

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

Injury No.: 00-179682

Employee: William Davis
Employer: St. Louis Public Schools
Insurer: St. Louis City Board of Education
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: July 19, 2000
Place and County of Accident: St. Louis City, Missouri

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 16, 2007. The award and decision of Administrative Law Judge Linda J. Wenman, issued July 16, 2007, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 20th day of March 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

DISSENTING OPININO FILED

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

After a review of the entire record as a whole, and consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed. I believe the administrative law judge erred in concluding that employee met the burden of proof regarding the contraction of an occupational disease.

The employee must prove by substantial and competent evidence that he has contracted an occupational disease and not an ordinary disease of life. *Kelley v. Banta & Stude Const. Co., Inc.*, 1 S.W.3d 43, 48 (Mo.App. E.D. 1999); *Hayes v. Hudson Foods, Inc.*, 818 S.W.2d 296, 299-300 (Mo.App. S.D. 1991). This involves showing that there was an exposure to the disease which was greater than or different from that which affects the public generally, and that 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. *Id.*; *Dawson v. Associated Elec.*, 885 S.W.2d 712, 716 (Mo.App. W.D. 1994).

Employee failed to meet his burden that he contracted an occupational disease, varicose veins, and not an ordinary disease of life. Employee testified that he first noticed symptoms related to his varicose vein condition beginning in 1990. Employee testified that he lived with the condition for quite a number of years and just thought it was part of the aging process. Employee testified that he noticed as the years went along that when he was on his feet for any length of time that they would start to hurt and swell. Employee testified that his condition interfered with his ability to do his job as a physical education teacher as he got older.

Employee underwent surgery for his condition in July of 2000 but did not file his claim for workers' compensation benefits until nearly three years later. Furthermore, employee testified that he was very active outside work participating in physical activities including working part-time as a baseball umpire. Employee's work as an umpire required prolonged standing as well as bending and running. Employee's outside activities consisted of many of the same activities employee partook in as a physical education teacher. Employee led a very active lifestyle both inside and outside of work. Even so, physical activity may have increased employee's symptoms, but was not shown to be a substantial factor in causing his varicose veins. Employee testified that as his condition became worse, he reduced his level of activity; however employee's condition did not improve, but continued to deteriorate. Employee was unable to show that any one activity was causally related to the development of his varicose veins.

Dr. Rao and Dr. Volarich provided opinions as to medical causation with regard to employee's condition. However, the doctors do not share the same level of expertise with regard to employee's condition, varicose veins. Dr. Rao is both a vascular and general surgeon, whereas Dr. Volarich is a doctor of osteopathic medicine. Dr. Rao has been in private practice for thirteen years and has performed vein stripping surgery on numerous occasions. Dr. Rao testified that he evaluates approximately five patients a week for venous insufficiency, and that it's a regular part of his practice. Dr. Rao's expertise in vascular conditions, such as varicose veins, greatly outweighs that of Dr. Volarich. As such, I find that the opinion of Dr. Rao should be given greater weight.

After conducting an independent medical examination on September 28, 2004, Dr. Volarich found that employee's work was a substantial factor in the development of employee's varicose veins. In stark contrast to Dr. Volarich's opinion, Dr. Rao opined that employee's condition was inherited. Dr. Rao stated that varicose veins are most commonly a hereditary condition and that in the absence of major trauma, it is presumed to be an inherited condition. Therefore, after reviewing employee's medical records, Dr. Rao opined that employee's varicose veins were undoubtedly an inheritable or acquired condition over time. Dr. Rao opined that varicose veins are not caused by one job or another or by standing or sitting for prolonged

periods. Dr. Rao testified that standing in an immobile position or sitting for long periods of time with your legs down could aggravate the subjective complaints of venous insufficiency, but would not be a substantial causative factor that would result in the need for surgery. Dr. Rao stated that neither he nor anyone else could say whether employee's job or any one particular activity was a substantial contributing factor in the development of his condition.

I find the opinion of Dr. Rao to be most persuasive, credible and worthy of belief. Based on the medical evidence and testimony, it is reasonable to conclude that employee's activities as a physical education teacher were not a substantial contributing factor to the development of employee's varicose veins.

There was insufficient evidence to establish that employee's work conditions were causally related to the development of his varicose veins. Accordingly, I would reverse the decision of the administrative law judge and deny compensation in this case.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

Alice A. Bartlett, Member

AWARD

Employee:	William Davis	Injury No.:	00-179682
Dependents:	N/A	Before the	
Employer:	St. Louis Public Schools	Division of Workers'	
Additional Party:	Second Injury Fund	Compensation	
Insurer:	St. Louis City Board of Education	Department of Labor and Industrial	
Hearing Date:	May 7, 2007 continued to May 15, 2007	Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	LJW:tr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
 - Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
 - Date of accident or onset of occupational disease: July 19, 2000
 - State location where accident occurred or occupational disease was contracted: St. Louis City, MO

6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? N/A
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
- 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: While performing his usual duties as a physical education teacher over thirty years, Employee developed varicose veins of both legs.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Bilateral legs
- Nature and extent of any permanent disability: 7.5% right leg and 7.5% left leg at the 160 week level, and 10% multiplicity.
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: William Davis

Injury No.: 00-179682

17. Value necessary medical aid not furnished by employer/insurer? \$6,641.60
- Employee's average weekly wages: Sufficient for maximum rates
19. Weekly compensation rate: \$599.96 / \$314.26
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:	\$6,641.60
5 6/7th weeks of temporary total disability (or temporary partial disability)	\$3,514.05
26.4 weeks of permanent partial disability from Employer	\$8,296.46

22. Second Injury Fund liability: No

Total:	\$18,452.11
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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 in favor of the following attorney for necessary legal services rendered to the claimant: Charles Bobinette

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	William Davis	Injury No.: 00-179682
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	St. Louis City Public Schools	Department of Labor and Industrial Relations of Missouri
Additional Party:	Second Injury Fund	Jefferson City, Missouri
Insurer:	St. Louis City Board of Education	Checked by: LJW:tr

PRELIMINARIES

The above referenced Workers' Compensation claim was heard by the undersigned Administrative Law Judge on May 7, 2007, and continued on May 15, 2007. Post-trial memorandums were received, and the case was submitted on the June 29, 2007. Attorney Charles Bobinette represented William Davis (Claimant). St. Louis City Public Schools (Employer) were insured by the St. Louis City Board of Education, and represented by Attorney Eric Christensen. Assistant Attorney General Da-Niel Cunningham represented the Second Injury Fund (SIF). The case was heard with companion cases 00-179683, 02-153253, and 02-153257.

Prior to the start of the hearing the parties identified the issues for disposition in this case: arising out of and in the course/scope of employment; occupational disease; medical causation; medical expenses in the amount of \$6,641.60; temporary total disability (TTD), the liability of Employer and SIF for permanent partial disability (PPD) benefits; and a statute of limitations defense. Hearing venue is correct, and jurisdiction properly lies with the Missouri Division of Workers' Compensation.

Claimant offered Exhibits A-U, Employer offered Exhibits 1-2, and SIF offered Exhibits I-II. All exhibits were admitted into the record without objection. On May 22, 2007, Claimant filed a motion to supplement the record. On May 25, 2007, with all parties present, Claimant's motion was heard and denied. Any markings contained within any exhibit were present when received, and the markings did not influence the evidentiary weight given the exhibit. Any objections not expressly ruled on in this award are overruled.

Findings of Fact

All evidence presented has been reviewed. Only testimony necessary to support this award will be reviewed and summarized.

1. Claimant is a sixty year old retired physical education (PE) teacher who worked for Employer for over 30 years. Claimant taught grades K-8, and his job duties required him to be on his feet 90-95% of the teaching day. Claimant would perform calisthenics, run laps, and demonstrate sports at least four times per day. Claimant primarily taught on tile gym floors, or on blacktop. In addition to his duties as a PE teacher, Claimant worked daily lunch room duty, coached after school sports, and umpired as a NCAA Division I baseball umpire during the collegiate baseball season.
2. During the 1990's Claimant noticed he had developed varicose veins in both legs. He ignored the veins for a number of years, but noticed the longer he was on his feet, the more pain he experienced. During 1999, Claimant sought care for the condition with his private physician. Claimant was referred to Dr. Hurley for further evaluation. Dr. Hurley recommended varicose vein stripping of both legs, which Claimant wanted to delay until summer vacation.
3. On July 19, 2000, Claimant underwent bilateral varicose vein stripping. The medical expenses associated with this treatment totaled \$6,641.60. Claimant testified he returned to teaching on August 28, 2000. On January 14, 2004, Dr. Hurley wrote to Claimant's attorney and stated: "There is little doubt that prolonged standing and prone sitting are aggravating to varicose veins in as much as there was a policy at his institution not to permit the teachers to get off their feet when they were teaching. That would certainly contribute to the progression of varicose veins."
4. Dr. Volarich examined Claimant on September 28, 2004. Upon examination, Dr. Volarich noted multiple small scars over both lower extremities along the saphenous vein distribution, which was indicative of vein stripping. Small superficial spider veins remained on both legs. Dr. Volarich opined Claimant's work was a substantial factor in the development of his varicose veins, the treatment provided by Dr. Hurley was necessary, and the cost of the services provided were reasonable and customary. Dr. Volarich rated Claimant's overall disability from this condition at 15% PPD at the hip level, with 2.5% related to Claimant's umpiring duties.
5. Dr. Rao, a vascular surgeon, conducted a record review and supplied a report to Employer on April 3, 2007. Dr. Rao indicated that absent trauma, superficial venous insufficiency is most commonly an inherited condition based on genetics or time. Dr. Rao opined surgery should have cured Claimant, and he found no residual disability would be present. Dr. Rao agreed that prolonged sitting or standing would increase the symptoms of varicose veins.
6. As of hearing, Claimant testified surgery did help his symptoms, but he still experiences pain in the anterior portion of his lower legs. Claimant testified he continues to wear compression hose when he is active, and after prolonged standing he elevates his legs and applies ice. Additionally, Claimant testified he does not have a family history of varicose veins, has never been diagnosed with a deep vein thrombosis, nor has he been placed on blood thinners.

RULINGS OF LAW

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

Issues related to statute of limitations defense

Claimant filed a claim alleging occupational disease on July 16, 2003. Claimant indicated the date of occupational disease to be July 19, 2000, the day Claimant underwent surgery. Employer asserts a statute of limitations defense. "The standard for triggering the running of the statute of limitations requires: (1) a disability or injury, (2) that is compensable." *Rupard v. Kiesendahl, DDS*, 114 S.W.3d 389 (Mo.App.2003)(overruled on other grounds)(citing *Mann v. Supreme Express*, 851 S.W.2d 690 (Mo.App.1993)(overruled on other grounds)). The correct date of disability must be ascertained before a determination of statute of limitations bar is made.

In cases of occupational disease, the time in which a compensable injury has been sustained is the time when the disease has produced a compensable disability. *Sellers v. TransWorld Airlines, Inc.*, 752 S.W.2d 413 (Mo.App.1988)(overruled on other grounds). Compensable disability has been interpreted as being "the time when

some degree of disability results which can be the subject of compensation”. *Id.* “Mere awareness on the part of the employee of the presence of a work-related illness is not, in and of itself, sufficient knowledge of a compensable injury.” *Wiele v. National Super Markets Inc.*, 948 S.W.2d 142 (Mo.App.1997)(overruled on other grounds). An employee is entitled to receive reliable information that the condition is the result of employment prior to filing a claim. Thus, an employee can rely on a physician’s diagnosis, rather than the employee’s own impressions of the condition. *Mann v. Supreme Express*, 851 S.W.2d 690 (Mo. App.1993) (overruled on other grounds). However, an expert opinion is not absolute, and each case should be judged by its facts. *Sellers* at 417. When an injury is reasonably apparent and discoverable is a question of fact to be determined by the trier of fact. *Thomas v. Becker Materials Corp.*, 805 S.W.2d 271 (Mo.App. 1991).

A complete review of the record reveals no instance in which a medical expert informed Claimant his condition was related to his work duties, until the letter was issued by Dr. Hurley after the claim had been filed. I find the appropriate date of injury to be the date stated on the claim. The first time Claimant’s condition would have been disabling would have been the date of surgery, July 19, 2000. Employer filed the first report of injury on July 31, 2003, which allows Claimant a three year statute of limitations. §287.063.3, §287.430 RSMo. Claimant needed to file his claim by July 19, 2003, and his claim was filed on July 16, 2003. Claimant’s claim is not barred by the statute of limitations.

Issues relating to course/scope, arising out of, occupational disease and medical causation

Claimant alleges an occupational disease of bilateral varicose veins that arose from his work duties. Section 287.067 RSMo., defines occupational disease as:

... an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.”

In cases of alleged occupational disease, the disease must be occupationally induced, rather than an ordinary disease of life. *Hayes v. Hudson Foods, Inc.*, 818 S.W.2d 296 (Mo.App.1991) (overruled on other grounds). An occupational disease is not compensable if work is merely “a triggering or precipitating factor.” §287.067.2 RSMo. The exposure to the disease must be greater or different from disease exposure to the general public, and there must be a disease/work link common to the specific job or profession. *Polavarapu v. General Motors Corp.*, 897 S.W.2d 63 (Mo.App. 1995). The work must be a substantial factor in the cause of the resulting medical condition or disability. §287.020.2 RSMo. A causative factor may be substantial even if it is not the primary or most significant factor. *Cahall v. Cahall*, 963 S.W.2d 368, 372 (Mo.App. 1998) (overruled on other grounds). Further, there is no minimum percentage set out in the Workers’ Compensation Law defining “substantial factor”. *Id.* Whether employment is a substantial factor in causing the injury is a question of fact. *Sanderson v. Porta-Fab Corp.*, 989 S.W.2d 599, 603 (Mo.App. 1999) (overruled on other grounds).

Determinations of this kind require the assistance of expert medical testimony. Medical causation not within lay understanding or experience requires expert medical evidence. *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596 (Mo.banc 1994) (overruled on other grounds). The weight to be accorded an expert’s testimony should be determined by the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. *Choate v. Lily Tulip, Inc.*, 809 S.W.2d 102 (Mo.App. 1991) (overruled on other grounds). Dr. Volarich and Dr. Rao provided opinions regarding the cause of Claimant’s condition. Dr. Volarich found Claimant’s work to have been a substantial factor in his development of varicose veins, and Dr. Rao opined to reach this conclusion “is too strong.” While Dr. Rao does not directly link Claimant’s work to his development of varicose veins, he indicated Claimant’s work likely aggravated his symptoms. The aggravation of a preexisting condition is a compensable injury if the claimant establishes a direct casual link between job duties and the aggravated condition. *See Smith v. Climate Engineering*, 939 S.W.2d 429, 433-34 (Mo. App. E.D. 1996) (overruled on other grounds). If a claimant can show that the performance of the usual and customary duties led to a breakdown or change in pathology, the injury is compensable. *Bennett v. Columbia Health Care*, 80 S.W.3d 524 (Mo.App.W.D. 2002) (overruled on other grounds). The worsening

of a preexisting condition is a change in pathology. *Id.* at 529.

Whether Claimant's job duties caused or aggravated his condition, at a minimum his condition was aggravated. Claimant clearly suffered a change of pathology. Employer required Claimant to be on his feet while teaching, 90-95% of his day he was teaching, and as he taught he was performing his job duties as required by Employer. I find Claimant has met his burden to establish occupational disease, arising out of and in the course and scope of employment, and medical causation regarding his need for medical treatment of bilateral varicose veins.

Issues relating to past medical expenses and temporary total disability

Claimant requests total reimbursement of medical expenses in the amount of \$6,641.60. Section 287.140.1 RSMo., provides that an employer shall provide such medical, surgical, chiropractic, ambulance and hospital treatment as may be necessary to cure and relieve the effects of the work injury. Additionally, §287.140.3 RSMo., provides that all medical fees and charges under this section shall be fair and reasonable. A sufficient factual basis exists to award payment of medical expenses when medical bills and supporting medical records are introduced into evidence supported by testimony that the expenses were incurred in connection with treatment of a compensable injury. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo.banc 1989). Itemized bills were supported by the appropriate medical records, and Claimant's testimony. Drs. Volarich and Rao testified the medical treatment received was necessary. Dr. Volarich testified the charges were reasonable and customary. Employer asserts it never waived its right to direct medical care, as all medical treatment was completed before it was aware of an alleged injury. On the other hand, Claimant can not make a demand for treatment unless he was aware the injury was work related. While what the Employer avers is true, and the awarding of the medical produces a harsh result, I do not have the powers of an equitable court. Claimant has met his burden of proof. Accordingly, I find Employer liable for \$6,641.60 in medical expenses accrued by Claimant in an attempt to cure and relieve the effects of his work related injury.

Claimant also seeks TTD benefits for the period of recovery following surgery. TTD benefits are intended to cover a period of time from injury until such time as claimant can return to work. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641 (Mo.App. 1991) (overruled in part). Claimant arranged to have surgery during the summer break from teaching. Claimant did not collect unemployment while off during the summer, and frequently engaged in other employment. I find Claimant is entitled to the 5 6/7ths weeks of TTD benefits he requests. Although Claimant did not provide off work slips for this time period (as he was not required to be teaching), I find this period to be a reasonable recovery period. Accordingly, I find Employer liable for \$3,514.05 in TTD benefits.

Issues relating to permanent partial disability owed by Employer

A permanent partial award is intended to cover claimant's permanent limitations due to a work related injury and any restrictions his limitations may impose on employment opportunities. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641,646 (Mo.App. 1991) (overruled on other grounds). Dr. Volarich rated Claimant's injury as 12.5% PPD of each leg at the hip level. Dr. Rao found no disability. With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983) (overruled on other grounds). Taking into consideration the opinions expressed by the various physicians, the medical records, and Claimant's testimony, I award Claimant 7.5% PPD of each leg at the thigh level (160 week level), and an additional 10% multiplicity for which Employer is liable.

Issues relating to permanent partial disability owed by Second Injury Fund

Section 287.220.1 RSMo., provides that SIF is implicated in all cases of permanent partial disability where there has been previous disability that created a hindrance and obstacle to employment or re-employment, and the primary injury along with the pre-existing disability(s) reach a threshold of 50 weeks (12.5%) for a body as a whole injury or 15% of a major extremity. The combination of the primary and pre-existing conditions must produce additional disability greater than the sum of the total disabilities. Claimant's award of PPD liable by Employer does not meet the statutory threshold necessary to trigger SIF liability, and Claimant's request for SIF benefits is denied.

CONCLUSION

In summary, Claimant sustained an occupational disease on July 19, 2000, that arose out of and in the course and scope of his employment with Employer. Claimant is awarded \$6,641.60 in past medical expenses, \$3,514.05 in past TTD benefits, and \$8,296.46 in permanent partial disability from Employer. SIF has no liability. Claimant's attorney is entitled to a 25% lien of any payments made to Claimant.

Date: _____

Made by: _____

LINDA J. WENMAN
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey W. Buker
Acting Division Director
Division of Workers' Compensation

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 00-179683

Employee: William Davis
Employer: St. Louis Public Schools
Insurer: St. Louis City Board of Education
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: July 26, 2000
Place and County of Accident: St. Louis City, Missouri

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 16, 2007. The award and decision of Administrative Law Judge Linda J. Wenman, issued July 16, 2007, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 20th day of March 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

DISSENTING OPINION FILED

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

After a review of the entire record as a whole, and consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed. I believe the administrative law judge erred in concluding that employee met the burden of proof regarding the contraction of an occupational disease.

The employee must prove by substantial and competent evidence that he has contracted an occupational disease and not an ordinary disease of life. *Kelley v. Banta & Stude Const. Co., Inc.*, 1 S.W.3d 43, 48 (Mo.App. E.D. 1999); *Hayes v. Hudson Foods, Inc.*, 818 S.W.2d 296, 299-300 (Mo.App. S.D. 1991). This involves showing that there was an exposure to the disease which was greater than or different from that which affects the public generally, and that 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. *Id.*; *Dawson v. Associated Elec.*, 885 S.W.2d 712, 716 (Mo.App. W.D. 1994).

Employee failed to meet his burden that he contracted an occupational disease, plantar fasciitis, and not an ordinary disease of life. However, the medical records indicate that employee began complaining of pain in his left foot in the early 1990's. Employee testified that he began to experience pain in his left heel in 1998. Employee testified that he experienced pain in the bottom of his heel when he got up in the morning and that the pain increased the longer he was on his feet. When asked if his activities as a physical education

teacher made his pain worse, employee testified that he noticed an increase in pain anytime he was on his feet.

There is no indication in the medical record that employee's work as a physical education teacher was causally related to his condition. The medical record does reveal that employee's left heel problem was bothered by his activity as an umpire for college baseball games. Dr. Williams noted in the December 7, 1999 office visit that employee had symptoms of plantar fasciitis of the left heel and that employee had trouble umpiring the college world series as a result. On February 17, 2000, employee requested a cortisone injection as he had an upcoming college baseball game. Dr. Williams noted in the April 13, 2000 office visit that employee would benefit from heel cups due to the fact that he had a busy season of umpiring.

Employee underwent conservative treatment on his foot including a stretching program, cortisone injections, orthotics and anti-inflammatory medication. Employee underwent a left plantar release on July 26, 2000. Dr. Aubuchon opined that employee's condition was made worse by increased activity, such as running, jogging, or being on one's feet on hard surfaces for long periods of time. Dr. Aubuchon referenced employee's work activities and indicated that they could contribute to his condition; however, he failed to mention employee's outside activities. Dr. Aubuchon does not opine that employee's work activities were a substantial factor in the development of his condition; only that employee's increased activity contributed to the development of inflammation of employee's left heel.

Furthermore, Dr. Milne, orthopedic surgeon, performed an independent medical evaluation at the request of employee's counsel on October 13, 2005. Dr. Milne opined that there was no specific causal connection between employee's occupation as a physical education teacher and his plantar fasciitis.

