

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

Injury No.: 07-069506

Employee: Patrick P. Fitzgerald
Employer: A & M Printing (Settled)
Insurer: American Family Insurance (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 7, 2011, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Robert B. Miner, issued February 7, 2011, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 7th day of December 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Patrick P. Fitzgerald

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed to award benefits to employee.

Employee suffered compensable work injuries resulting in significant permanent partial disability on July 31, 2007, when he tripped and fell onto a plate burner machine, injuring his left elbow, left shoulder, and neck. At the time he sustained these injuries, employee suffered from a preexisting permanent partial disability of the low back. Employee seeks permanent partial disability benefits from the Second Injury Fund for the increased disability resulting from the combination of the disability resulting from his work injuries of July 31, 2007, and the preexisting low back disability.

Employee injured his low back in 1989. Employee's back started hurting while he was at work. Employee was unable to stand straight up and the pain was so severe that he went to the emergency room. An MRI revealed retrolisthesis at L5 with disc degeneration and a central disc bulge at L5-S1. The doctors discussed surgery with employee but told him there was only a 50% chance of his back improving, so employee chose not to have the surgery. Plus, employee didn't have the money to pay for the surgery or to afford what might have been as much as a six month healing period. (Even though it appears employee might have had a workers' compensation claim for the low back, he did not pursue it, and thus was unable to get treatment via his employer's workers' compensation doctors). Employee's low back problems persisted over the years leading up to the work injury and prompted employee to seek periodic treatment for debilitating low back pain, including 8 or 9 visits to the emergency room. Each visit was the same. The doctors took an x-ray, told him he had a bulging disc, and gave him pain medication. Employee never sought more aggressive treatment for his low back problem because he didn't have insurance and couldn't afford it. But employee's low back pain was so bad that he sometimes could not walk or even stand up straight. Employee's back caused him trouble when driving and doing work at home. Employee had to change his plans whenever he had a flare-up of back pain, because the pain was so intense he was unable to do anything but lie down, sometimes for as long as two entire days. Employee missed work more than 20 times due to this condition.

Dr. Poppa evaluated employee and provided his expert medical opinion in this matter. Dr. Poppa believes employee's low back condition amounts to a 12.5% permanent partial disability of the body as a whole, and that it constituted a hindrance or obstacle to employment. Dr. Poppa opined that a 20% load factor best represents the synergistic interaction of the preexisting low back disability with the left elbow, left shoulder, and neck disability resulting from the July 2007 work injury. Dr. Poppa's expert medical opinion stands unopposed on the record. The Second Injury Fund did not provide a competing doctor's opinion in this matter. In fact, the only evidence offered by the Second Injury Fund was an exhibit consisting of medical records, and this was excluded from the record because it constituted inadmissible hearsay evidence.

Employee: Patrick P. Fitzgerald

- 2 -

Section 287.220.1 RSMo creates the Second Injury Fund and provides for the payment of permanent partial disability benefits where an employee with preexisting disabilities suffers enhanced disability following a work injury, so long as the preexisting disability and disability from the work injury are sufficiently serious to meet the statutory thresholds. Here, the administrative law judge denied employee's claim because he believed employee's preexisting low back disability wasn't serious enough to meet the threshold of 50 weeks for a body as a whole injury, even though this conflicts with Dr. Poppa's unopposed expert opinion. Remarkably, the administrative law judge denied employee's claim for compensation even though he specifically found credible employee's testimony about his back problems, including employee's testimony about visiting the emergency room numerous times, missing 20 or more days from work, having to change his plans due to flare-ups, and having problems performing his work due to his low back. A close look at the award reveals why the administrative law judge made this choice:

Claimant has not had back surgery. While Claimant has continued to have back pain every week or every two and has needed to occasionally change plans, he was not taking pain medication on a consistent basis prior to his July 31, 2007, accident. He has not had follow-up pain management treatment for his back pain. He has not had epidural shots for his back. He has not had chiropractic treatment or physical therapy for his back.

Award, page 20.

These and other comments in the award make clear that the administrative law judge denied employee's claim because employee didn't get a lot of medical treatment for his low back. Why didn't employee seek more treatment?

Q. With regard to your back, sir, have you ever had medical insurance that would cover treatment on your back?

A. No.

Q. Could you afford treatment on your back on your own?

A. No.

Transcript, page 37.

The foregoing exchange between employee and his attorney stands unopposed on the record. Employee didn't get more treatment for one reason. He couldn't afford it. So, here we have an employee who credibly testified that he has a seriously disabling preexisting low back problem but that he didn't seek a lot of treatment for it because he didn't have insurance and couldn't afford that treatment. We also have an administrative law judge who credited employee's testimony but nevertheless denied his claim because employee didn't provide an extensive treatment record in connection with the low back. Stated another way, the administrative law judge denied compensation for a condition

Employee: Patrick P. Fitzgerald

- 3 -

that he *believes employee has* solely because employee could not afford to get the treatment that would have provided a more extensive treatment record.

Setting aside for a moment the glaring injustice inherent in this result, I wish first to point out that nothing in the Missouri Workers' Compensation Law or Missouri case law requires that an employee bring copious medical treatment records—or even a medical expert's evaluation—to a workers' compensation hearing where (as here) a complex question of medical causation is not an issue. To the contrary, the courts have long held that an employee's testimony alone is sufficient to support an award of benefits. See *Riggs v. Daniel International*, 771 S.W.2d 850, 852 (Mo. App. 1989); *Ford v. Bi-State Dev. Agency*, 677 S.W.2d 899, 904 (Mo. App. 1984); *Fogelsong v. Banquet Foods Corp.*, 526 S.W.2d 886, 892 (Mo. App. 1975); and *Smith v. Terminal Transfer Co.*, 372 S.W.2d 659, 665 (Mo. App. 1963). Especially where the administrative law judge specifically stated that he believed employee's testimony as to the nature and extent of his low back disability, it runs directly contrary to Missouri law to deny his claim solely because he did not provide medical records establishing numerous medical visits and procedures referable to the low back. But what is all the more troubling here is that employee did not even have those records to provide because he could not afford to seek such treatment.

The administrative law judge lists surgery, epidural steroid shots, physical therapy, chiropractic treatment, medications, and other treatments, as if employee were totally free to pick and choose among these options and simply elected not to because his back problem wasn't that bad. The administrative law judge ignores that for someone without medical insurance, these treatments are effectively unavailable due to their astronomical and wholly prohibitive cost. The administrative law judge turns a blind eye to the reality of the situation. It wasn't that employee decided his bulging disc at L5-S1 didn't really bother him. It was that he could not afford to have it treated. The administrative law judge's and majority's choice to deny benefits here works the effect of punishing someone for being unable to afford treatment that they needed. This was never the intent of the Missouri Workers' Compensation Law.

I find employee sustained a 12.5% permanent partial disability of the body as a whole referable to his low back condition including the bulging disc at L5-S1. This meets the applicable 50-week threshold for triggering Second Injury Fund liability under § 287.220.1. Because employee's primary injuries clearly resulted in permanent partial disability that exceeds the threshold, I would reverse the decision of the administrative law judge and award employee the permanent partial disability enhancement benefits to which he is entitled.

Because the majority has determined otherwise, I respectfully dissent from the decision of the Commission.

Curtis E. Chick, Jr., Member

AWARD

Employee: Patrick P. Fitzgerald

Injury No.: 07-069506

Employer: A & M Printing (settled)

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

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

Insurer: American Family Insurance (settled)

Hearing Date: December 16, 2010

Checked by: RBM

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? No as to the Second Injury Fund.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: July 31, 2007.
5. State location where accident occurred or occupational disease was contracted: Kansas City, Platte County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee tripped over a loose carpet and fell.

12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Left upper extremity and neck.
14. Nature and extent of any permanent disability: Not determined as to July 31, 2007 primary injury.
15. Compensation paid to-date for temporary disability: \$23,022.15.
16. Value necessary medical aid paid to date by employer/insurer? \$37,963.92.
17. Value necessary medical aid not furnished by employer/insurer? Not determined.
18. Employee's average weekly wages: \$684.54.
19. Weekly compensation rate: \$389.04 for permanent partial disability.
20. Method wages computation: By agreement of the parties.

