless of the medical evidence of record, is that the medical opinions and testimony in the record do not support such a finding. Instead the medical evidence and testimony squarely supports the finding that the combination of the multiple disease processes, without the alleged bilateral foot condition, rendered Claimant permanently and totally disabled.

I find that both Drs. Schuman and Feinberg provided opinions that eliminated the Second Injury Fund from having any liability for this permanent total disability. Dr. Schuman, an expert in cardiology and internal medicine, quite clearly testified that due to the stroke and renal failure, Claimant was unemployable. He further opined that the hypertension, peripheral neuropathy and many other conditions would add to that, but it was simply the stroke (neurological) and renal failure that would make him unemployable. Finally, he confirmed that even if Claimant had not had the foot problems, he would still be permanently and totally disabled based on the prior problems alone. Essentially, Dr. Schuman found that there was no combination between the alleged foot condition and the pre-existing disabilities that caused the permanent total disability; it was Claimant's multiple progressive conditions by themselves that resulted in the total disability. Without any combination involving the alleged bilateral foot condition, there is no Second Injury Fund liability for the permanent total disability. I find Dr. Stephen Schuman's opinion in this regard credible.

Similarly, Dr. Barry Feinberg wrote in his report that, "Patient is permanently and totally disabled as a result of the combination of primarily his cardiovascular problems and kidney problems. The result of these problems has caused patient significant decrease in exercise tolerance, peripheral neuropathy, and kidney failure with the need for transplantation and dialysis." While he tried in his deposition testimony to slightly alter this opinion to include a combination with the alleged bilateral foot condition, on cross-examination he again confirmed a couple times that Claimant's permanent total disability was primarily as a result of the renal and cardiovascular problems. Essentially then, I find that, like Dr. Schuman's credible testimony, Dr. Feinberg also finds Claimant's permanent total disability resulted without any real combination with the alleged bilateral foot condition. While the addition of the alleged foot condition may have made Claimant *more* permanently and totally disabled, if he was already permanently and totally disabled without it, based just on the renal and cardiovascular problems, then its addition is of no consequence in determining whether the Second Injury Fund actually has any liability for the permanent total disability.

In order for Claimant to have a valid claim for permanent total disability against the Second Injury Fund, Claimant must prove that it was the combination of the alleged primary bilateral foot condition and the pre-existing disabilities that renders him permanently and totally disabled. If the combination of those disabilities did not result in the permanent total disability, then the Second Injury Fund has no liability for the permanent total disability. In this case, I find based on the competent, credible and reliable evidence in Dr. Schuman's medical report and testimony (as supported by the opinion of Dr. Feinberg) that Claimant's neurological condition (stroke) and chronic renal failure and its resulting symptomology, in and of themselves, resulted

in enough disability to render Claimant permanently and totally disabled independent of the alleged bilateral foot condition at work on January 1, 2003. Therefore, Claimant has failed to prove the proper combination of disabilities and his Claim fails against the Second Injury Fund in that respect.

The medical treatment records from Dr. Mellas, Abbott & Associates, Inc. and St. Mary's Health Center document the profound problems Claimant was having with his multiple debilitating systemic conditions and how those conditions affected his ability to work. Considering the complaints and problems related solely to these conditions, I find Claimant had profound limitations. I find that any restrictions he may have had attributable to his alleged bilateral foot condition from the alleged 2003 injury are fully overshadowed by, and encompassed in, the already profound restrictions he had based on these other conditions.

I find it significant that despite having had this alleged bilateral foot condition in 2003, there is hardly any mention of it anywhere in the records of Dr. Mellas or Abbott & Associates, Inc., nor is there any mention of how this alleged bilateral foot condition had any impact on his ability to function. All of this evidence leads me to the conclusion that the profound effects and limitations from the other debilitating conditions, in and of themselves, was enough to render Claimant permanently and totally disabled.

Therefore, based upon Claimant's failure to prove that the combination of the pre-existing and alleged primary disabilities rendered Claimant permanently and totally disabled (as opposed to just the systemic debilitating conditions in and of themselves), I find that Claimant has failed to meet his burden of proof that he is permanently and totally disabled under the statute against the Second Injury Fund.

Hence, for this separate and distinct reason from that discussed in the prior section, the Second Injury Fund Claim in this case is denied.

CONCLUSION:

Claimant has failed to meet his burden of proving the presence of an occupational disease that arose out of or in the course of employment, or that was medically causally related to it. Since Claimant has failed to prove the presence of a compensable underlying primary Claim in this case regarding the bilateral foot condition, Claimant’s Claim against the Second Injury Fund also then fails for that lack of proof. However, even if Claimant was successful in proving the compensable underlying bilateral foot Claim, his Claim against the Second Injury Fund would still fail. Although Claimant is permanently and totally disabled under the statute, and although that permanent total disability is not against Employer as a result of the alleged last injury alone, based upon Claimant’s failure to prove that the combination of the pre-existing and alleged primary disabilities rendered Claimant permanently and totally disabled (as opposed to just the multiple systemic debilitating conditions in and of themselves), Claimant has failed to meet his burden of proof that he is permanently and totally disabled under the statute against the Second Injury Fund. Therefore, the Claim against the Second Injury Fund is denied and no benefits are awarded in this case.

Date: _____

Made by: _____

JOHN K. OTTENAD
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation