

Issued by THE LABOR AND INDUSTRIAL RELATIONS
COMMISSION

FINAL AWARD DENYING COMPENSATION

(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 03-145855

Employee: Robert Davinroy
Employer: Roadway Express, Inc. (Settled)
Insurer: Old Republic Insurance Company
c/o Gallagher Bassett (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: Alleged January 1, 2003
Place and County of Accident: St. Louis County

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 31, 2007, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge John K. Ottenad, issued July 31, 2007, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 21st day of February 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Robert Davinroy

Injury No.: 03-145855

Before the

Division of Workers'
Compensation

Department of Labor and
Industrial Relations of
Missouri

Jefferson City, Missouri

Dependents: N/A

Employer: Roadway Express, Inc. (Settled)

Additional Party: Second Injury Fund

Insurer: Old Republic Insurance Company
C/O Gallagher Bassett (Settled)

Hearing Dates: February 27, 2007 and March 27, 2007

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: (allegedly) January 1, 2003
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? N/A
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? N/A
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 dockworker for Employer who allegedly injured his right knee from the repetitive nature of his work.

- 12. Did accident or occupational disease cause death? No Date of death? N/A
- 13. Part(s) of body injured by accident or occupational disease: (allegedly) Right Knee
- 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: Robert Davinroy

Injury No.: 03-145855

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: N/A
- 19. Weekly compensation rate: N/A
- 20. Method wages computation: N/A

COMPENSATION PAYABLE

21. Amount of compensation payable:

Employer/Insurer previously settled their risk of liability in this case

22. Second Injury Fund liability:

None
\$0.00

Total:

\$0.00

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: Cynthia M. Hennessey.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Robert Davinroy

Injury No.: 03-145855

Dependents: N/A

Before the
Division of Workers'

Employer: Roadway Express, Inc. (Settled)

Additional Party: Second Injury Fund

Insurer: Old Republic Insurance Company
C/O Gallagher Bassett (Settled)

Compensation
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: JKO

On February 27, 2007, the employee, Robert Davinroy (Claimant), appeared in person and by his attorney, Ms. Cynthia M. Hennessey, for a hearing for a final award on his claim against the Second Injury Fund. The employer, Roadway Express, Inc. (Employer), and its insurer, Old Republic Insurance Company C/O Gallagher Bassett, were not present or represented at the hearing since they had previously settled their risk of liability in this Claim. The Second Injury Fund was represented at the hearing by Assistant Attorney General Da-Niel Cunningham.

Along with this Claim [Injury Number 03-145855, with a date of injury of January 1, 2003, alleging injury to the right knee], Claimant also tried his three other open companion Claims at the same time. Injury Number 01-152727, with a date of injury of December 26, 2001, alleges injury to the neck, right arm and body as a whole. Injury Number 02-158714, with a date of injury of December 31, 2002, alleges injury to the low back. Injury Number 03-147336, with a date of injury of January 2, 2003, alleges injury to the left knee. Separate awards have been issued for each of those other cases.

On the original hearing date, there were some evidentiary issues raised regarding some of the Exhibits, and Claimant was given up to 30 days to submit certified records for the disputed Exhibits. Claimant subsequently submitted the certified records, which were admitted into evidence on March 27, 2007. The record in this matter then closed as of the submission of those Exhibits on March 27, 2007. 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) Venue is proper in the City of St. Louis.
- 2) Employer received proper notice.

ISSUES:

- 1) Did Claimant sustain an accident or occupational disease?
- 2) Did the accident or occupational disease arise out of and in the course of employment?
- 3) Are Claimant's injuries and continuing complaints medically causally connected to his alleged injury and/or 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 injury?
- 5) What is the liability of the Second Injury Fund?
- 6) Was the Claim filed within the time prescribed by the law (within the statute of limitations)?
- 7) What is the appropriate rate of compensation for payment of benefits in this case?

8) Was Claimant an employee of Employer under the statute?

EXHIBITS:

The following exhibits were admitted into evidence:

Employee Exhibits:

- A) Medical reports of Dr. David Volarich dated August 3, 2004 and April 14, 2005
- B) Vocational assessment report of Mr. James England dated April 4, 2005
- C) Certified medical treatment records of Dr. Randall Roush at Northland Mid
America Orthopedics
- D) Certified medical treatment records of Dr. Jacques VanRyn and Dr. William Schroer
at Premier Care Orthopedics
- E) Certified medical treatment records of Dr. T.Z. Chen
- F) Certified medical treatment records of Christian Hospital Northeast-Northwest
- G) Certified medical treatment records of Dr. Terrell Mulford at Mercy Medical
Group-North County Office
- H) Certified medical treatment records of Dr. David Kennedy
- I) Certified medical treatment records of St. Louis Cardiology Consultants, LTD.
- J) Certified medical treatment records of Christian Hospital Northeast-Northwest
- K) Certified medical treatment records of Sears Optical
- L) Settlement stipulations resolving cases between Claimant and Employer in Injury
Numbers 01-152727, 02-158714, 03-145855, and 03-147336
- M) Deposition of Dr. David Volarich, with attachments, dated August 11, 2005
- N) Deposition of Mr. James England, with attachments, dated August 11, 2005
- O) Claim for Compensation for Injury Number 01-152727
- P) Claim for Compensation for Injury Number 02-158714
- Q) Claim for Compensation for Injury Number 03-145855

Second Injury Fund Exhibits:

- I) Copy of Mo. Rev. Stat. § 287.430
- II) Copy of Mo. Rev. Stat. § 490.692
- III) Copy of Missouri Regulation 8CSR 50-5.020
- IV) Division of Workers' Compensation Form 9-A
- V) Copy of Missouri Regulation 8CSR 50-2.010
- VI) Notice of deposition for deposition of Dr. David Volarich in Injury
Number 01-152727
- VII) Notice of deposition for deposition of Mr. James England in Injury
Number 01-152727
- VIII) Copy of Missouri Supreme Court Rule 57.07
- IX) Copy of **Conley v. Treasurer**, 999 S.W.2d 269
- X) Copy of **Totten v. Treasurer**, 116 S.W.3d 624

Notes: 1) *The parties requested that I take Judicial/Administrative Notice of the file contents in all four of these open Claims, including the Claims and Answers filed in each one. Accordingly, I have taken that Judicial/Administrative Notice of those file contents while formulating my decisions in these cases.*

2) *The Second Injury Fund objected to Exhibits G and I based on an improper certification, or lack of a certification on the records altogether. Claimant was given 30 days to cure this defect in these Exhibits. Claimant obtained a proper certification on each Exhibit and resubmitted them on March 27, 2007, on which date they were admitted into evidence in these cases.*

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

4) *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 February 27, 2007 or March 27, 2007.*

FINDINGS OF FACT [\[1\]](#):

Based on a comprehensive review of the evidence, including Claimant's testimony, the expert medical opinion and deposition, the vocational opinion and deposition, the stipulations for compromise settlement, the file contents, and the medical records, as well as my personal observations of Claimant at hearing, I find:

- 1) Claimant is a 60-year-old, currently retired individual, who worked for Roadway Express (Employer)

as a dockworker from 1988 until November 1, 2003, when he took early retirement. He confirmed that during his employment there, he was a regular full-time employee, not an independent contractor. He worked for no one else during this period of time. He estimated that including overtime, he made approximately \$1,000.00 per week. He sometimes worked 7 days a week, for 8 to 10 hours per day. In that position, he was responsible for loading and unloading trucks, driving a forklift, and lifting and stocking freight. His job required walking, bending, stooping, climbing, and sitting (while operating the forklift). Most of the time he was on his feet.

2) Claimant testified that he graduated from high school in 1964 and took two years of classes at SIU-Edwardsville. He did not obtain a degree. He testified he has never done any management or supervisory work. He has not worked behind a desk or as a clerk, and he has not done paperwork. He said he is computer illiterate.

3) Prior to working for Employer, he worked for 7 years as a maintenance man at Venice High School. He performed electrical and plumbing repair, as well as cleaned floors and repaired lockers. He then worked for American Freight as a dockworker from 1973 until they went out of business on August 15, 1988. His job there was very similar to the job described above that he then performed for Employer. All total, he was a member of the Teamster's Union for about 30 years.

4) At hearing, Claimant testified that his right knee first became symptomatic in early 2001. He said that they used to stretch before the shift, including doing deep knee bends, and on one occasion, his knee popped. He testified that he first received treatment for the right knee in 2002, from Dr. Roush. Claimant explained that he had to wait until his neck treatment from the 2001 injury was done before the doctor would do anything for the knee. Claimant further testified that he aggravated or injured his knee when constantly getting up on the forklift to do his job. He explained that there was a non-slip sand pad where he placed his foot when he climbed up on the forklift. His foot would be planted on the pad, and his body would twist, to sit down, but the foot would not move, causing a twisting of the knee.

5) Medical records from Northland Mid America Orthopedics (Exhibit C) showed that Claimant saw Dr. Randall Roush on December 31, 2001 for his right knee. In the medical history form signed by Claimant and dated December 31, 2001, Claimant indicated there was no injury or accident, and he had the problems going back for 12 months to December 31, 2000. Dr. Roush noted that Claimant complained of pain and swelling in the right knee off and on over the last year, and there was no history of any injury. Claimant stated that the pain is worse the more he works, and he noticed some occasional popping. There is no detailed description of his work, or how that work may have been causing or aggravating his knee condition. Upon examination, Dr. Roush found a moderate sized effusion of the right knee. An x-ray of the knee shows medial joint space narrowing. The diagnosis was osteoarthritis of the right knee. Dr. Roush removed joint fluid in the knee. Claimant returned to Dr. Roush on March 12, 2002 for recurring swelling in the right knee, and he noticed a little catching in the knee. Dr. Roush removed the joint fluid, and Claimant wanted to wait to get the MRI of the knee until after his scheduled neck surgery.

6) Dr. Roush ordered an MRI of the knee that was taken on May 1, 2002, which indicated a combination of degenerative changes and tears in the medial meniscus, as well as some subcortical cysts. According to Dr. Roush, Claimant's statements about occasional episodes of catching and buckling in the knees, in addition to the aches, seemed to support the finding of the meniscal tears and degenerative changes. On June 10, 2002, Dr. Roush diagnosed Claimant with a torn medial meniscus and osteoarthritis in the right knee.

7) Dr. Roush performed arthroscopic surgery on Claimant's right knee on July 1, 2002. In addition to a partial medial meniscectomy, he also performed a chondroplasty of the medial femoral condyle and medial tibial condyle. The operative note (as summarized in Dr. Roush's records) characterized the findings in the knee as "osteoarthritis with erosion of the cartilage down to bone." Claimant continued to follow-up with Dr.

Roush, and six weeks after surgery, he was found to have an osteoarthritic area on the medial side of the knee and a meniscal tear. Dr. Roush treated the knee problems with Synvisc injections over three visits.

8) Claimant testified that his left knee became symptomatic during the summer of 2002 while he was rehabbing the right knee. He said Dr. Roush initially told him to wear a brace on it.

9) On October 18, 2002, about 10 months after Claimant came in for his right knee, Claimant came to Dr. Roush with swelling in his left knee. The medical history form signed by Claimant on that date confirmed that there was no accident or injury involving the left knee. Claimant noted that the complaints in the knee began on approximately September 15, 2002. Dr. Roush noted Claimant has had recurrent swelling, and he aspirated the knee of fluid. Claimant's diagnosis was osteoarthritis and effusion of the left knee. Claimant appeared again on November 8, 2002 for another aspiration of joint fluid in the left knee, and a Synvisc injection. Claimant's last visit with Dr. Roush occurred on November 18, 2002. His left knee was again aspirated and he again received a Synvisc injection. Dr. Roush diagnosed osteoarthritis and effusion of the left knee.

10) Medical records from Premier Care Orthopedics (Exhibit D) showed that Claimant saw Dr. Jacques VanRyn on November 22, 2002 regarding his knees. On the Patient Registration form signed by Claimant on that same date he listed his personal health insurance as being responsible for the bills and did not indicate this was a work injury, but instead checked the "Other" line as the reason for his visit. There was absolutely no discussion in the records of any aspects of his job or how the work aggravated or caused his knee complaints and problems. After Dr. VanRyn reviewed Claimant's medical records and examined Claimant, he diagnosed Claimant with advancing osteoarthritis of the right and left knees, and possible synovitis with reaction to a Synvisc treatment on the left knee. Dr. VanRyn treated Claimant with a Medrol-Dose Dosepak for his inflammation, and he referred Claimant to see Dr. Schroer for a second opinion on the need for unicondylar knee arthroplasty on the right knee. The doctor noted that they were just trying to do something to get him through the next year at work until he could retire.

11) On November 26, 2002, Claimant saw Dr. William Schroer for a second opinion for his right knee pain. Dr. Schroer noted both knees had significant varus instability, and recent x-rays showed bone-on-bone changes of the medial joint line of the right knee. He opined that the left knee had significant degenerative loss of the medial joint line articular cartilage, and its condition was similar to the right knee. Dr. Schroer recommended unicompartmental knee replacement for the right knee.

12) Claimant saw Dr. VanRyn again on December 16, 2002 for continuing pain in both knees. An MRI scan showed that there was no medial meniscus left on the medial side of his left knee, and he had considerable bone edema. His diagnosis was bilateral medial gonarthrosis, and Dr. VanRyn recommended bilateral Repecci unicondylar arthroplasties. Claimant returned to Dr. VanRyn on January 7, 2003 seeking the recommended surgical intervention because his pain had worsened to the extent that "he could no longer do his activities of daily living."

13) On January 15, 2003, Claimant underwent bilateral unicompartmental knee arthroplasty with Dr. Schroer to treat his bilateral medial joint line knee degenerative arthritis. Twelve days after the knee replacements, Claimant had a superficial wound infection around his surgical staples, but he eventually recovered and the incisions healed. Claimant had follow-up visits with Dr. Schroer through the period after the surgery until August 1, 2003. During this time, Claimant's condition continued to improve with fewer complaints and increased activity. As of June 5, 2003, despite his improvement in functioning, he noted some swelling at the end of an active day and also noted some difficulty with sustaining activities throughout the whole day. Dr. Schroer released Claimant back to work as of July 1, 2003 with the caveat that if the knees got achy, swollen or sore, then he was doing too much and needed to back off. During the last visit on August 1, 2003, Claimant again reported having some functional deficits at work with aches and pains in the knees, but overall, the doctor characterized his knees as doing "extremely well."

14) Claimant testified that he told Employer about the problems he was having with his knees. He also testified that although he had made about \$1,000.00 per week before this, he started turning down overtime because of his knee problems. Claimant said he was off work for about 6 months for his knees in 2003. He said that at first he felt better, but since then he has really not felt any better as a result of the treatment for his knees.

15) Claimant testified that when he went back to work in July 2003, his knees were killing him. He said that climbing on the forklift, and every step for that matter, was painful. He said he could hardly do it. He could not lift, bend, stoop, squat or kneel very well. He said friends and supervisors helped him, and he primarily handled lighter loads and forklift loads. He said it was the combination of problems with his knees, back, neck and shoulders that caused him to stop working.

16) Claimant was examined by Dr. David Volarich for the first time on August 3, 2004. (Exhibit A) Dr. Volarich performed an independent medical examination at the request of Claimant's attorney, and provided no treatment. At the time of this first examination, the only Claim that Claimant had apparently filed so far was the 2001 neck Claim. Despite that fact, Dr. Volarich's report dated August 3, 2004 contains an extensive history of not only the 2001 injury, but also Claimant's pre-existing complaints and problems with the right eye, low back, heart and bilateral shoulders, as well as his subsequent medical conditions and complaints regarding the low back and bilateral knees. Dr. Volarich's report also contains an extensive section regarding Claimant's job activities as a dockworker for Employer. Additionally, Dr. Volarich reviewed medical treatment records for all of these conditions/injuries, and he performed a physical examination of each and every one of these body parts.

17) Dr. Volarich opined that as a result of the December 26, 2001 injury, Claimant had a herniated nucleus pulposus of C7-T1 to the right, as well as right arm radiculopathy along the C8 nerve root, which was surgically treated with a discectomy, partial vertebrectomy and fusion with instrumentation. He rated Claimant as having 40% permanent partial disability of the body as a whole referable to the cervical spine for this injury. For the numerous pre-existing conditions/disabilities, Dr. Volarich diagnosed and rated the following: 25% of the right shoulder for non-surgically repaired right shoulder impingement; 35% of the left shoulder for non-surgically repaired moderately severe left shoulder impingement; 20% of the body as a whole referable to the low back for lumbar syndrome secondary to degenerative disc disease and degenerative joint disease; 20% of the body as a whole referable to the cardiovascular system for coronary artery disease, which was surgically treated with a three vessel coronary artery bypass grafting; and 100% of the right eye for right eye blindness secondary to trauma as a child.

18) Dr. Volarich then also diagnosed and rated, what he termed, the subsequent conditions/disabilities. He rated Claimant as having 15% of the body as a whole referable to the lumbar spine for progression of lumbar spine disease, including a bulge at L5-S1, and then also rated 50% of each knee due to bilateral severe degenerative arthritis requiring bilateral unicompartmental arthroplasties. Despite having the medical records and history of these conditions, Dr. Volarich provided no opinions that they were caused or aggravated by Claimant's work for Employer.

19) Dr. Volarich then opined that "Mr. Davinroy is permanently and totally disabled as a result of the work related injuries of 12/26/01 in combination with his preexisting medical conditions and subsequent knee surgeries and arthroplasties."

20) Following Dr. Volarich's first report, Claimant filed two new Claims for Compensation, now claiming occupational disease work-related injuries to the low back on December 31, 2002 and to the bilateral knees in January 2003. The low back Claim was assigned Injury Number 02-158714, and the bilateral knee Claim was assigned Injury Number 03-145855. Both of the Claims were dated February 11, 2005. The Claims were the first documents filed in each case. There were no Reports of Injury from Employer, nor any other

indication that Employer had any prior knowledge of these conditions or their alleged work-relatedness.

21) Claimant was then examined again by Dr. David Volarich, at the request of Claimant's attorney, on April 14, 2005. (Exhibit A) He was provided with the same medical records he reviewed in connection with his first examination. Although some of the measurements on the physical examination were updated, Dr. Volarich admitted in his report that "there are no significant changes in the physical examination." Claimant also provided the same history regarding the prior and subsequent low back condition, as well as all of his other conditions, except that he now remembered more details and was able to provide more history regarding his bilateral knee condition.

22) Dr. Volarich now recorded in his new report a history of the right knee popping in January 2001 while Claimant was performing stretching exercises as a part of a company-sponsored exercise program before the beginning of the work day. Dr. Volarich also writes in the new report that Claimant did not experience symptoms until May 2001 and was diagnosed with osteoarthritis in December 2001. Dr. Volarich writes, "At the time, he reported no injury, but after thinking about it, he recalled that his right knee had popped in January of 2001." In addition to this newly remembered "pop" in the right knee, the report also now contains more and new details about the job Claimant did for Employer. There is now a description of an anti-skid pad on the forklift on which Claimant stepped, as well as a description of the pivoting and twisting involving the knees that allegedly occurred about 100 times per day. None of this was described in the first report when Dr. Volarich took an already extensive medical and vocational history.

23) Based apparently on this "new" history and the fact that Claims were now filed for the low back and knees (since everything else seemingly remained the same since the time of the first report), Dr. Volarich now opined that the repetitive nature of Claimant's job was a substantial contributing factor in the aggravation of his lumbar syndrome leading up to December 31, 2002, as well as a substantial contributing factor in the aggravation of his bilateral knee osteoarthritis. His ratings of 15% of the body as a whole referable to the lumbar spine for progression of lumbar spine disease, including a bulge at L5-S1, and 50% of each knee due to bilateral severe degenerative arthritis requiring bilateral unicompartmental arthroplasties, remained the same as in the first report. His opinion that Claimant was permanently and totally disabled also remained the same, except that now the reason for the permanent total disability was the combination of the work-related conditions to the knees, low back and neck, in combination with all of his pre-existing disabilities.

24) Following Dr. Volarich's second report, Claimant then filed a new set of Claims regarding his knee conditions. He filed an Amended Claim for Injury Number 03-145855, changing the allegation of bilateral knees to just right knee, and alleging a date of injury of January 1, 2003. He then filed a new Claim alleging injury to the left knee, with a date of injury of January 2, 2003, which was assigned Injury Number 03-147336. These new Claims were dated August 11, 2005. In the case of the Claim for the new January 2, 2003 allegation of left knee injury, the Claim was the first document filed in that case. There was no Report of Injury from Employer, nor any other indication that Employer had any prior knowledge of this condition or its alleged work-relatedness.

25) Employer and Claimant entered into an agreement to resolve their portion of these 2003 Claims (Injury Nos. 03-145855 and 03-147336) by Stipulations for Compromise Settlement (Exhibit L) on October 14, 2005. They settled Injury Number 03-145855 for \$8,162.88 or approximately 15% permanent partial disability of the right knee. They settled Injury Number 03-147336 for \$8,162.88 or approximately 15% permanent partial disability of the left knee. Both stipulations reflect that Employer paid no medical or TTD benefits in connection with either of these Claims.

RULINGS OF LAW:

Based on a comprehensive review of the substantial and competent evidence, and based upon the applicable laws of the State of Missouri, I find:

Issue 1: Did Claimant sustain an accident or occupational disease?

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

Issue 3: Are Claimant's injuries and continuing complaints medically causally connected to his alleged injury and/or exposure at work leading up to January 2, 2003?

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

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 in the alternative that he either sustained an accident or occupational disease involving both knees that was medically causally related to his employment for Employer. However, Claimant's only possible description of an accident involving either knee is the popping of the right knee from 2001 that he just “remembered” in 2005 when he went to see Dr. Volarich for the second time. I find this delayed recollection of the alleged accident by Claimant is not credible. Further, Claimant has not submitted any medical evidence to support an accident theory in this case. In fact, Claimant denied any history of a specific injury or accident to Dr. Roush. Therefore, in the absence of credible testimony from Claimant, and in the absence of medical evidence to support that an accident was responsible for his bilateral knee conditions, I find Claimant has failed to meet his burden of proof that an accident occurred and was responsible for causing Claimant's bilateral knee conditions.

Then there is Claimant's occupational disease theory for the alleged bilateral knee injuries. 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 knee conditions, including Claimant's testimony, the medical treatment records from Dr. Roush, Dr. VanRyn, and Dr. Schroer, and the independent medical reports from Dr. Volarich, 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 knee conditions and continuing complaints are medically causally related to his employment leading up to January 1, 2003.

The medical treatment records on the knees in evidence cover a period of time of approximately 19 months, from December 31, 2001 until August 1, 2003. Having conducted an exhaustive review of those records, I find no indication in any of the records, from any of the treating doctors, that Claimant's knee conditions are causally connected to his employment for Employer. There is admittedly one reference to the right knee complaints being worse the more he works, and an indication that he is a dockworker, but there is no causal connection made between his knee complaints and his employment. In the Medical History forms, 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 knee condition. He never describes elements of his job duties that aggravate his knees, and he never describes a popping incident in the right knee while exercising before starting work. He is consistently diagnosed with osteoarthritis, a progressive, degenerative condition of the knee joint. He apparently submitted all of his medical bills through his personal health insurance, since Employer paid no medical, according to the stipulations. Further, he never received TTD for any period of time off work while treating for the knees. In fact, Claimant never even filed a Claim alleging that the knee conditions were work-related until after all of the treatment had been completed, and after he had already been seen the first time by his own rating physician.

It is also important to note that my review of the medical records revealed evidence of degenerative conditions in other parts of Claimant's body besides just his knees. His low back examinations revealed degenerative disc and degenerative spine disease. Additionally, his neck examination revealed stenosis and evidence of degenerative changes. In that respect then, I find that Claimant had documented evidence of these progressive, degenerative conditions in many joints of his body, suggesting a systemic disease as opposed to an occupational exposure.

Claimant was examined by Dr. Volarich the first time in 2004 at the request of his own attorney. As documented in his report, Dr. Volarich took an extensive medical and vocational history from Claimant. He reviewed all of the medical treatment records, including the treatment on the knees, and performed a full physical examination of all disputed body parts, including the knees. He provided opinions on permanent partial disability for all of the disputed body parts, including the knees, and provided a causation opinion on the neck. He characterized the knee and new low back complaints as "subsequent medical conditions and complaints." He diagnosed degenerative arthritis in the knees and the progression of Claimant's degenerative lumbar disease. Despite having all of the medical records, the results of his comprehensive physical examination, and an extensive history of Claimant's job activities, nowhere in that first report did he causally relate Claimant's new low back or bilateral knee complaints to his work for Employer. However, he

did unequivocally state that Claimant is permanently and totally disabled as a result of the combination of the pre-existing disabilities, primary disability to his neck and subsequent conditions involving the knees.

This opinion from Dr. Volarich, however, caused problems for Claimant in terms of claiming permanent total disability against the Second Injury Fund. If the subsequent knee conditions were not work-related, but yet were part of the reason that Claimant was permanently and totally disabled, then Claimant would not be able to sustain a Second Injury Fund Claim for those benefits. Claimant would have had a subsequent deterioration of a condition unrelated to work, which would have eliminated his Claim for permanent total disability against the Fund.

Then after Dr. Volarich issued his first report, Claims are now filed for the first time by Claimant alleging that the progression of his low back complaints, and his bilateral knee conditions, are work-related conditions. Following the filing of the new Claims, and Claimant's additional visit with Dr. Volarich on April 14, 2005, we then get basically the same opinion from Dr. Volarich on permanent total disability in this supplemental report, but in this second report, he causally relates the knees and low back complaints to Claimant's work, and so eliminates the problem he caused for Claimant with his first opinion on permanent total disability. Now with Dr. Volarich causally relating all of the conditions to his work, the Second Injury Fund is potentially back on the hook for permanent total disability based on the alleged combination of all of these disabilities.

However, in evaluating Dr. Volarich's two reports in this case, the real question is; What changed between August 3, 2004 and April 14, 2005 to account for this difference of opinion? Dr. Volarich had all the same medical treatment records, and essentially the same results from his physical examination. He had a detailed description of Claimant's job. Certainly, if he had thought the knees and low back were work-related conditions when he first examined Claimant on August 3, 2004, he could have provided that opinion, but he did not. He described them instead as "subsequent" and "degenerative" conditions involving the knees and low back.

In essence, the only thing that changed between those two reports was that Claimant now "remembered" elements of his history that he had not previously reported. Although Claimant initially reported there was no injury to the right knee, now over 4 years later, he remembered a pop in the right knee while doing pre-work-day warm-ups. Despite previously giving a detailed description of his work, he now adds the history of the non-stick pads and the pivoting and twisting involving his knees, as well as the number of times he gets up and down from the forklift, which he did not previously describe. Given the timing of his recollection of these things, and the fact that none of these elements of his history appear in any other medical treatment records, I do not find Claimant's testimony, or his revised history, credible.

Since Claimant's revised history (and his testimony in that regard) served as the basis for Dr. Volarich's supplemental report and opinions on the medical causation of Claimant's knee conditions, I also do not find Dr. Volarich's opinions on the medical causation of the bilateral knee conditions to be competent, credible or persuasive evidence. I should note that I do find his initial report and opinions from August 3, 2004, are credible and persuasive. His opinions and conclusions in that report are grounded in the medical treatment records he reviewed, the results of his physical examination and the history he was given. It is only after the newfound history is remembered and reported by Claimant in connection with the second report, that I take issue with Dr. Volarich's opinions.

As Dr. Volarich was the only physician to find an occupational disease and medically causally relate that condition to Claimant's employment for Employer, and as Dr. Volarich's opinions in that regard (as stated in his April 14, 2005 report) 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 testimony regarding the nature of his job and the impact it had on his knees (if any), 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 right knee, Claimant's Claim against the Second Injury Fund also then fails for that lack of proof.

Given that this ruling on these issues is dispositive of this case, the rest of the issues in this case are moot and will not be addressed. The Second Injury Fund Claim here is denied.

CONCLUSION:

Claimant has failed to prove that he sustained a compensable primary injury to the right knee in this case. He failed to meet his burden of proving the presence of an accident or occupational disease that arose out of or in the course and scope of his employment for Employer. He also failed to provide competent, credible and persuasive evidence that his right knee complaints were medically causally connected to his alleged injury and/or exposure at work leading up to January 1, 2003. Therefore, the Second Injury Fund Claim is denied based on his inability to prove a compensable underlying primary injury to the right knee.

Date: _____

Made by: _____

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

A true copy: Attest:

Jeffrey W. Buker
Acting Director
Division of Workers' Compensation

Issued by THE LABOR AND INDUSTRIAL RELATIONS
COMMISSION

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

Injury No.: 03-147336

Employee: Robert Davinroy

Employer: Roadway Express, Inc. (Settled)

Insurer: Old Republic Insurance Company
c/o Gallagher Bassett (Settled)

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Date of Accident: Alleged January 2, 2003

Place and County of Accident: St. Louis County

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 31, 2007, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge John K. Ottenad, issued July 31, 2007, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 21st day of February 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Robert Davinroy

Injury No.: 03-147336

Before the

Division of Workers'
Compensation

Department of Labor and
Industrial Relations of
Missouri

Jefferson City, Missouri

Dependents: N/A

Employer: Roadway Express, Inc. (Settled)

Additional Party: Second Injury Fund

Insurer: Old Republic Insurance Company

C/O Gallagher Bassett (Settled)

Hearing Dates: February 27, 2007 and March 27, 2007

Checked by: JKO

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
3. 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
6. Date of accident or onset of occupational disease: (allegedly) January 2, 2003
7. 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? N/A
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? No
10. Was claim for compensation filed within time required by Law? N/A
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 dockworker for Employer who allegedly injured his left knee from the repetitive nature of his work.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: (allegedly) Left Knee
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: Robert Davinroy

Injury No.: 03-147336

17. Value necessary medical aid not furnished by employer/insurer? N/A

19. Employee's average weekly wages: N/A

19. Weekly compensation rate: N/A

20. Method wages computation: N/A

COMPENSATION PAYABLE

21. Amount of compensation payable:

Employer/Insurer previously settled their risk of liability in this case

22. Second Injury Fund liability:

None	\$0.00
Total:	<u>\$0.00</u>

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: Cynthia M. Hennessey.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Robert Davinroy	Injury No.: 03-147336
Dependents:	N/A	Before the
Employer:	Roadway Express, Inc. (Settled)	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	Old Republic Insurance Company	Department of Labor and Industrial
	C/O Gallagher Bassett (Settled)	Relations of Missouri
		Jefferson City, Missouri
		Checked by: JKO

On February 27, 2007, the employee, Robert Davinroy (Claimant), appeared in person and by his attorney, Ms. Cynthia M. Hennessey, for a hearing for a final award on his claim against the Second Injury Fund. The employer, Roadway Express, Inc. (Employer), and its insurer, Old Republic Insurance Company C/O Gallagher Bassett, were not present or represented at the hearing since they had previously settled their risk of liability in this Claim. The Second Injury Fund was represented at the hearing by Assistant Attorney General Da-Niel Cunningham.

Along with this Claim [Injury Number 03-147336, with a date of injury of January 2, 2003, alleging injury to the left knee], Claimant also tried his three other open companion Claims at the same time. Injury

Number 01-152727, with a date of injury of December 26, 2001, alleges injury to the neck, right arm and body as a whole. Injury Number 02-158714, with a date of injury of December 31, 2002, alleges injury to the low back. Injury Number 03-145855, with a date of injury of January 1, 2003, alleges injury to the right knee. Separate awards have been issued for each of those other cases.

On the original hearing date, there were some evidentiary issues raised regarding some of the Exhibits, and Claimant was given up to 30 days to submit certified records for the disputed Exhibits. Claimant subsequently submitted the certified records, which were admitted into evidence on March 27, 2007. The record in this matter then closed as of the submission of those Exhibits on March 27, 2007. 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:

- 3) Venue is proper in the City of St. Louis.
- 4) Employer received proper notice.

ISSUES:

- 9) Did Claimant sustain an accident or occupational disease?
- 10) Did the accident or occupational disease arise out of and in the course of employment?
- 11) Are Claimant's injuries and continuing complaints medically causally connected to his alleged injury and/or exposure at work leading up to January 2, 2003?
- 12) What is the nature and extent of Claimant's permanent partial and/or permanent total disability attributable to this injury?
- 13) What is the liability of the Second Injury Fund?
- 14) Was the Claim filed within the time prescribed by the law (within the statute of limitations)?
- 15) What is the appropriate rate of compensation for payment of benefits in this case?
- 16) Was Claimant an employee of Employer under the statute?

EXHIBITS:

The following exhibits were admitted into evidence:

Employee Exhibits:

- A) Medical reports of Dr. David Volarich dated August 3, 2004 and April 14, 2005
- B) Vocational assessment report of Mr. James England dated April 4, 2005

- C) Certified medical treatment records of Dr. Randall Roush at Northland Mid America Orthopedics
- D) Certified medical treatment records of Dr. Jacques VanRyn and Dr. William Schroer at Premier Care Orthopedics
- E) Certified medical treatment records of Dr. T.Z. Chen
- F) Certified medical treatment records of Christian Hospital Northeast-Northwest
- G) Certified medical treatment records of Dr. Terrell Mulford at Mercy Medical Group-North County Office
- H) Certified medical treatment records of Dr. David Kennedy
- I) Certified medical treatment records of St. Louis Cardiology Consultants, LTD.
- J) Certified medical treatment records of Christian Hospital Northeast-Northwest
- K) Certified medical treatment records of Sears Optical
- L) Settlement stipulations resolving cases between Claimant and Employer in Injury Numbers 01-152727, 02-158714, 03-145855, and 03-147336
- M) Deposition of Dr. David Volarich, with attachments, dated August 11, 2005
- N) Deposition of Mr. James England, with attachments, dated August 11, 2005
- O) Claim for Compensation for Injury Number 01-152727
- P) Claim for Compensation for Injury Number 02-158714
- Q) Claim for Compensation for Injury Number 03-145855

Second Injury Fund Exhibits:

- I) Copy of Mo. Rev. Stat. § 287.430
- II) Copy of Mo. Rev. Stat. § 490.692
- III) Copy of Missouri Regulation 8CSR 50-5.020
- IV) Division of Workers' Compensation Form 9-A
- V) Copy of Missouri Regulation 8CSR 50-2.010
- VI) Notice of deposition for deposition of Dr. David Volarich in Injury Number 01-152727
- VII) Notice of deposition for deposition of Mr. James England in Injury

- VIII) Copy of Missouri Supreme Court Rule 57.07
- IX) Copy of **Conley v. Treasurer**, 999 S.W.2d 269
- X) Copy of **Totten v. Treasurer**, 116 S.W.3d 624

Notes: 1) *The parties requested that I take Judicial/Administrative Notice of the file contents in all four of these open Claims, including the Claims and Answers filed in each one. Accordingly, I have taken that Judicial/Administrative Notice of those file contents while formulating my decisions in these cases.*

2) *The Second Injury Fund objected to Exhibits G and I based on an improper certification, or lack of a certification on the records altogether. Claimant was given 30 days to cure this defect in these Exhibits. Claimant obtained a proper certification on each Exhibit and resubmitted them on March 27, 2007, on which date they were admitted into evidence in these cases.*

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

4) *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 February 27, 2007 or March 27, 2007.*

FINDINGS OF FACT [\[2\]](#):

Based on a comprehensive review of the evidence, including Claimant's testimony, the expert medical opinion and deposition, the vocational opinion and deposition, the stipulations for compromise settlement, the file contents, and the medical records, as well as my personal observations of Claimant at hearing, I find:

26) Claimant is a 60-year-old, currently retired individual, who worked for Roadway Express (Employer) as a dockworker from 1988 until November 1, 2003, when he took early retirement. He confirmed that during his employment there, he was a regular full-time employee, not an independent contractor. He worked for no one else during this period of time. He estimated that including overtime, he made approximately \$1,000.00 per week. He sometimes worked 7 days a week, for 8 to 10 hours per day. In that position, he was responsible for loading and unloading trucks, driving a forklift, and lifting and stocking freight. His job required walking, bending, stooping, climbing, and sitting (while operating the forklift). Most of the time he was on his feet.

27) Claimant testified that he graduated from high school in 1964 and took two years of classes at SIU-Edwardsville. He did not obtain a degree. He testified he has never done any management or supervisory work. He has not worked behind a desk or as a clerk, and he has not done paperwork. He said he is computer illiterate.

28) Prior to working for Employer, he worked for 7 years as a maintenance man at Venice High School. He performed electrical and plumbing repair, as well as cleaned floors and repaired lockers. He then worked for American Freight as a dockworker from 1973 until they went out of business on August 15, 1988. His job there was very similar to the job described above that he then performed for Employer. All total, he was a

member of the Teamster's Union for about 30 years.

29) At hearing, Claimant testified that his right knee first became symptomatic in early 2001. He said that they used to stretch before the shift, including doing deep knee bends, and on one occasion, his knee popped. He testified that he first received treatment for the right knee in 2002, from Dr. Roush. Claimant explained that he had to wait until his neck treatment from the 2001 injury was done before the doctor would do anything for the knee. Claimant further testified that he aggravated or injured his knee when constantly getting up on the forklift to do his job. He explained that there was a non-slip sand pad where he placed his foot when he climbed up on the forklift. His foot would be planted on the pad, and his body would twist, to sit down, but the foot would not move, causing a twisting of the knee.

30) Medical records from Northland Mid America Orthopedics (Exhibit C) showed that Claimant saw Dr. Randall Roush on December 31, 2001 for his right knee. In the medical history form signed by Claimant and dated December 31, 2001, Claimant indicated there was no injury or accident, and he had the problems going back for 12 months to December 31, 2000. Dr. Roush noted that Claimant complained of pain and swelling in the right knee off and on over the last year, and there was no history of any injury. Claimant stated that the pain is worse the more he works, and he noticed some occasional popping. There is no detailed description of his work, or how that work may have been causing or aggravating his knee condition. Upon examination, Dr. Roush found a moderate sized effusion of the right knee. An x-ray of the knee shows medial joint space narrowing. The diagnosis was osteoarthritis of the right knee. Dr. Roush removed joint fluid in the knee. Claimant returned to Dr. Roush on March 12, 2002 for recurring swelling in the right knee, and he noticed a little catching in the knee. Dr. Roush removed the joint fluid, and Claimant wanted to wait to get the MRI of the knee until after his scheduled neck surgery.

31) Dr. Roush ordered an MRI of the knee that was taken on May 1, 2002, which indicated a combination of degenerative changes and tears in the medial meniscus, as well as some subcortical cysts. According to Dr. Roush, Claimant's statements about occasional episodes of catching and buckling in the knees, in addition to the aches, seemed to support the finding of the meniscal tears and degenerative changes. On June 10, 2002, Dr. Roush diagnosed Claimant with a torn medial meniscus and osteoarthritis in the right knee.

32) Dr. Roush performed arthroscopic surgery on Claimant's right knee on July 1, 2002. In addition to a partial medial meniscectomy, he also performed a chondroplasty of the medial femoral condyle and medial tibial condyle. The operative note (as summarized in Dr. Roush's records) characterized the findings in the knee as "osteoarthritis with erosion of the cartilage down to bone." Claimant continued to follow-up with Dr. Roush, and six weeks after surgery, he was found to have an osteoarthritic area on the medial side of the knee and a meniscal tear. Dr. Roush treated the knee problems with Synvisc injections over three visits.

33) Claimant testified that his left knee became symptomatic during the summer of 2002 while he was rehabbing the right knee. He said Dr. Roush initially told him to wear a brace on it.

34) On October 18, 2002, about 10 months after Claimant came in for his right knee, Claimant came to Dr. Roush with swelling in his left knee. The medical history form signed by Claimant on that date confirmed that there was no accident or injury involving the left knee. Claimant noted that the complaints in the knee began on approximately September 15, 2002. Dr. Roush noted Claimant has had recurrent swelling, and he aspirated the knee of fluid. Claimant's diagnosis was osteoarthritis and effusion of the left knee. Claimant appeared again on November 8, 2002 for another aspiration of joint fluid in the left knee, and a Synvisc injection. Claimant's last visit with Dr. Roush occurred on November 18, 2002. His left knee was again aspirated and he again received a Synvisc injection. Dr. Roush diagnosed osteoarthritis and effusion of the left knee.

35) Medical records from Premier Care Orthopedics (Exhibit D) showed that Claimant saw Dr. Jacques VanRyn on November 22, 2002 regarding his knees. On the Patient Registration form signed by

Claimant on that same date he listed his personal health insurance as being responsible for the bills and did not indicate this was a work injury, but instead checked the "Other" line as the reason for his visit. There was absolutely no discussion in the records of any aspects of his job or how the work aggravated or caused his knee complaints and problems. After Dr. VanRyn reviewed Claimant's medical records and examined Claimant, he diagnosed Claimant with advancing osteoarthritis of the right and left knees, and possible synovitis with reaction to a Synvisc treatment on the left knee. Dr. VanRyn treated Claimant with a Medrol-Dose Dosepak for his inflammation, and he referred Claimant to see Dr. Schroer for a second opinion on the need for unicondylar knee arthroplasty on the right knee. The doctor noted that they were just trying to do something to get him through the next year at work until he could retire.

36) On November 26, 2002, Claimant saw Dr. William Schroer for a second opinion for his right knee pain. Dr. Schroer noted both knees had significant varus instability, and recent x-rays showed bone-on-bone changes of the medial joint line of the right knee. He opined that the left knee had significant degenerative loss of the medial joint line articular cartilage, and its condition was similar to the right knee. Dr. Schroer recommended unicompartmental knee replacement for the right knee.

37) Claimant saw Dr. VanRyn again on December 16, 2002 for continuing pain in both knees. An MRI scan showed that there was no medial meniscus left on the medial side of his left knee, and he had considerable bone edema. His diagnosis was bilateral medial gonarthrosis, and Dr. VanRyn recommended bilateral Repecci unicondylar arthroplasties. Claimant returned to Dr. VanRyn on January 7, 2003 seeking the recommended surgical intervention because his pain had worsened to the extent that "he could no longer do his activities of daily living."

38) On January 15, 2003, Claimant underwent bilateral unicompartmental knee arthroplasty with Dr. Schroer to treat his bilateral medial joint line knee degenerative arthritis. Twelve days after the knee replacements, Claimant had a superficial wound infection around his surgical staples, but he eventually recovered and the incisions healed. Claimant had follow-up visits with Dr. Schroer through the period after the surgery until August 1, 2003. During this time, Claimant's condition continued to improve with fewer complaints and increased activity. As of June 5, 2003, despite his improvement in functioning, he noted some swelling at the end of an active day and also noted some difficulty with sustaining activities throughout the whole day. Dr. Schroer released Claimant back to work as of July 1, 2003 with the caveat that if the knees got achy, swollen or sore, then he was doing too much and needed to back off. During the last visit on August 1, 2003, Claimant again reported having some functional deficits at work with aches and pains in the knees, but overall, the doctor characterized his knees as doing "extremely well."

39) Claimant testified that he told Employer about the problems he was having with his knees. He also testified that although he had made about \$1,000.00 per week before this, he started turning down overtime because of his knee problems. Claimant said he was off work for about 6 months for his knees in 2003. He said that at first he felt better, but since then he has really not felt any better as a result of the treatment for his knees.

40) Claimant testified that when he went back to work in July 2003, his knees were killing him. He said that climbing on the forklift, and every step for that matter, was painful. He said he could hardly do it. He could not lift, bend, stoop, squat or kneel very well. He said friends and supervisors helped him, and he primarily handled lighter loads and forklift loads. He said it was the combination of problems with his knees, back, neck and shoulders that caused him to stop working.

41) Claimant was examined by Dr. David Volarich for the first time on August 3, 2004. (Exhibit A) Dr. Volarich performed an independent medical examination at the request of Claimant's attorney, and provided no treatment. At the time of this first examination, the only Claim that Claimant had apparently filed so far was the 2001 neck Claim. Despite that fact, Dr. Volarich's report dated August 3, 2004 contains an extensive history of not only the 2001 injury, but also Claimant's pre-existing complaints and problems with

the right eye, low back, heart and bilateral shoulders, as well as his subsequent medical conditions and complaints regarding the low back and bilateral knees. Dr. Volarich's report also contains an extensive section regarding Claimant's job activities as a dockworker for Employer. Additionally, Dr. Volarich reviewed medical treatment records for all of these conditions/injuries, and he performed a physical examination of each and every one of these body parts.

42) Dr. Volarich opined that as a result of the December 26, 2001 injury, Claimant had a herniated nucleus pulposus of C7-T1 to the right, as well as right arm radiculopathy along the C8 nerve root, which was surgically treated with a discectomy, partial vertebrectomy and fusion with instrumentation. He rated Claimant as having 40% permanent partial disability of the body as a whole referable to the cervical spine for this injury. For the numerous pre-existing conditions/disabilities, Dr. Volarich diagnosed and rated the following: 25% of the right shoulder for non-surgically repaired right shoulder impingement; 35% of the left shoulder for non-surgically repaired moderately severe left shoulder impingement; 20% of the body as a whole referable to the low back for lumbar syndrome secondary to degenerative disc disease and degenerative joint disease; 20% of the body as a whole referable to the cardiovascular system for coronary artery disease, which was surgically treated with a three vessel coronary artery bypass grafting; and 100% of the right eye for right eye blindness secondary to trauma as a child.

43) Dr. Volarich then also diagnosed and rated, what he termed, the subsequent conditions/disabilities. He rated Claimant as having 15% of the body as a whole referable to the lumbar spine for progression of lumbar spine disease, including a bulge at L5-S1, and then also rated 50% of each knee due to bilateral severe degenerative arthritis requiring bilateral unicompartmental arthroplasties. Despite having the medical records and history of these conditions, Dr. Volarich provided no opinions that they were caused or aggravated by Claimant's work for Employer.

44) Dr. Volarich then opined that "Mr. Davinroy is permanently and totally disabled as a result of the work related injuries of 12/26/01 in combination with his preexisting medical conditions and subsequent knee surgeries and arthroplasties."

45) Following Dr. Volarich's first report, Claimant filed two new Claims for Compensation, now claiming occupational disease work-related injuries to the low back on December 31, 2002 and to the bilateral knees in January 2003. The low back Claim was assigned Injury Number 02-158714, and the bilateral knee Claim was assigned Injury Number 03-145855. Both of the Claims were dated February 11, 2005. The Claims were the first documents filed in each case. There were no Reports of Injury from Employer, nor any other indication that Employer had any prior knowledge of these conditions or their alleged work-relatedness.

46) Claimant was then examined again by Dr. David Volarich, at the request of Claimant's attorney, on April 14, 2005. (Exhibit A) He was provided with the same medical records he reviewed in connection with his first examination. Although some of the measurements on the physical examination were updated, Dr. Volarich admitted in his report that "there are no significant changes in the physical examination." Claimant also provided the same history regarding the prior and subsequent low back condition, as well as all of his other conditions, except that he now remembered more details and was able to provide more history regarding his bilateral knee condition.

47) Dr. Volarich now recorded in his new report a history of the right knee popping in January 2001 while Claimant was performing stretching exercises as a part of a company-sponsored exercise program before the beginning of the work day. Dr. Volarich also writes in the new report that Claimant did not experience symptoms until May 2001 and was diagnosed with osteoarthritis in December 2001. Dr. Volarich writes, "At the time, he reported no injury, but after thinking about it, he recalled that his right knee had popped in January of 2001." In addition to this newly remembered "pop" in the right knee, the report also now contains more and new details about the job Claimant did for Employer. There is now a description of an anti-skid pad on the forklift on which Claimant stepped, as well as a description of the pivoting and twisting involving

the knees that allegedly occurred about 100 times per day. None of this was described in the first report when Dr. Volarich took an already extensive medical and vocational history.

48) Based apparently on this “new” history and the fact that Claims were now filed for the low back and knees (since everything else seemingly remained the same since the time of the first report), Dr. Volarich now opined that the repetitive nature of Claimant’s job was a substantial contributing factor in the aggravation of his lumbar syndrome leading up to December 31, 2002, as well as a substantial contributing factor in the aggravation of his bilateral knee osteoarthritis. His ratings of 15% of the body as a whole referable to the lumbar spine for progression of lumbar spine disease, including a bulge at L5-S1, and 50% of each knee due to bilateral severe degenerative arthritis requiring bilateral unicompartmental arthroplasties, remained the same as in the first report. His opinion that Claimant was permanently and totally disabled also remained the same, except that now the reason for the permanent total disability was the combination of the work-related conditions to the knees, low back and neck, in combination with all of his pre-existing disabilities.

49) Following Dr. Volarich’s second report, Claimant then filed a new set of Claims regarding his knee conditions. He filed an Amended Claim for Injury Number 03-145855, changing the allegation of bilateral knees to just right knee, and alleging a date of injury of January 1, 2003. He then filed a new Claim alleging injury to the left knee, with a date of injury of January 2, 2003, which was assigned Injury Number 03-147336. These new Claims were dated August 11, 2005. In the case of the Claim for the new January 2, 2003 allegation of left knee injury, the Claim was the first document filed in that case. There was no Report of Injury from Employer, nor any other indication that Employer had any prior knowledge of this condition or its alleged work-relatedness.

50) Employer and Claimant entered into an agreement to resolve their portion of these 2003 Claims (Injury Nos. 03-145855 and 03-147336) by Stipulations for Compromise Settlement (Exhibit L) on October 14, 2005. They settled Injury Number 03-145855 for \$8,162.88 or approximately 15% permanent partial disability of the right knee. They settled Injury Number 03-147336 for \$8,162.88 or approximately 15% permanent partial disability of the left knee. Both stipulations reflect that Employer paid no medical or TTD benefits in connection with either of these Claims.

RULINGS OF LAW:

Based on a comprehensive review of the substantial and competent evidence, and based upon the applicable laws of the State of Missouri, I find:

Issue 1: Did Claimant sustain an accident or occupational disease?

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

Issue 3: Are Claimant’s injuries and continuing complaints medically causally connected to his alleged injury and/or exposure at work leading up to January 2, 2003?