COMPENSATION PAYABLE

21. Amount of compensation payable: None as to Employer. Employer has previously settled.
22. Second Injury Fund liability: None. Employee's claim against the Second Injury Fund is denied.

TOTAL FROM SECOND INJURY FUND: None.

23. Future requirements awarded: None.

Employee's claim against the Second Injury Fund is denied.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Patrick P. Fitzgerald

Injury No.: 07-069506

Employer: A & M Printing (settled)

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

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

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PRELIMINARIES

A final hearing was held in this case on Employee's claim against The Treasurer of the State of Missouri as Custodian of the Second Injury Fund on December 16, 2010 in Riverside, Missouri. Employee, Patrick P. Fitzgerald, appeared in person and by his attorney, Michael W. Downing. The Treasurer of the State of Missouri as Custodian of the Second Injury Fund appeared by its attorney, Benita Seliga. Employer, A & M Printing, and Insurer, American Family Insurance, previously settled and did not appear or participate in the hearing. Michael W. Downing requested an attorney's fee of 24% from all amounts awarded. The attorneys waived filing post-hearing briefs.

STIPULATIONS

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

1. On or about July 31, 2007, Patrick P. Fitzgerald ("Claimant") was an employee of A & M Printing ("Employer") and was working under the provisions of the Missouri Workers' Compensation Law.
2. On or about July 31, 2007, the liability of Employer under said law was fully insured by American Family Insurance.
3. On or about July 31, 2007, Claimant sustained an injury by accident in Kansas City, Platte County, Missouri, arising out of and in the course of his employment.
4. Employer had notice of Claimant's alleged injury.
5. Claimant's Claim for Compensation was filed within the time allowed by law.

6. The average weekly wage was \$684.54, and rate of compensation for permanent partial disability is \$389.04 per week.

7. Employer/Insurer has paid \$23,022.15 in temporary disability compensation.

8. Employer/Insurer has paid \$37,963.92 in medical aid.

ISSUES

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

1. Nature and extent of permanent partial disability.
2. Liability of the Second Injury Fund for permanent partial disability benefits.

Claimant testified in person. In addition, Claimant offered the following exhibits which were admitted in evidence without objection (Dr. Poppa's deposition was admitted subject to objections contained in the deposition):

A—Dr. Michael Poppa Deposition and deposition exhibits, and

B—Stipulation for Compromise Settlement.

The Second Injury Fund did not offer any additional witnesses. The Second Injury Fund offered SIF Exhibit 1, two pages of medical notes. Claimant objected to the admission of SIF Exhibit 1. The objection was sustained and SIF Exhibit 1 was not admitted in evidence.

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

Findings of Fact

Summary of the Evidence

Claimant worked for Employer as a press operator. He printed business cards and envelopes and loaded and unloaded paper.

On July 31, 2007, Claimant injured his left elbow, left shoulder, and neck when he tripped over a loose carpet and fell into a plate burner machine while he was working for

Employer. He was first treated at St. Luke's. He was later treated at the Headache and Pain Center where he had MRIs of his neck and shoulder. He had physical therapy. He was referred to Dr. Satterlee who performed left shoulder surgery on February 14, 2008. He was then sent to Dr. Hylton for evaluation of his neck injury. Dr. Hylton did not recommend surgery on his neck.

Claimant followed with Dr. Satterlee for left elbow complaints. Dr. Satterlee performed left elbow surgery on July 8, 2008. Dr. Satterlee released Claimant in October 2008.

Claimant was sent by his attorney to Dr. McMillan for evaluation of his neck condition. Dr. MacMillan recommended Claimant have surgery on his neck. Claimant did not want neck surgery and did not have neck surgery. He settled his worker's compensation case against Employer for 30 1/2% of the body.

Claimant continues to have problems with his left arm. He has pain in his left arm and has to let his arm rest. He has trouble picking up things. His left arm wears out more quickly than before the July 31, 2007 injury. His left elbow, left shoulder, and neck get fatigued. Pain keeps him from doing things. He has numbness in his ring and little finger on the left side.

Claimant was terminated by Employer after he was released from treatment. Claimant had worked for Employer for five years when he was injured on July 31, 2007.

Claimant found a job four months before the December 16, 2010 hearing that is less physical and less stressful than his job for Employer. In his current job, he puts molds on the ends of wires and puts wire into a machine. Claimant sits about fifty percent of the time and stands about fifty percent of the time in his current job. He earns less money now than he did for Employer.

Claimant injured his lower back in the late 1980's or early 1990's when his back just began hurting at work. He went to the emergency room and had x-rays for bulging disks. He did not claim a work related injury. The pain in his lower back prevented him from standing up straight. He went to Truman Medical Center where he had follow-up care. He was told back surgery was available but that he had only a fifty-fifty chance of improving. He would have been off work for six months if he had surgery. He could not pay for surgery and declined surgery.

Claimant has had periodic medical care for low back pain since he first injured his back. He has been to the hospital between six and eight times for x-rays. He has taken pain medication. Claimant testified that he did not have more treatment for his back because he did not have medical insurance and could not afford it.

Claimant testified his back problems have caused problems with work. His back has hurt to the point where he could not stand or walk. He lay in bed until he stopped hurting. It usually took a day or two for the pain to stop. Claimant testified he had missed work over twenty times before July 31, 2007 because of his back.

Claimant testified he continues to have back problems today. He stated sometimes his back hurts every week. His back hurts on average every week or every two weeks. His pain has interfered with activities of daily living and has caused him to change plans.

Claimant has sometimes taken pain medication, and at other times has not medication, when his back has hurt. He has not had follow-up pain management treatment for his back pain. He has not had epidural shots for his back. He has not had chiropractic treatment or physical therapy for his back. He has never had back surgery.

Claimant worked in printing for twenty-five years. His duties were pretty much the same during that time. His job duties included loading paper onto a machine and sometimes handling cases of reams that weighed generally forty pounds.

Claimant testified that he had been on medicine for diabetes for eight years before the accident.

Claimant was born on July 27, 1965 and is forty-five years old.

The ALJ did not observe Claimant to appear to be in pain during the hearing in this case.

I find the Claimant's testimony to be credible unless discussed otherwise later in this award.

Evaluation of Dr. Michael Poppa

Exhibit A contains the deposition of Dr. Michael Poppa taken on September 23, 2010, with Poppa Deposition Exhibit 1, his Curriculum Vitae, and Poppa Deposition Exhibit 2, his August 25, 2009 report addressed to Claimant's attorney pertaining to Claimant. Dr. Poppa is Board Certified by the American Osteopathic Board of Preventive Medicine. He is a Certified Independent Medical Examiner, as certified by the American Board of Independent Medical Examiners. He has active licenses in Missouri, Kansas, and Oklahoma. He is affiliated with two hospitals.

Dr. Poppa testified that he is the onsite physician for two companies where he examines and treats work related injuries and personal conditions and is involved in case management. He also reviews drug screens. He treats in his office. He testified most of his time is spent on independent medical evaluations in Missouri and Kansas.

Dr. Poppa testified he evaluated Claimant at Claimant's attorney's request on August 25, 2009. He authored his August 25, 2009 report, Deposition Exhibit 2.

Dr. Poppa's report states in part at pages 1-2:

Mr. Fitzgerald also presents history of a pre-existing lumbar condition, which pre-existed his recent work accident dated 7/31/07 (Missouri Injury #07-069506). In this regard, I reviewed the following medical records, which support Mr. Fitzgerald's history of a chronic lumbar condition including:

- Medical records from The Headache & Pain Center (Page 2 of 4) indicate under 'Serious Injuries' – Back injury: Bulging disc in lumbar.

- Emergency department record – St. Luke's Hospital of Kansas City dated 3/11/04 indicates Mr. Fitzgerald was seen, evaluated and received treatment for lumbar pain.