I find the opinion of Dr. Milne to be most persuasive, credible and worthy of belief. Based on the more credible, convincing and persuasive evidence, employee's activities as a physical education teacher were not a substantial factor in the cause of his plantar fasciitis. While it is clear that employee's job required him to be physically active, there is no recognizable link between employee's foot condition and his employment. Therefore, employee has failed to show by competent and substantial evidence that he has a compensable occupational disease.

There was insufficient evidence to establish that employee's work duties were a substantial factor in the development of his plantar fasciitis. Accordingly, I would reverse the decision of the administrative law judge and deny compensation in this case.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

Alice A. Bartlett, Member

AWARD

Employee:	William Davis	Injury No.: 00-179683
Dependents:	N/A	Before the
Employer:	St. Louis Public Schools	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	St. Louis City Board of Education	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
 - Was the injury or occupational disease compensable under Chapter 287? Yes
 3. Was there an accident or incident of occupational disease under the Law? Yes
 - Date of accident or onset of occupational disease: July 26, 2000
 - State location where accident occurred or occupational disease was contracted: St. Louis City, MO
 6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
 7. Did employer receive proper notice? N/A
 8. Did accident or occupational disease arise out of and in the course of the employment? Yes
 - 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: While performing his usual duties as a physical education teacher over thirty years, Employee developed left plantar fasciitis.
 12. Did accident or occupational disease cause death? No
 13. Part(s) of body injured by accident or occupational disease: Left foot
 - Nature and extent of any permanent disability: 15% left foot at the 155 week level, and SIF liability.
 15. Compensation paid to-date for temporary disability: None
 16. Value necessary medical aid paid to date by employer/insurer? None
- Employee: William Davis Injury No.: 00-179683
17. Value necessary medical aid not furnished by employer/insurer? \$7,607.00
 - Employee's average weekly wages: Sufficient for maximum rates

19. Weekly compensation rate: \$599.96 / \$314.26

20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:	\$7,607.00
4 6/7th weeks of temporary total disability (or temporary partial disability)	paid under 00-179682
23.25 weeks of permanent partial disability from Employer	\$7,306.55

22. Second Injury Fund liability: Yes

25.81 weeks of permanent partial disability from Second Injury Fund	\$8,111.05
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Total:	\$23,024.60
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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 in favor of the following attorney for necessary legal services rendered to the claimant: Charles Bobinette

FINDINGS OF FACT and RULINGS OF LAW:

Employee: William Davis

Injury No.: 00-179683

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: St. Louis City Public Schools

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

Additional Party: Second Injury Fund

Insurer: St. Louis City Board of Education

Checked by: LJW:tr

PRELIMINARIES

The above referenced Workers' Compensation claim was heard by the undersigned Administrative Law Judge on May 7, 2007, and continued on May 15, 2007. Post-trial memorandums were received, and the case was submitted on the June 29, 2007. Attorney Charles Bobinette represented William Davis (Claimant). St. Louis City Public Schools (Employer) were insured by the St. Louis City Board of Education, and represented by Attorney Eric Christensen. Assistant Attorney General Da-Niel Cunningham represented the Second Injury Fund (SIF). The case was heard with companion cases 00-179682, 02-153253, and 02-153257.

Prior to the start of the hearing the parties identified the issues for disposition in this case: arising out of and in the course/scope of employment; occupational disease; medical causation; medical expenses in the amount of \$7,607.00; temporary total disability (TTD), the liability of Employer and SIF for permanent partial disability (PPD) benefits; and a statute of limitations defense. Hearing venue is correct, and jurisdiction properly lies with the Missouri Division of Workers' Compensation.

Claimant offered Exhibits A-U, Employer offered Exhibits 1-2, and SIF offered Exhibits I-II. All exhibits were admitted into the record without objection. On May 22, 2007, Claimant filed a motion to supplement the record. On May 25, 2007, with all parties present, Claimant's motion was heard and denied. Any markings contained within any exhibit were present when received, and the markings did not influence the evidentiary weight given the exhibit. Any objections not expressly ruled on in this award are overruled.

Findings of Fact

All evidence presented has been reviewed. Only testimony necessary to support this award will be reviewed and summarized.

1. Claimant is a sixty year old retired physical education (PE) teacher who worked for Employer for over 30 years. Claimant taught grades K-8, and his job duties required him to be on his feet 90-95% of the teaching day. Claimant would perform calisthenics, run laps, and demonstrate sports at least four times per day. Claimant primarily taught on tile gym floors, or on blacktop. In addition to his duties as a PE teacher, Claimant worked daily lunch room duty, coached after school sports, and umpired as a NCAA Division I baseball umpire during the collegiate baseball season.
2. During the 1990's Claimant experienced intermittent left heel pain. By February 2000 Claimant was referred to Dr. Aubuchon for further evaluation. Dr. Aubuchon initiated conservative treatment including cortisone injections, orthotics, a night splint, stretching exercises, and anti-inflammatory medication. When conservative measures failed, Dr. Aubuchon recommended a plantar fascia release, which Claimant wanted to delay until summer vacation.
3. On July 26, 2000, Claimant underwent a left plantar fascia release. The medical expenses associated with this treatment totaled \$7,607.00. Claimant testified he returned to teaching on August 28, 2000. Dr. Aubuchon opined Claimant's activities at work contributed to his development of plantar fasciitis. On January 20, 2004, Dr. Aubuchon wrote to Claimant's attorney and stated: "Excessive wear and tear on his feet has contributed to his development of inflammation of his heel."
4. Claimant has preexisting conditions involving his left knee, right shoulder, and lumbar spine. Claimant initially injured his left knee playing basketball in college. Prior to his July 26, 2000 injury, Claimant had undergone two left knee surgeries, and had received seven cortisone injections into his left knee. Regarding his right shoulder, during October 1996, an MRI revealed a ruptured biceps tendon that was not repaired. Regarding his lumbar spine, in 1997, a MRI for radicular complaints revealed degenerative disc disease at L4-5 with mild stenosis, and a small disc herniation at L3-4. On March 31, 1997, Claimant was pre-certified to receive a series of three epidural steroid injections at St. John's Mercy Medical Center.
5. Dr. Volarich examined Claimant on September 28, 2004. Upon examination, Dr. Volarich noted tenderness in the plantar surface located near the insertion site of the plantar fascia. Dr. Volarich opined Claimant's work was a substantial factor in the development of his plantar fasciitis, the treatment provided by Dr. Aubuchon was necessary,

and the cost of the services provided were reasonable and customary. Dr. Volarich rated Claimant's overall disability from this condition at 30% PPD of the foot, with 5% related to Claimant's umpiring duties.

6. Regarding Claimant's preexisting conditions, upon examination of Claimant's left knee, Dr. Volarich noted a weak and atrophied left quadriceps and hamstring muscles, swelling, and crepitus of his left knee. Regarding Claimant's right shoulder, Dr. Volarich noted a positive impingement test, crepitus, a Popeye deformity, and decreased range of motion. Regarding Claimant's lumbar spine, Dr. Volarich noted restricted range of motion. Dr. Volarich rated Claimant's left knee at 75% PPD, his right shoulder at 40% PPD, and his lumbar spine at 25% BAW PPD. Dr. Volarich found Claimant's preexisting disabilities were a hindrance or obstacle to Claimant's employment, and the combination of his July 26, 2000 injury and preexisting conditions created a disability substantially greater than the simple sum.

7. Dr. Milne, an orthopedic surgeon, examined Claimant on October 13, 2005. Dr. Milne found no abnormalities regarding Claimant's left foot. Dr. Milne opined: "I think these symptoms are related to a lifetime of wear and tear, both in his profession as a PE teacher, as well as his profession as an umpire and his active lifestyle." Dr. Milne opined Claimant's left plantar fasciitis was a long standing chronic condition, and without a specific trauma Dr. Milne could not find causation related to his employment. Dr. Milne indicated he would defer to Dr. Aubuchon or another foot specialist regarding permanent disability.

8. As of hearing, Claimant testified surgery did help his symptoms, but he still experiences pain in his left foot, and he continues to wear orthotics in his shoes. Additionally, Claimant testified he does not have a family history of plantar fasciitis.

RULINGS OF LAW

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

Issues related to statute of limitations defense

Claimant filed a claim alleging occupational disease on July 10, 2003. Claimant indicated the date of occupational disease to be July 26, 2000, the day Claimant underwent surgery. Employer asserts a statute of limitations defense. "The standard for triggering the running of the statute of limitations requires: (1) a disability or injury, (2) that is compensable." *Rupard v. Kiesendahl, DDS*, 114 S.W.3d 389 (Mo.App.2003)(overruled on other grounds)(citing *Mann v. Supreme Express*, 851 S.W.2d 690 (Mo.App.1993)(overruled on other grounds)). The correct date of disability must be ascertained before a determination of statute of limitations bar is made.

In cases of occupational disease, the time in which a compensable injury has been sustained is the time when the disease has produced a compensable disability. *Sellers v. TransWorld Airlines, Inc.*, 752 S.W.2d 413 (Mo.App.1988)(overruled on other grounds). Compensable disability has been interpreted as being "the time when some degree of disability results which can be the subject of compensation". *Id.* "Mere awareness on the part of the employee of the presence of a work-related illness is not, in and of itself, sufficient knowledge of a compensable injury." *Wiele v. National Super Markets Inc.*, 948 S.W.2d 142 (Mo.App.1997)(overruled on other grounds). An employee is entitled to receive reliable information that the condition is the result of employment prior to filing a claim. Thus, an employee can rely on a physician's diagnosis, rather than the employee's own impressions of the condition. *Mann v. Supreme Express*, 851 S.W.2d 690 (Mo. App.1993) (overruled on other grounds). However, an expert opinion is not absolute, and each case should be judged by its facts. *Sellers* at 417. When an injury is reasonably apparent and discoverable is a question of fact to be determined by the trier of fact. *Thomas v. Becker Materials Corp.*, 805 S.W.2d 271 (Mo.App. 1991).

A complete review of the record reveals no instance in which a medical expert informed Claimant his condition was related to his work duties, until the letter was issued by Dr. Aubuchon after the claim had been filed. I find the appropriate date of injury to be the date stated on the claim. The first time Claimant's condition would have been disabling would have been the date of surgery, July 26, 2000. Employer filed the first report of injury on July 31, 2003, which allows Claimant a three year statute of limitations. Claimant needed to file his claim by July 26, 2003,

and his claim was filed on July 10, 2003. §287.063.3, §287.430 RSMo. Claimant's claim is not barred by the statute of limitations.

Issues relating to course/scope, arising out of, occupational disease and medical causation

Claimant alleges an occupational disease of left plantar fasciitis that arose from his work duties. Section 287.067 RSMo., defines occupational disease as:

... an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.”

In cases of alleged occupational disease, the disease must be occupationally induced, rather than an ordinary disease of life. *Hayes v. Hudson Foods, Inc.*, 818 S.W.2d 296 (Mo.App.1991) (overruled on other grounds). An occupational disease is not compensable if work is merely “a triggering or precipitating factor.” §287.067.2 RSMo. The exposure to the disease must be greater or different from disease exposure to the general public, and there must be a disease/work link common to the specific job or profession. *Polavarapu v. General Motors Corp.*, 897 S.W.2d 63 (Mo.App. 1995). The work must be a substantial factor in the cause of the resulting medical condition or disability. §287.020.2 RSMo. A causative factor may be substantial even if it is not the primary or most significant factor. *Cahall v. Cahall*, 963 S.W.2d 368, 372 (Mo.App. 1998) (overruled on other grounds). Further, there is no minimum percentage set out in the Workers' Compensation Law defining “substantial factor.” *Id.* Whether employment is a substantial factor in causing the injury is a question of fact. *Sanderson v. Porta-Fab Corp.*, 989 S.W.2d 599, 603 (Mo.App. 1999) (overruled on other grounds).

Determinations of this kind require the assistance of expert medical testimony. Medical causation not within lay understanding or experience requires expert medical evidence. *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596 (Mo.banc 1994) (overruled on other grounds). The weight to be accorded an expert's testimony should be determined by the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. *Choate v. Lily Tulip, Inc.*, 809 S.W.2d 102 (Mo.App. 1991) (overruled on other grounds). Dr. Volarich and Dr. Milne provided opinions regarding the cause of Claimant's condition. Dr. Volarich found Claimant's work to have been a substantial factor in his development of left plantar fasciitis, and Dr. Milne opined Claimant's diagnosis is related to a lifetime of wear and tear both in his professional and personal life. Although not deposed, Claimant's treating physician, Dr. Aubuchon, agreed with Dr. Volarich in that Claimant's teaching activities contributed to his development of plantar fasciitis. The aggravation of a preexisting condition is a compensable injury if the claimant establishes a direct casual link between job duties and the aggravated condition. *See Smith v. Climate Engineering*, 939 S.W.2d 429, 433-34 (Mo. App. E.D. 1996) (overruled on other grounds). If a claimant can show that the performance of the usual and customary duties led to a breakdown or change in pathology, the injury is compensable. *Bennett v. Columbia Health Care*, 80 S.W.3d 524 (Mo.App.W.D. 2002) (overruled on other grounds). The worsening of a preexisting condition is a change in pathology. *Id.* at 529.

Whether Claimant's job duties caused or aggravated his condition, at a minimum his condition was aggravated. Claimant clearly suffered a change of pathology. Employer required Claimant to be on his feet while teaching, which encompassed 90-95% of his day, and as he taught he was performing his job duties as required by Employer. I find Claimant has met his burden to establish occupational disease, arising out of and in the course and scope of employment, and medical causation regarding his need for medical treatment of left plantar fasciitis.

Issues relating to past medical expenses and temporary total disability

Claimant requests total reimbursement of medical expenses in the amount of \$7,607.00. Section 287.140.1 RSMo., provides that an employer shall provide such medical, surgical, chiropractic, ambulance and hospital treatment as may be necessary to cure and relieve the effects of the work injury. Additionally, §287.140.3 RSMo., provides that all medical fees and charges under this section shall be fair and reasonable. A sufficient factual basis exists to award

payment of medical expenses when medical bills and supporting medical records are introduced into evidence supported by testimony that the expenses were incurred in connection with treatment of a compensable injury. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo.banc 1989). Itemized bills were supported by the appropriate medical records, and Claimant's testimony. Dr. Volarich testified the medical treatment received was necessary, and the charges were reasonable and customary. Employer asserts it never waived its right to direct medical care, as all medical treatment was completed before it was aware of an alleged injury. On the other hand, Claimant can not make a demand for treatment unless he was aware the injury was work related. While what the Employer avers is true, and the awarding of the medical produces a harsh result, I do not have the powers of an equitable court. Claimant has met his burden of evidence. Accordingly, I find Employer liable for \$7,607.00 in medical expenses accrued by Claimant in an attempt to cure and relieve the effects of his work related injury.

Claimant also seeks TTD benefits for the period of recovery following surgery. TTD benefits are intended to cover a period of time from injury until such time as claimant can return to work. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641 (Mo.App. 1991) (overruled in part). The temporary compensation paid cannot exceed an amount equal to 105% of the state average weekly wage. §287.170.1(4) RSMo. Claimant arranged to have surgery during the summer break from teaching. Claimant did not collect unemployment while off during the summer, and frequently engaged in other employment. Normally, Claimant would be entitled to receive 4 6/7th weeks of TTD benefits, but in an effort to condense his medical treatment during his summer break, Claimant overlapped medical treatment with the medical condition that is the subject of injury number 00-179682. Claimant has been awarded TTD benefits at the maximum rate allowed by law in the award issued for #00-179682, a period that encompasses the period at issue in the case at bar. Accordingly, I find Employer has satisfied its obligation to pay TTD in this case by complying with the award in #00-179682.

Issues relating to permanent partial disability owed by Employer

A permanent partial award is intended to cover claimant's permanent limitations due to a work related injury and any restrictions his limitations may impose on employment opportunities. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641,646 (Mo.App. 1991) (overruled on other grounds). Dr. Volarich rated Claimant's injury as 25% PPD of his left foot. Dr. Milne deferred to a foot specialist to determine the amount of disability. With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983) (overruled on other grounds). Taking into consideration the opinions expressed by the various physicians, the medical records, and Claimant's testimony, I award Claimant 15% PPD at the 155 week level referable to his left foot for which Employer is liable.

Issues relating to permanent partial disability owed by Second Injury Fund

Section 287.220.1 RSMo., provides that SIF is implicated in all cases of permanent partial disability where there has been previous disability that created a hindrance and obstacle to employment or re-employment, and the primary injury along with the pre-existing disability(s) reach a threshold of 50 weeks (12.5%) for a body as a whole injury or 15% of a major extremity. The combination of the primary and pre-existing conditions must produce additional disability greater than the simple sum of the disabilities.

Claimant's previous disabilities include his left knee, right shoulder, and lumbar spine. SIF argues Claimant had worked without restrictions and in his chosen profession throughout his career; therefore, these disabilities could not have been a hindrance and obstacle to employment. But as observed by Dr. Volarich, the fact Claimant worked without a restriction doesn't mean Claimant didn't have problems doing various activities. The medical evidence speaks for the injuries. I find Claimant's preexisting left knee, right shoulder, and lumbar spine injuries rose to a level to produce a hindrance and obstacle to employment, and meet the statutory threshold needed for SIF liability. I further find at the time of Claimant's July 26, 2000 injury, Claimant had a 40% PPD referable to his left knee, 15% PPD referable to his right shoulder, and 12.5% BAW PPD referable to his lumbar spine. I find when Claimant's last injury to his left foot is combined with his preexisting disabilities, the combination creates a substantially greater disability than the simple sum, and a synergistic affect occurs. Applying a 15% load factor, Claimant is entitled to receive 25.81 weeks of compensation from SIF or \$8,111.05.

CONCLUSION

In summary, Claimant sustained an occupational disease on July 26, 2000 that arose out of and in the course and scope of his employment with Employer. Claimant is awarded \$7,607.00 in past medical expenses, no past TTD benefits, and \$7,306.55 in permanent partial disability from Employer. Claimant is also awarded \$8,111.05 from SIF. Claimant's attorney is entitled to a 25% lien of any payments made to Claimant.

Date: _____

Made by: _____

LINDA J. WENMAN
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey W. Buker
Acting Division Director
Division of Workers' Compensation

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION _____

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

Injury No.: 02-153253

Employee: William Davis
Employer: St. Louis Public Schools
Insurer: St. Louis City Board of Education
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: July 3, 2002

Place and County of Accident: St. Louis City, Missouri

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 16, 2007. The award and decision of Administrative Law Judge Linda J. Wenman, issued July 16, 2007, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 20th day of March 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

DISSENTING OPINION FILED

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

After a review of the entire record as a whole, and consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed. I believe the administrative law judge erred in concluding that employee met the burden of proof regarding the contraction of an occupational disease.

The employee must prove by substantial and competent evidence that he has contracted an occupational disease and not an ordinary disease of life. *Kelley v. Banta & Stude Const. Co., Inc.*, 1 S.W.3d 43, 48 (Mo.App. E.D. 1999); *Hayes v. Hudson Foods, Inc.*, 818 S.W.2d 296, 299-300 (Mo.App. S.D. 1991). This involves showing that there was an exposure to the disease which was greater than or different from that which affects the public generally, and that 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. *Id.*; *Dawson v. Associated Elec.*, 885 S.W.2d 712, 716 (Mo.App. W.D. 1994).

Employee failed to meet his burden that he contracted an occupational disease, plantar fasciitis, and not an ordinary disease of life. Employee testified that within approximately a month of recuperating from the

surgery on his left foot, employee began experiencing problems with his right foot. Employee testified that the symptoms in his right foot were exactly the same as those he experienced in his left foot. Employee sought treatment from Dr. Aubuchon who treated him for the same condition in his left foot.

Employee underwent conservative treatment on his foot including a stretching program, cortisone injections, orthotics and anti-inflammatory medication. After conservative treatment failed, employee underwent a right plantar release on July 3, 2002. Employee testified that he experienced more complications in the recovery after surgery with the right foot than the left. Employee continued to experience pain following the surgery. Dr. Aubuchon opined that employee's condition was made worse by increased activity, such as running, jogging, or being on one's feet on hard surfaces for long periods of time. Dr. Aubuchon noted that employee engaged in these activities as a physical education teacher but failed to mention employee's outside activities. Dr. Aubuchon does not opine that employee's work activities were a substantial factor in the development of his condition; only that employee's increased activity contributed to the development of inflammation of employee's right heel.

Furthermore, Dr. Milne, orthopedic surgeon, performed an independent medical evaluation at the request of employee's counsel on October 13, 2005. Dr. Milne opined that there was no specific causal connection between employee's occupation as a physical education teacher and his plantar fasciitis.

I find the opinion of Dr. Milne to be most persuasive, credible and worthy of belief. Based on the more credible, convincing and persuasive evidence, employee's activities as a physical education teacher was not a substantial factor in the cause of his plantar fasciitis. While it is clear that employee's job required him to be physically active, there is no recognizable link between employee's foot condition and his employment. Therefore, employee has failed to show by competent and substantial evidence that he has a compensable occupational disease.

There was insufficient evidence to establish that employee's work duties were a substantial factor in the cause of his plantar fasciitis. Accordingly, I would reverse the decision of the administrative law judge and deny compensation in this case.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

Alice A. Bartlett, Member

AWARD

Employee:	William Davis	Injury No.: 02-153253
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	St. Louis Public Schools	Department of Labor and Industrial Relations of Missouri
Additional Party:	Second Injury Fund	Jefferson City, Missouri
Insurer:	St. Louis City Board of Education	
Hearing Date:	May 7, 2007 continued to May 15, 2007	Checked by: LJW:tr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
 - Was the injury or occupational disease compensable under Chapter 287? Yes
 3. Was there an accident or incident of occupational disease under the Law? Yes
 - Date of accident or onset of occupational disease: July 3, 2002
 - State location where accident occurred or occupational disease was contracted: St. Louis City, MO
 6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
 7. Did employer receive proper notice? N/A
 8. Did accident or occupational disease arise out of and in the course of the employment? Yes
 - 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: While performing his usual duties as a physical education teacher over thirty years, Employee developed right plantar fasciitis.
 12. Did accident or occupational disease cause death? No
 13. Part(s) of body injured by accident or occupational disease: Right foot
 - Nature and extent of any permanent disability: 15% right foot at the 155 week level, and SIF liability.
 15. Compensation paid to-date for temporary disability: None
 16. Value necessary medical aid paid to date by employer/insurer? None
- Employee: William Davis Injury No.: 02-153253
17. Value necessary medical aid not furnished by employer/insurer? \$7,014.00
 - Employee's average weekly wages: Sufficient for maximum rates
 19. Weekly compensation rate: \$649.32 / \$340.12
 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:	\$7,014.00
17 2/7th weeks of temporary total disability (or temporary partial disability)	\$11,223.96
23.25 weeks of permanent partial disability from Employer	\$7,907.79

22. Second Injury Fund liability: Yes

31.7 weeks of permanent partial disability from Second Injury Fund	\$10,781.80
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Total: \$36,927.55

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 in favor of the following attorney for necessary legal services rendered to the claimant: Charles Bobinette

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	William Davis	Injury No.: 02-153253
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	St. Louis City Public Schools	Department of Labor and Industrial Relations of Missouri
Additional Party:	Second Injury Fund	Jefferson City, Missouri
Insurer:	St. Louis City Board of Education	Checked by: LJW:tr

PRELIMINARIES

The above referenced Workers' Compensation claim was heard by the undersigned Administrative Law Judge

on May 7, 2007, and continued on May 15, 2007. Post-trial memorandums were received, and the case was submitted on the June 29, 2007. Attorney Charles Bobinette represented William Davis (Claimant). St. Louis City Public Schools (Employer) were insured by the St. Louis City Board of Education, and represented by Attorney Eric Christensen. Assistant Attorney General Da-Niel Cunningham represented the Second Injury Fund (SIF). The case was heard with companion cases 00-179682, 00-179683, and 02-153257.

Prior to the start of the hearing the parties identified the issues for disposition in this case: arising out of and in the course/scope of employment; occupational disease; medical causation; medical expenses in the amount of \$7,014.00; temporary total disability (TTD), and the liability of Employer and SIF for permanent partial disability (PPD) benefits. Hearing venue is correct, and jurisdiction properly lies with the Missouri Division of Workers' Compensation.

Claimant offered Exhibits A-U, Employer offered Exhibits 1-2, and SIF offered Exhibits I-II. All exhibits were admitted into the record without objection. On May 22, 2007, Claimant filed a motion to supplement the record. On May 25, 2007, with all parties present, Claimant's motion was heard and denied. Any markings contained within any exhibit were present when received, and the markings did not influence the evidentiary weight given the exhibit. Any objections not expressly ruled on in this award are overruled.

Findings of Fact

All evidence presented has been reviewed. Only testimony necessary to support this award will be reviewed and summarized.

1. Claimant is a sixty year old retired physical education (PE) teacher who worked for Employer for over 30 years. Claimant taught grades K-8, and his job duties required him to be on his feet 90-95% of the teaching day. Claimant would perform calisthenics, run laps, and demonstrate sports at least four times per day. Claimant primarily taught on tile gym floors, or on blacktop. In addition to his duties as a PE teacher, Claimant worked daily lunch room duty, coached after school sports, and umpired as a NCAA Division I baseball umpire during the collegiate baseball season.
2. During April 2002 Claimant experienced right heel pain. Claimant sought care with Dr. Aubuchon, who had previously treated his left foot. Dr. Aubuchon initiated conservative treatment including cortisone injections, orthotics, a night splint, stretching exercises, and anti-inflammatory medication. When conservative measures failed, Dr. Aubuchon recommended a plantar fascia release. Although Claimant last worked during June 2002, he officially retired from teaching during October 2002.
3. On July 3, 2002, Claimant underwent a right plantar fascia release. Post-operatively, Claimant's recovery was slow, and a MRI during September revealed a stress fracture of his right heel. The medical cost associated with treatment totaled \$7,014.00. Dr. Aubuchon opined Claimant's activities at work contributed to his development of plantar fasciitis. On January 20, 2004, Dr. Aubuchon wrote to Claimant's attorney and stated: "Excessive wear and tear on his feet has contributed to his development of inflammation of his heel."
4. Claimant has preexisting conditions involving his left knee, right shoulder, lumbar spine, and left plantar fascia release. Claimant initially injured his left knee playing basketball in college. Prior to his July 3, 2002 injury, Claimant had undergone two left knee surgeries, had received nine cortisone injections into his left knee, and x-rays of his left knee demonstrated bone on bone. Regarding his right shoulder, during October 1996 an MRI revealed a ruptured biceps tendon that was not repaired. Regarding his lumbar spine, in 1997 an MRI for radicular complaints revealed degenerative disc disease at L4-5 with mild stenosis, and a small disc herniation at L3-4. On March 31, 1997, Claimant was pre-certified to receive a series of three lumbar epidural steroid injections at St. John's Mercy Medical Center. On July 26, 2000, Dr. Aubuchon performed a plantar fascia release of Claimant's left foot.
5. Dr. Volarich examined Claimant on September 28, 2004. Upon examination, Dr. Volarich noted tenderness in the plantar surface located near the insertion site of the plantar fascia. Dr. Volarich opined Claimant's work was a substantial factor in the development of his plantar fasciitis, the treatment provided by Dr. Aubuchon was necessary, and the cost of the services provided were reasonable and customary. Dr. Volarich rated Claimant's overall disability

from this condition at 30% PPD of the foot, with 5% related to Claimant's umpiring duties.

6. Regarding Claimant's preexisting conditions, upon examination of Claimant's left knee, Dr. Volarich noted a weak and atrophied left quadriceps and hamstring muscles, swelling, and crepitus of his left knee. Regarding Claimant's right shoulder, Dr. Volarich noted a positive impingement test, crepitus, a Popeye deformity, and decreased range of motion. Regarding Claimant's lumbar spine, Dr. Volarich noted restricted range of motion. Regarding Claimant's left foot, Dr. Volarich noted tenderness in the plantar surface located near the insertion site of the plantar fascia. Dr. Volarich rated Claimant's left knee at 75% PPD, his right shoulder at 40% PPD, his lumbar spine at 25% BAW PPD, and his left foot at 25% PPD. Dr. Volarich found Claimant's preexisting disabilities were a hindrance or obstacle to Claimant's employment, and the combination of his July 3, 2002 injury and preexisting conditions created a disability substantially greater than the simple sum.

7. Dr. Milne, an orthopedic surgeon, examined Claimant on October 13, 2005. Dr. Milne found no abnormalities regarding Claimant's right foot. Dr. Milne opined: "I think these symptoms are related to a lifetime of wear and tear, both in his profession as a PE teacher, as well as his profession as an umpire and his active lifestyle." Dr. Milne opined Claimant's right plantar fasciitis was a long standing chronic condition, and without a specific trauma Dr. Milne could not find causation related to his employment. Dr. Milne indicated he would defer to Dr. Aubuchon or another foot specialist regarding permanent disability.

8. As of hearing, Claimant testified surgery did help his symptoms, but he still experiences pain in his right foot, and he continues to wear orthotics in his shoes. Additionally, Claimant testified he does not have a family history of plantar fasciitis.

RULINGS OF LAW

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

Issues relating to course/scope, arising out of, occupational disease and medical causation

Claimant alleges an occupational disease of right plantar fasciitis that arose from his work duties. Section 287.067 RSMo., defines occupational disease as:

... an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence."

In cases of alleged occupational disease, the disease must be occupationally induced, rather than an ordinary disease of life. *Hayes v. Hudson Foods, Inc.*, 818 S.W.2d 296 (Mo.App.1991) (overruled on other grounds). An occupational disease is not compensable if work is merely "a triggering or precipitating factor". §287.067.2 RSMo. The exposure to the disease must be greater or different from disease exposure to the general public, and there must be a disease/work link common to the specific job or profession. *Polavarapu v. General Motors Corp.*, 897 S.W.2d 63 (Mo.App. 1995). The work must be a substantial factor in the cause of the resulting medical condition or disability. §287.020.2 RSMo. A causative factor may be substantial even if it is not the primary or most significant factor. *Cahall v. Cahall*, 963 S.W.2d 368, 372 (Mo.App. 1998) (overruled on other grounds). Further, there is no minimum percentage set out in the Workers' Compensation Law defining "substantial factor." *Id.* Whether employment is a substantial factor in causing the injury is a question of fact. *Sanderson v. Porta-Fab Corp.*, 989 S.W.2d 599, 603 (Mo.App. 1999) (overruled on other grounds).

Determinations of this kind require the assistance of expert medical testimony. Medical causation not within lay understanding or experience requires expert medical evidence. *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596 (Mo.banc 1994) (overruled on other grounds). The weight to be accorded an expert's testimony should be determined

by the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. *Choate v. Lily Tulip, Inc.*, 809 S.W.2d 102 (Mo.App. 1991) (overruled on other grounds). Dr. Volarich and Dr. Milne provided opinions regarding the cause of Claimant's condition. Dr. Volarich found Claimant's work to have been a substantial factor in his development of right plantar fasciitis, and Dr. Milne opined Claimant's diagnosis is related to a lifetime of wear and tear both in his professional and personal life. Although not deposed, Claimant's treating physician, Dr. Aubuchon, agrees with Dr. Volarich in that Claimant's teaching activities contributed to his development of plantar fasciitis. The aggravation of a preexisting condition is a compensable injury if the claimant establishes a direct causal link between job duties and the aggravated condition. See *Smith v. Climate Engineering*, 939 S.W.2d 429, 433-34 (Mo. App. E.D. 1996) (overruled on other grounds). If a claimant can show that the performance of the usual and customary duties led to a breakdown or change in pathology, the injury is compensable. *Bennett v. Columbia Health Care*, 80 S.W.3d 524 (Mo.App.W.D. 2002) (overruled on other grounds). The worsening of a preexisting condition is a change in pathology. *Id.* at 529.

Whether Claimant's job duties caused or aggravated his condition, at a minimum his condition was aggravated. Claimant clearly suffered a change of pathology, Employer required Claimant to be on his feet while teaching, which encompassed 90-95% of his day, and as he taught he was performing his job duties as required by Employer. I find Claimant has met his burden to establish occupational disease, arising out of and in the course and scope of employment, and medical causation regarding his need for medical treatment of right plantar fasciitis.

Issues relating to past medical expenses and temporary total disability

Claimant requests total reimbursement of medical expenses in the amount of \$7,014.00. Section 287.140.1 RSMo., provides that an employer shall provide such medical, surgical, chiropractic, ambulance and hospital treatment as may be necessary to cure and relieve the effects of the work injury. Additionally, §287.140.3 RSMo., provides that all medical fees and charges under this section shall be fair and reasonable. A sufficient factual basis exists to award payment of medical expenses when medical bills and supporting medical records are introduced into evidence supported by testimony that the expenses were incurred in connection with treatment of a compensable injury. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo.banc 1989). Itemized bills were supported by the appropriate medical records, and Claimant's testimony. Dr. Volarich testified the medical treatment received was necessary, and the charges were reasonable and customary. Employer asserts it never waived its right to direct medical care, as all medical treatment was completed before it was aware of an alleged injury. On the other hand, Claimant can not make a demand for treatment unless he was aware the injury was work related. While what the Employer avers is true, and the awarding of the medical produces a harsh result, I do not have the powers of an equitable court. Claimant has met his burden of evidence. Accordingly, I find Employer liable for \$7,014.00 in medical expenses accrued by Claimant in an attempt to cure and relieve the effects of his work related injury.

Claimant also seeks TTD benefits for the period of recovery following surgery. TTD benefits are intended to cover a period of time from injury until such time as claimant can return to work. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641 (Mo.App. 1991) (overruled in part). The temporary compensation paid cannot exceed an amount equal to 105% of the state average weekly wage. §287.170.1(4) RSMo. Claimant arranged to have surgery after he retired from teaching, however, he continued to pursue his umpiring duties. Claimant did not collect unemployment while not working due to treatment. Claimant's recovery was delayed due to development of a stress fracture, and overlapped with care obtained regarding companion case 02-153257. Regarding treatment for this injury, Claimant seeks 17 2/7th weeks of TTD benefits starting on the date of surgery and ending on October 31, 2002. As Claimant was retired during this time period, off work slips were not requested. However, Claimant's requested timeframe for TTD is supported by the medical evidence. Claimant's stress fracture was discovered on a MRI obtained September 10, 2002, and extended his recovery time. Accordingly, I find Employer is liable for 17 2/7th weeks of TTD benefits or \$11,223.96.

Issues relating to permanent partial disability owed by Employer

A permanent partial award is intended to cover claimant's permanent limitations due to a work related injury and any restrictions his limitations may impose on employment opportunities. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641,646 (Mo.App. 1991) (overruled on other grounds). Dr. Volarich rated Claimant's injury as 25% PPD

of his right foot. Dr. Milne deferred to a foot specialist to determine the amount of disability. With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983) (overruled on other grounds). Taking into consideration the opinions expressed by the various physicians, the medical records, and Claimant's testimony, I award Claimant 15% PPD at the 155 week level referable to his right foot for which Employer is liable.

Issues relating to permanent partial disability owed by Second Injury Fund

Section 287.220.1 RSMo., provides that SIF is implicated in all cases of permanent partial disability where there has been previous disability that created a hindrance and obstacle to employment or re-employment, and the primary injury along with the pre-existing disability(s) reach a threshold of 50 weeks (12.5%) for a body as a whole injury or 15% of a major extremity. The combination of the primary and pre-existing conditions must produce additional disability greater than the simple sum of the disabilities.

Claimant's previous disabilities include his left knee, right shoulder, lumbar spine, and left foot. SIF argues Claimant had worked without restrictions and in his chosen profession throughout his career; therefore, these disabilities could not have been a hindrance or obstacle to employment. But as observed by Dr. Volarich, the fact Claimant worked without a restriction doesn't mean Claimant didn't have problems doing various activities. The medical evidence speaks for the injuries. I find Claimant's preexisting left knee, right shoulder, lumbar spine, and left foot injuries rose to a level to produce a hindrance and obstacle to employment, and meet the statutory threshold needed for SIF liability. I further find at the time of Claimant's July 3, 2002 injury Claimant had a 50% PPD referable to his left knee, 15% PPD referable to his right shoulder, 12.5% BAW PPD referable to his lumbar spine, and 15% PPD referable to his left foot. I find when Claimant's last injury to his right foot is combined with his preexisting disabilities, the combination creates a substantially greater disability than the simple sum, and a synergistic affect occurs. Applying a 15% load factor, Claimant is entitled to receive 31.7 weeks of compensation from SIF or \$10,781.80.

CONCLUSION

In summary, Claimant sustained an occupational disease on July 3, 2002 that arose out of and in the course and scope of his employment with Employer. Claimant is awarded \$7,014.00 in past medical expenses, \$11,223.96 in past TTD benefits, and \$7,907.79 in permanent partial disability from Employer. Claimant is also awarded \$10,781.80 from SIF. Claimant's attorney is entitled to a 25% lien of any payments made to Claimant.

Date: _____

Made by: _____

LINDA J. WENMAN
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey W. Buker
Acting Division Director
Division of Workers' Compensation

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 02-153257

Employee: William Davis
Employer: St. Louis Public Schools
Insurer: St. Louis City Board of Education
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: September 9, 2002
Place and County of Accident: St. Louis City, Missouri

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 16, 2007. The award and decision of Administrative Law Judge Linda J. Wenman, issued July 16, 2007, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 20th day of March 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

DISSENTING OPINION FILED

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

DISSENTING OPINION

After a review of the entire record as a whole, and consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed. I believe the administrative law judge erred in concluding that employee met the burden of proof regarding the contraction of an occupational disease.

The employee must prove by substantial and competent evidence that he has contracted an occupational disease and not an ordinary disease of life. *Kelley v. Banta & Stude Const. Co., Inc.*, 1 S.W.3d 43, 48 (Mo.App. E.D. 1999); *Hayes v. Hudson Foods, Inc.*, 818 S.W.2d 296, 299-300 (Mo.App. S.D. 1991). This involves showing that there was an exposure to the disease which was greater than or different from that which affects the public generally, and that 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. *Id.*; *Dawson v. Associated Elec.*, 885 S.W.2d 712, 716 (Mo.App. W.D. 1994).

The administrative law judge found that employee's job duties aggravated his right knee degeneration. The administrative law judge found that there was no doubt that employee had other factors other than his work duties that placed him at risk for knee degeneration; however the time spent in those activities paled in comparison to his work activities. The administrative law judge ultimately concluded that Dr. Volarich was most persuasive, and that employee met his burden by establishing an occupational disease, right knee degeneration. I disagree with the findings and conclusions of the administrative law judge and I believe that competent and substantial evidence supports that employee failed to meet his burden of proof that he contracted an occupational disease and not an ordinary disease of life.

Employee did not establish a medical causal relationship between his job duties as a physical education teacher and his right knee condition. Employee began experiencing problems with his right knee in April of 2002. Employee sought treatment from Dr. Williams, who had previously treated employee for problems with his left knee. Employee underwent conservative treatment including cortisone injections. An MRI of employee's right knee revealed a medial meniscus tear, joint effusion, sprained medial collateral ligament, chondromalacia of the patella, mild bursitis as well as degenerative changes of the knee joint. On September 9, 2002, employee underwent a right knee arthroscopy, partial medial meniscectomy, chondroplasty of the medial femoral condyle, and chondroplasty of the trochlea of the femur. Employee developed severe osteoarthritis in both knees and underwent bilateral knee replacements on August 4, 2003.

The administrative law judge ignores the fact that the medical record makes numerous references to employee's activities as an umpire for college baseball and that those activities caused employee significant difficulty with his right knee. The medical record does make multiple references to employee's active lifestyle; specifically to his activity as an umpire contributing to his knee pain. Dr. William's office note of April 4, 2002 states that employee was refereeing again and began experiencing right knee pain. In addition, the same office note makes reference to the fact that employee was exercising while not at work by using an elliptical machine; and after using the machine for two days employee noticed a sudden onset of pain in his right knee and calf. Again it was noted in employee's office visit on March 7, 2003 that employee began refereeing and that his knees were bothering him again. At that time Dr. Williams suggested that employee wear a brace to get him through the baseball season. It was further noted on April 24, 2003 that employee had been umpiring college baseball games and had been very active; specifically, that he was very busy

running up and down the lines to make calls. Dr. Williams noted that employee continued to have pain and requested a cortisone injection in order to keep up with his baseball games and finish out the season.

It is clear that employee's condition was bothered by his activity as an umpire; however the medical records do not make any specific references to his activities as a physical education teacher causing such problems. Therefore, it is difficult to conclude that his work activities were a factor, let alone a substantial contributing factor to the development of his right knee condition. In addition, employee testified to having a very active lifestyle outside of teaching and coaching. Employee testified that as his condition became worse, that he reduced his level of activity; however despite reducing his activity, employee's right knee condition continued to deteriorate. Physical activity may have increased employee's subjective pain complaints, but was not shown to be a substantial factor in causing the degenerative condition in his right knee. Employee was unable to show that any one activity was causally related to the development of his right knee degeneration.

In addition, the administrative law judge relies on the opinion of Dr. Volarich who is a doctor of osteopathic medicine, rather than employee's treating doctor who is a surgeon that specializes in orthopedic conditions. Instead of relying on employee's treating surgeon, the administrative law judge chose to rely on the opinion of Dr. Volarich who examined employee one time for the purpose of preparing a report for employee's workers' compensation case. Dr. Volarich evaluated employee, at the request of employee's counsel, on September 28, 2004, for the purpose of an independent medical examination only. Dr. Volarich opined that employee's work was a substantial factor in the development of his right knee degeneration. Dr. Volarich based his opinion on his examination of employee along with a review of employee's medical records. Dr. Volarich relied upon employee's truthfulness regarding the description of his job duties, injuries and complaints when preparing his report. Dr. Volarich opined that employee suffered a 75% permanent partial disability referable to the right knee, and found that 15% of that rating was due to employee's umpiring activities.

Dr. Williams, employee's treating surgeon, as well as Dr. Milne, orthopedic surgeon, disagreed with Dr. Volarich on the issue of medical causation. In contrast to Dr. Volarich, Drs. Williams and Milne, who are both orthopedic specialists, opined that employee's condition was not work-related.

Dr. Williams noted in his September 24, 2002 office visit that employee asked multiple questions about whether his job as a physical education teacher was a contributing factor to the arthritis in both his knees. Dr. Williams stated that he did not believe that it was; but that it was inherited soft cartilage which caused employee to develop arthritis in his knees. As employee's treating surgeon, Dr. Williams was well aware of employee's orthopedic problems and medical history. In fact, Dr. Williams treated employee for similar problems with his left knee as well as other orthopedic conditions over the years. Dr. Williams was most familiar with employee's right knee condition and would be in the best position to render an opinion as to medical causation.

Furthermore, Dr. Milne performed an independent medical evaluation at the request of employee's counsel on October 13, 2005 and concurred with Dr. Williams. Dr. Milne, like Dr. Williams, is an orthopedic surgeon and as such his opinion should be given greater weight than that of Dr. Volarich. Dr. Milne has greater expertise in orthopedic conditions and therefore is better equipped to assess and evaluate employee's right knee degeneration. After examining employee and evaluating his medical records, Dr. Milne opined that employee's symptoms, due to the degenerative changes in his knees, were related to a lifetime of wear and tear. Dr. Milne opined that employee would likely have the same type of problems in his knees regardless of his occupation. Dr. Milne based this on employee's age, height and weight, overall activity level and history of degenerative joint disease. Dr. Milne agreed with Dr. Williams that employee's condition was due to an inherited condition, osteoarthritis, and was not specifically causally connected to his employment as a physical education teacher.

Both Drs. Williams and Milne state convincingly that employee suffered from an inherent condition, osteoarthritis, and that his work was not a substantial contributing factor to the development of his condition.

I find the opinions of Drs. Milne and Williams to be most persuasive, credible and worthy of belief. Based on the medical evidence and testimony, it is reasonable to conclude that employee did not contract an occupational disease, but instead suffered from an ordinary disease of life.

There was insufficient evidence to establish that employee's work duties were a substantial factor in causing employee's right knee condition. Accordingly, I would reverse the decision of the administrative law judge and deny compensation in this case.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

Alice A. Bartlett, Member

AWARD

Employee:	William Davis	Injury No.:	02-153257
Dependents:	N/A	Before the	
Employer:	St. Louis Public Schools	Division of Workers'	
Additional Party:	Second Injury Fund	Compensation	
Insurer:	St. Louis City Board of Education	Department of Labor and Industrial	
Hearing Date:	May 7, 2007 continued to May 15, 2007	Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	LJW:tr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
 - Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
 - Date of accident or onset of occupational disease: September 9, 2002
 - State location where accident occurred or occupational disease was contracted: St. Louis City, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? N/A

8. Did accident or occupational disease arise out of and in the course of the employment? Yes

- 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: While performing his usual duties as a physical education teacher over thirty years, Employee developed right knee complaints resulting in surgery on September 9, 2002, and August 4, 2003.

12. Did accident or occupational disease cause death? No

13. Part(s) of body injured by accident or occupational disease: Right knee

- Nature and extent of any permanent disability: 40% right knee at the 160 week level, and SIF liability.

15. Compensation paid to-date for temporary disability: None

16. Value necessary medical aid paid to date by employer/insurer? None

Employee: William Davis

Injury No.: 02-153257

17. Value necessary medical aid not furnished by employer/insurer? \$60,336.31

- Employee's average weekly wages: Sufficient for maximum rates

19. Weekly compensation rate: \$649.32 / \$340.12

20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:	\$60,336.31
29 weeks of temporary total disability (or temporary partial disability)	\$18,830.28
64 weeks of permanent partial disability from Employer	\$21,767.68

22. Second Injury Fund liability: Yes

46.52 weeks of permanent partial disability from Second Injury Fund	\$15,822.38
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Total: \$116,756.65

23. Future requirements awarded: Pursuant to this award

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 in favor of the following attorney for necessary legal services rendered to the claimant: Charles Bobinette

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	William Davis	Injury No.: 02-153257
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	St. Louis City Public Schools	Department of Labor and Industrial Relations of Missouri
Additional Party:	Second Injury Fund	Jefferson City, Missouri
Insurer:	St. Louis City Board of Education	Checked by: LJW:tr

PRELIMINARIES

The above referenced Workers' Compensation claim was heard by the undersigned Administrative Law Judge on May 7, 2007, and continued on May 15, 2007. Post-trial memorandums were received, and the case was submitted on the June 29, 2007. Attorney Charles Bobinette represented William Davis (Claimant). St. Louis City Public Schools (Employer) were insured by the St. Louis City Board of Education, and represented by Attorney Eric Christensen. Assistant Attorney General Da-Niel Cunningham represented the Second Injury Fund (SIF). The case was heard with companion cases 00-179682, 00-179683, and 02-153253.

Prior to the start of the hearing the parties identified the issues for disposition in this case: arising out of and in the course/scope of employment; occupational disease; medical causation; medical expenses in the amount of \$60,336.31; temporary total disability (TTD), the liability of Employer and SIF for permanent partial disability (PPD) benefits, and future medical benefits. Hearing venue is correct, and jurisdiction properly lies with the Missouri Division of Workers' Compensation.

Claimant offered Exhibits A-U, Employer offered Exhibits 1-2, and SIF offered Exhibits I-II. All exhibits were admitted into the record without objection. On May 22, 2007, Claimant filed a motion to supplement the record. On May 25, 2007, with all parties present, Claimant's motion was heard and denied. Any markings contained within any exhibit were present when received, and the markings did not influence the evidentiary weight given the exhibit. Any objections not expressly ruled on in this award are overruled.

Findings of Fact

All evidence presented has been reviewed. Only testimony necessary to support this award will be reviewed and summarized.

1. Claimant is a sixty year old retired physical education (PE) teacher who worked for Employer for over 30 years. Claimant taught grades K-8, and his job duties required him to be on his feet 90-95% of the teaching day. Claimant would perform calisthenics, run laps, and demonstrate sports at least four times per day. Claimant primarily taught on tile gym floors, or on blacktop. In addition to his duties as a PE teacher, Claimant worked daily lunch room duty, coached after school sports, and umpired as a NCAA Division I baseball umpire during the collegiate baseball season. Although Claimant last worked in June 2002, he officially retired from teaching during October 2002.

2. During April 2002 Claimant used his elliptical machine at home. Two days later, Claimant noticed right knee and calf pain. During this time Claimant was also functioning in his role as a PE teacher for Employer. Claimant sought care with Dr. Williams, who had previously treated his left knee. Dr. Williams initiated conservative treatment including cortisone injections, suggested physical therapy with a chiropractor, and ordered an MRI. The MRI of Claimant's right knee was obtained on April 10, 2002, and demonstrated chronic attrition, a tear of the posterior horn of his medial meniscus, a joint effusion, a sprained medial collateral ligament, grade III chondromalacia of his patella, mild bursitis, and degenerative changes of his knee. Claimant continued to work.

3. On August 30, 2002, Claimant sought care with Dr. Williams after experiencing pain in his left shoulder. Dr. Williams administered a cortisone injection into the shoulder, and ordered a MRI. The MRI was obtained on August 31, 2002, and demonstrated a full thickness tear of Claimant's supraspinatus tendon.

4. Despite conservative treatment, Claimant's right knee symptoms persisted, and on September 9, 2002, Dr. Williams performed a right knee arthroscopy, partial medial meniscectomy, chondroplasty of the medial femoral condyle, and chondroplasty of the trochlea of the femur. Claimant was unable to work from September 9, 2002 through October 31, 2002.

5. On September 24, 2002, Claimant asked Dr. Williams if the condition of both knees was related to his work as a PE teacher, and Dr. Williams recorded as follows: "I do not believe it is. I believe it is inherited soft cartilage and he tends to get arthritis in his knees." By November 15, 2002, Dr. Williams noted Claimant had end-stage osteoarthritis in both knees. Conservative measures continued, including multiple cortisone injections.

6. On March 11, 2003, Dr. Williams noted Claimant needed to undergo bilateral knee replacements, but Claimant wanted to wait to proceed until the college baseball season had ended, as he was attempting to umpire at the Division I level.

7. On August 4, 2003, Claimant underwent bilateral total knee replacements. Post-operatively, Claimant underwent physical and aqua therapy, and received cortisone injections as needed. Claimant was unable to work from the date of surgery until March of 2004. Claimant resumed collegiate umpiring, and worked as an umpire until 2006. Total medical costs regarding Claimant's right knee totaled \$60,336.31.

8. Claimant has preexisting conditions involving his left knee, right and left shoulders, lumbar spine, and left and right plantar fascia releases. Claimant initially injured his left knee playing basketball in college. Prior to his September 9, 2002 injury, Claimant had undergone two left knee surgeries, had received nine cortisone injections into his left knee, and x-rays of his left knee demonstrated bone on bone. Regarding his right shoulder, during October 1996 an MRI revealed a ruptured biceps tendon that was not repaired. As stated previously, Claimant was diagnosed in August 2002 with a torn tendon and rotator cuff that was not surgically repaired. Regarding his lumbar spine, in 1997 an MRI for radicular complaints revealed degenerative disc disease at L4-5 with mild stenosis, and a small disc herniation at L3-4. On March 31, 1997, Claimant was pre-certified to receive a series of three lumbar epidural steroid injections at St. John's Mercy Medical Center. On July 26, 2000, Dr. Aubuchon performed a plantar fascia release of Claimant's left foot. On July 3, 2002, Claimant underwent a right plantar fascia release.

5. Dr. Volarich examined Claimant on September 28, 2004. Upon examination, Dr. Volarich noted weak and atrophied right quadriceps and hamstring muscles, swelling, and crepitus of his right knee, limitation in squatting, and

an inability to hop. Dr. Volarich opined Claimant's work was a substantial factor in the development of his right knee degeneration, the treatment provided by Dr. Williams was necessary, and the cost of the services provided was reasonable and customary. Dr. Volarich rated Claimant's overall disability from this condition at 75% PPD of the right knee, with 15% related to Claimant's umpiring duties.

6. Regarding Claimant's preexisting conditions, upon examination of Claimant's left knee, Dr. Volarich noted a weak and atrophied left quadriceps and hamstring muscles, swelling, and crepitus of his left knee. Regarding Claimant's shoulders, Dr. Volarich noted a positive impingement tests, crepitus, Popeye deformities, and decreased range of motion. Regarding Claimant's lumbar spine, Dr. Volarich noted restricted range of motion. Regarding Claimant's left and right feet, Dr. Volarich noted tenderness in the plantar surface located near the insertion site of the plantar fascia. Dr. Volarich rated Claimant's left knee at 75% PPD, his right shoulder at 40% PPD, his lumbar spine at 25% BAW PPD, 25% PPD of his right foot, 25% PPD of his left foot, and 40% PPD of his left shoulder. Dr. Volarich found Claimant's preexisting disabilities were a hindrance or obstacle to Claimant's employment, and the combination of his September 9, 2002 injury and preexisting conditions created a disability substantially greater than the simple sum.

7. Dr. Milne, an orthopedic surgeon, examined Claimant on October 13, 2005. Dr. Milne found Claimant's gait and range of motion to be consistent with a knee replacement. Dr. Milne opined: "I think these symptoms are related to a lifetime of wear and tear, both in his profession as a PE teacher, as well as his profession as an umpire and his active lifestyle." Dr. Milne opined Claimant's degenerative knee condition was an inherited case of osteoarthritis that was not specifically connected to work as a PE teacher, and without a specific trauma Dr. Milne could not find causation related to his employment. Dr. Milne found no disability to Claimant's right knee in the absence of a work connection.

8. As of hearing, Claimant testified surgery did help his symptoms, but he still experiences pain in his right knee that at times radiates down his leg. He no longer performs any impact activities, and he now bikes, swims, or uses his elliptical trainer for exercise. He avoids any activity that involves stairs, ladders or kneeling, and his bending is limited. Additionally, Claimant testified he does not have a family history of degenerative joint disease.

RULINGS OF LAW

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

Issues relating to course/scope, arising out of, occupational disease and medical causation

Claimant alleges an occupational disease of his right knee that arose from his work duties. Section 287.067 RSMo., defines occupational disease as:

... an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence."

In cases of alleged occupational disease, the disease must be occupationally induced, rather than an ordinary disease of life. *Hayes v. Hudson Foods, Inc.*, 818 S.W.2d 296 (Mo.App.1991) (overruled on other grounds). An occupational disease is not compensable if work is merely "a triggering or precipitating factor." §287.067.2 RSMo. The exposure to the disease must be greater or different from disease exposure to the general public, and there must be a disease/work link common to the specific job or profession. *Polavarapu v. General Motors Corp.*, 897 S.W.2d 63 (Mo.App. 1995). The work must be a substantial factor in the cause of the resulting medical condition or disability. §287.020.2 RSMo. A causative factor may be substantial even if it is not the primary or most significant factor. *Cahall v. Cahall*, 963 S.W.2d 368, 372 (Mo.App. 1998) (overruled on other grounds). Further, there is no minimum percentage set out in the Workers' Compensation Law defining "substantial factor." *Id.* Whether employment is a substantial factor in causing the injury is a question of fact. *Sanderson v. Porta-Fab Corp.*, 989 S.W.2d 599, 603 (Mo.App. 1999) (overruled on other grounds).

Determinations of this kind require the assistance of expert medical testimony. Medical causation not within lay understanding or experience requires expert medical evidence. *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596 (Mo.banc 1994) (overruled on other grounds). The weight to be accorded an expert's testimony should be determined by the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. *Choate v. Lily Tulip, Inc.*, 809 S.W.2d 102 (Mo.App. 1991) (overruled on other grounds). Dr. Volarich and Dr. Milne provided opinions regarding the cause of Claimant's right knee condition. Dr. Volarich found Claimant's work to have been a substantial factor in his development of right knee degeneration, and Dr. Milne opined Claimant's diagnosis is related to a lifetime of wear and tear both in his professional and personal life. The aggravation of a preexisting condition is a compensable injury if the claimant establishes a direct casual link between job duties and the aggravated condition. See *Smith v. Climate Engineering*, 939 S.W.2d 429, 433-34 (Mo. App. E.D. 1996) (overruled on other grounds). If a claimant can show that the performance of the usual and customary duties led to a breakdown or change in pathology, the injury is compensable. *Bennett v. Columbia Health Care*, 80 S.W.3d 524 (Mo.App.W.D. 2002) (overruled on other grounds). The worsening of a preexisting condition is a change in pathology. *Id.* at 529.

Whether Claimant's job duties caused or aggravated his condition, at a minimum his condition was aggravated. Claimant clearly suffered a change of pathology, Employer required Claimant to be on his feet while teaching and that encompassed 90-95% of his day, and as he taught he was performing his job duties as required by Employer. Claimant did have activities outside his work as a PE teacher, but the percentage of time spent in those activities pales in comparison to his work duties. There is no doubt Claimant had factors other than his work duties that placed him at risk for knee degeneration. However, as stated in *Cahall*, a causative factor may be substantial even if it is not the primary or most significant factor.

I do not find Claimant's use of a home elliptical trainer in April 2002 to be an intervening injury. The evidence presented does not indicate Claimant suffered symptoms on the day of use; rather, he noticed symptoms in his right knee two days later. During this time period, Claimant was also teaching. Claimant alleges his knee condition developed as an occupational disease over a significant period of time. The extensive medical findings at the time of surgery on September 9, 2002, support this contention. I find Dr. Volarich to be persuasive, and I find Claimant has met his burden to establish occupational disease, arising out of and in the course and scope of employment, and medical causation regarding his need for medical treatment of his right knee degeneration.

Issues relating to past medical expenses and temporary total disability

Claimant requests total reimbursement of medical expenses in the amount of \$60,336.31 related only to the treatment of his right knee. Section 287.140.1 RSMo., provides that an employer shall provide such medical, surgical, chiropractic, ambulance and hospital treatment as may be necessary to cure and relieve the effects of the work injury. Additionally, §287.140.3 RSMo., provides that all medical fees and charges under this section shall be fair and reasonable. A sufficient factual basis exists to award payment of medical expenses when medical bills and supporting medical records are introduced into evidence supported by testimony that the expenses were incurred in connection with treatment of a compensable injury. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo.banc 1989). Itemized bills were supported by the appropriate medical records, and Claimant's testimony. Drs. Volarich testified the medical treatment received was necessary, and the charges were reasonable and customary. Employer asserts it never waived its right to direct medical care, as all medical treatment was completed before it was aware of an alleged injury. On the other hand, Claimant can not make a demand for treatment unless he was aware the injury was work related. While what the Employer avers is true, and the awarding of the medical produces a harsh result, I do not have the powers of an equitable court. Claimant has met his burden of evidence. Accordingly, I find Employer liable for \$60,336.31 in medical expenses accrued by Claimant in an attempt to cure and relieve the effects of his work related injury.

Claimant also seeks TTD benefits for the period of recovery following surgery. TTD benefits are intended to cover a period of time from injury until such time as claimant can return to work. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641 (Mo.App. 1991) (overruled in part). The temporary compensation paid cannot exceed an amount equal to 105% of the state average weekly wage. §287.170.1(4) RSMo. Claimant had surgery after he retired from teaching; however, he continued to pursue his umpiring duties. Claimant did not collect unemployment while not

working due to treatment. As Claimant was retired during this time period, off work slips were not requested. However, Claimant's requested timeframe for TTD is supported by the medical evidence, and Dr. Volarich opined Claimant's recovery time was appropriate for a knee replacement. Claimant overlapped medical treatment for his right knee with the medical condition that is the subject of injury number 02-153253. Claimant has been awarded TTD benefits at the maximum rate allowed by law in the award issued for #02-153253, a period that encompasses a portion of the period at issue in the case at bar. I find Employer is only liable for TTD benefits covering a period of August 4, 2003 through February 22, 2004, or 29 weeks. Accordingly, I find Employer is liable for 29 weeks of TTD benefits or \$18,830.28.

Issues relating to permanent partial disability owed by Employer

A permanent partial award is intended to cover claimant's permanent limitations due to a work related injury and any restrictions his limitations may impose on employment opportunities. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641,646 (Mo.App. 1991) (overruled on other grounds). Dr. Volarich rated Claimant's injury as 60% PPD of his right knee. Dr. Milne found no disability. With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983) (overruled on other grounds). Taking into consideration the opinions expressed by the various physicians, the medical records, and Claimant's testimony, I award Claimant 40% PPD at the 160 week level referable to his right knee for which Employer is liable.

Issues relating to permanent partial disability owed by Second Injury Fund

Section 287.220.1 RSMo., provides that SIF is implicated in all cases of permanent partial disability where there has been previous disability that created a hindrance and obstacle to employment or re-employment, and the primary injury along with the pre-existing disability(s) reach a threshold of 50 weeks (12.5%) for a body as a whole injury or 15% of a major extremity. The combination of the primary and pre-existing conditions must produce additional disability greater than the simple sum of all the disabilities.

Claimant's previous disabilities include his left knee, right and left shoulders, lumbar spine, and left and right feet. SIF argues Claimant had worked without restrictions and in his chosen profession throughout his career; therefore, these disabilities could not have been a hindrance or obstacle to employment. But as observed by Dr. Volarich, the fact Claimant worked without a restriction doesn't mean Claimant didn't have problems doing various activities. The medical evidence speaks for the injuries. I find Claimant's preexisting left knee, bilateral shoulders, lumbar spine, and bilateral foot injuries rose to a level to produce a hindrance and obstacle to employment, and meet the statutory threshold needed for SIF liability. I further find at the time of Claimant's September 9, 2002 injury Claimant had a 50% PPD referable to his left knee , 15% PPD referable to each shoulder , 12.5% BAW PPD referable to his lumbar spine, and 15% PPD referable to each foot. I find when Claimant's last injury to his right knee is combined with his preexisting disabilities, the combination creates a substantially greater disability than the simple sum, and a synergistic affect occurs. Applying a 15% load factor, Claimant is entitled to receive 46.52 weeks of compensation from SIF or \$15,822.38.

Issues related to future medical care

Claimant seeks future medical care regarding his right knee. Claimant is not required to present evidence concerning the specific future medical treatment that will be necessary in order to receive an award of future medical care. *Landers v. Chrysler Corp.*, 963 S.W2d 275 (Mo.App. 1997) (overruled in part). Future medical benefits may be awarded if a claimant shows by reasonable probability that there will be a need for additional medical care due to the work-related injury. *Id.* When future medical benefits are awarded, the medical care must flow from the accident in order to hold an employer liable. *Id.* Reasonable probability is based on reason and experience that inclines the mind to believe, but leaves room for doubt. *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 320 (Mo.App. 1986).

Claimant currently is seen by Dr. Williams on an annual basis to assess the status of his prosthetic knee. Dr. Volarich has indicated Claimant's knee replacement is expected to last between 12–15 years depending on Claimant's

activity level. Claimant is currently 60 years old, and it is reasonable to expect his right knee prosthesis will need to be replaced at least once in his remaining lifetime. I find Claimant has met his burden to establish entitlement to future medical benefits regarding his right knee. Employer shall leave medical open as relates to Claimant's right knee, and provide ongoing treatment as directed by a competent physician.

CONCLUSION

In summary, Claimant sustained an occupational disease on September 9, 2002 that arose out of and in the course and scope of his employment with Employer. Claimant is awarded \$60,336.31 in past medical expenses, \$18,830.28 in past TTD benefits, and \$21,767.68 in permanent partial disability from Employer. Employer shall leave medical open as relates to Claimant's right knee. Claimant is also awarded \$15,822.38 from SIF. Claimant's attorney is entitled to a 25% lien of any payments made to Claimant.

Date: _____

Made by: _____

LINDA J. WENMAN
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey W. Buker
Acting Division Director
Division of Workers' Compensation

The motion, responses to the motion, and the order of the court are preserved with the marked exhibits.

One week later, Claimant underwent a left plantar fascia release, which is the subject of injury number 00-179683.

Section 287.020.3(1) defines injury as that which has arisen out of and in the course of employment. Section 287.020.3(2) instructs that to arise out of and in the course of employment an injury must meet four requirements; (a) the employment is a substantial factor causing the injury, (b) the injury is a natural incident of the work/employment, (c) the employment was a proximate cause of the injury, and (d) the injury is not from risk unrelated to the employment to which other workers would be equally exposed outside of employment in normal life.

The motion, responses to the motion, and the order of the court are preserved with the marked exhibits.

One week earlier, Claimant underwent bilateral vein stripping, which was the subject of injury number 00-179682.

Section 287.020.3(1) defines injury as that which has arisen out of and in the course of employment. Section 287.020.3(2) instructs that to arise

out of and in the course of employment an injury must meet four requirements; (a) the employment is a substantial factor causing the injury, (b) the injury is a natural incident of the work/employment, (c) the employment was a proximate cause of the injury, and (d) the injury is not from risk unrelated to the employment to which other workers would be equally exposed outside of employment in normal life.

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A TTD benefit overlap occurred, and will be addressed in companion case 02-153257.

The percentage of disability designated for this condition is increased from Claimant's July 6, 2000 injury due to the ongoing deterioration of Claimant's left knee.

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Claimant is not claiming his left knee replacement due to his initial college injury and ongoing treatment for his left knee throughout the years. Claimant is limiting his medical reimbursement request to his right knee, and although both knees were replaced on August 4, 2003, Claimant is confining his request to ½ of the total medical charges for his bilateral knee replacements.

In #02-153253, Claimant received TTD benefits from 7/3/02 – 10/31/02. In the case at bar, Claimant alleges two periods of TTD, 9/9/02 – 10/31/02 and 8/4/03 – 2/22/04.

The percentage of disability designated for this condition is increased from Claimant's July 6, 2000 injury due to the ongoing deterioration of Claimant's left knee.

SIF may argue Claimant's left shoulder condition is subsequent to his right knee, and the alleged date of injury to the right knee occurred during April 2002, however, Claimant's right knee did not become disabling until his first surgery on September 9, 2002. The date of injury as plead in his claim is correct.