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

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 in the alternative that he either sustained an accident or occupational disease involving both knees that was medically causally related to his employment for Employer. However, Claimant’s only possible description of an accident involving either knee is the popping of the right knee from 2001 that he just “remembered” in 2005 when he went to see Dr. Volarich for the second time. I find this delayed recollection of the alleged accident by Claimant is not credible. Further, Claimant has not submitted any medical evidence to support an accident theory in this case. In fact, Claimant denied any history of a specific injury or accident to Dr. Roush. Therefore, in the absence of credible testimony from Claimant, and in the absence of medical evidence to support that an accident was responsible for his bilateral knee conditions, I find Claimant has failed to meet his burden of proof that an accident occurred and was responsible for causing Claimant’s bilateral knee conditions.

Then there is Claimant’s occupational disease theory for the alleged bilateral knee injuries. 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 knee conditions, including Claimant’s testimony, the medical treatment records from Dr. Roush, Dr. VanRyn, and Dr. Schroer, and the independent medical reports from Dr. Volarich, 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 knee conditions and continuing complaints are medically causally related to his employment leading up to January 2, 2003.

The medical treatment records on the knees in evidence cover a period of time of approximately 19 months, from December 31, 2001 until August 1, 2003. Having conducted an exhaustive review of those records, I find no indication in any of the records, from any of the treating doctors, that Claimant's knee conditions are causally connected to his employment for Employer. There is admittedly one reference to the right knee complaints being worse the more he works, and an indication that he is a dockworker, but there is no causal connection made between his knee complaints and his employment. In the Medical History forms, 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 knee condition. He never describes elements of his job duties that aggravate his knees, and he never describes a popping incident in the right knee while exercising before starting work. He is consistently diagnosed with osteoarthritis, a progressive, degenerative condition of the knee joint. He apparently submitted all of his medical bills through his personal health insurance, since Employer paid no medical, according to the stipulations. Further, he never received TTD for any period of time off work while treating for the knees. In fact, Claimant never even filed a Claim alleging that the knee conditions were work-related until after all of the treatment had been completed, and after he had already been seen the first time by his own rating physician.

It is also important to note that my review of the medical records revealed evidence of degenerative conditions in other parts of Claimant's body besides just his knees. His low back examinations revealed degenerative disc and degenerative spine disease. Additionally, his neck examination revealed stenosis and evidence of degenerative changes. In that respect then, I find that Claimant had documented evidence of these progressive, degenerative conditions in many joints of his body, suggesting a systemic disease as opposed to an occupational exposure.

Claimant was examined by Dr. Volarich the first time in 2004 at the request of his own attorney. As documented in his report, Dr. Volarich took an extensive medical and vocational history from Claimant. He reviewed all of the medical treatment records, including the treatment on the knees, and performed a full physical examination of all disputed body parts, including the knees. He provided opinions on permanent partial disability for all of the disputed body parts, including the knees, and provided a causation opinion on the neck. He characterized the knee and new low back complaints as "subsequent medical conditions and complaints." He diagnosed degenerative arthritis in the knees and the progression of Claimant's degenerative lumbar disease. Despite having all of the medical records, the results of his comprehensive physical examination, and an extensive history of Claimant's job activities, nowhere in that first report did he causally relate Claimant's new low back or bilateral knee complaints to his work for Employer. However, he did unequivocally state that Claimant is permanently and totally disabled as a result of the combination of the pre-existing disabilities, primary disability to his neck and subsequent conditions involving the knees.

This opinion from Dr. Volarich, however, caused problems for Claimant in terms of claiming permanent total disability against the Second Injury Fund. If the subsequent knee conditions were not work-related, but yet were part of the reason that Claimant was permanently and totally disabled, then Claimant would not be able to sustain a Second Injury Fund Claim for those benefits. Claimant would have had a subsequent deterioration of a condition unrelated to work, which would have eliminated his Claim for permanent total disability against the Fund.

Then after Dr. Volarich issued his first report, Claims are now filed for the first time by Claimant alleging that the progression of his low back complaints, and his bilateral knee conditions, are work-related conditions. Following the filing of the new Claims, and Claimant's additional visit with Dr. Volarich on April 14, 2005, we then get basically the same opinion from Dr. Volarich on permanent total disability in this supplemental report, but in this second report, he causally relates the knees and low back complaints to Claimant's work, and so eliminates the problem he caused for Claimant with his first opinion on permanent total disability. Now with Dr. Volarich causally relating all of the conditions to his work, the Second Injury Fund is potentially back on the hook for permanent total disability based on the alleged combination of all of

these disabilities.

However, in evaluating Dr. Volarich's two reports in this case, the real question is; What changed between August 3, 2004 and April 14, 2005 to account for this difference of opinion? Dr. Volarich had all the same medical treatment records, and essentially the same results from his physical examination. He had a detailed description of Claimant's job. Certainly, if he had thought the knees and low back were work-related conditions when he first examined Claimant on August 3, 2004, he could have provided that opinion, but he did not. He described them instead as "subsequent" and "degenerative" conditions involving the knees and low back.

In essence, the only thing that changed between those two reports was that Claimant now "remembered" elements of his history that he had not previously reported. Although Claimant initially reported there was no injury to the right knee, now over 4 years later, he remembered a pop in the right knee while doing pre-work-day warm-ups. Despite previously giving a detailed description of his work, he now adds the history of the non-stick pads and the pivoting and twisting involving his knees, as well as the number of times he gets up and down from the forklift, which he did not previously describe. Given the timing of his recollection of these things, and the fact that none of these elements of his history appear in any other medical treatment records, I do not find Claimant's testimony, or his revised history, credible.

Since Claimant's revised history (and his testimony in that regard) served as the basis for Dr. Volarich's supplemental report and opinions on the medical causation of Claimant's knee conditions, I also do not find Dr. Volarich's opinions on the medical causation of the bilateral knee conditions to be competent, credible or persuasive evidence. I should note that I do find his initial report and opinions from August 3, 2004, are credible and persuasive. His opinions and conclusions in that report are grounded in the medical treatment records he reviewed, the results of his physical examination and the history he was given. It is only after the newfound history is remembered and reported by Claimant in connection with the second report, that I take issue with Dr. Volarich's opinions.

As Dr. Volarich was the only physician to find an occupational disease and medically causally relate that condition to Claimant's employment for Employer, and as Dr. Volarich's opinions in that regard (as stated in his April 14, 2005 report) 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 testimony regarding the nature of his job and the impact it had on his knees (if any), 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 left knee, Claimant's Claim against the Second Injury Fund also then fails for that lack of proof.

Given that this ruling on these issues is dispositive of this case, the rest of the issues in this case are moot and will not be addressed. The Second Injury Fund Claim here is denied.

CONCLUSION:

Claimant has failed to prove that he sustained a compensable primary injury to the left knee in this case. He failed to meet his burden of proving the presence of an accident or occupational disease that arose out of or in the course and scope of his employment for Employer. He also failed to provide competent, credible and persuasive evidence that his left knee complaints were medically causally connected to his alleged injury and/or exposure at work leading up to January 2, 2003. Therefore, the Second Injury Fund Claim is denied based on his inability to prove a compensable underlying primary injury to the left knee.

Date: _____

Made by: _____

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

A true copy: Attest:

Jeffrey W. Buker
Acting Director
Division of Workers' Compensation

[1] Only those facts directly relevant to the determinative issues below will be listed.

[2] Only those facts directly relevant to the determinative issues below will be listed.