- A lumbar MRI from the CPS Diagnostic Imaging & Stroke Center dated 4/19/89 indicates, 'Again demonstrated is grade I retrolisthesis¹ on L5 on S1. On the T2 weighted images there is decreased signal intensity from the L5-S1 disc level representing disc degeneration. In addition, there appears to be a central disc bulge at that level. Distal portion of the spinal cord is noted and appears to be grossly normal.'

Dr. Poppa's report states in part under the section titled "Examination":

'They did offer surgery on my back but said I would be in a body cast for 6 months.' 'I have missed work because of it and some days it hurts and I can't stand up' (lumbar spine) 'I know there was at least a

¹ "Retrolisthesis" is defined as "backward slippage of one vertebra onto the vertebra immediately below." *The Free Dictionary by Farlex*, <http://medical-dictionary.thefreedictionary.com/retrolisthesis>.

half dozen times at my last job and told Mark.' (lumbar spine) 'I do get some pain down my leg.'

Physical examination reveals reflexes of his lower extremities are active and symmetrical bilaterally. Seated straight leg raising produced left low back pain greater than on the right. Mr. Fitzgerald voiced complaints of pain on palpation overlying his lumbosacral area on the left greater than the right. Lumbar range of motion was decreased with associated pain complaints at end range of all motion. Mr. Fitzgerald performed heel and toe walking satisfactorily.

Dr. Poppa's report states the following Conclusions (pp. 3-4):

Based upon today's history, physical examination and review of provided medical records, I have the following opinions:

- 1) Prior to 7/31/07, Mr. Fitzgerald did have residual permanent partial disability involving his lumbar spine, judged to be of a moderate severity with persistent lumbar pain and lower extremity radiculopathy. It is my opinion Mr. Fitzgerald's pre-existing lumbar condition represents a 12.5% permanent partial disability of the body as a whole.
- 2) It is my opinion that Mr. Fitzgerald's chronic lumbar condition prior to 7/31/07, did constitute a hindrance or obstacle to employment or re-employment if he became unemployed.
- 3) It is my opinion that when one combines the permanent partial disability involving his lumbar impairment with the additional permanent partial disability (30.5% body as a whole, MO Injury #07-069506), a significant enhancement of the combined disabilities arises above the simple arithmetic sum of the separate disabilities. In combination, an enhancement factor of 20% above the simple arithmetic sum of the separate disabilities is felt to be appropriate.

The above medical opinions are based on a reasonable degree of medical certainty.

Dr. Poppa testified regarding portions of his report. His testimony is consistent with his report. Dr. Poppa testified he reviewed records identified in his report. These included records of Drisko, Fee & Parkins, P.C., Dr. Craig Satterlee, and Dr. Jeffrey

MacMillan. Dr. Poppa noted Claimant's complaints, including his arm and shoulder hanging down, Claimant getting worn out easily in his neck, and his neck "killing" him.

Dr. Poppa was asked the following questions and gave the following answers (Poppa deposition, pp. 14-15):

Q. And you rated the preexisting back injury, correct?

A. Yes, I did.

Q. What rating did you assign?

A. It was my opinion that, as a result of Mr. Fitzgerald's moderate severity with persistent lumbar pain and lower extremity radiculopathy, his condition was consistent with a 12.5 percent permanent partial disability of the body as a whole.

Q. That lumbar pain was 20 years of duration?

A. He described it as off and on and talked to his employer, as I stated, went to the ER, as I indicated, also, for back pain.

Q. This had been going on for 20 years?

A. Correct.

Q. Did you consider the preexisting back injury to be a hindrance or an obstacle to employment?

A. Yes.

Q. Why?

A. In an individual with chronic lower back pain and especially with lower extremity radiculopathy, those individuals are – do experience pain – back pain and lower extremity pain that oftentimes prohibits them or does not allow them to do their regular job duties and/or turn down jobs. Those individuals have problems in bending, lifting, twisting, independent also from the chronic pain that he experienced.

Q. Did you assign a loading factor?

A. Yes.

Q. What was it?

A. It was my opinion that a 20 percent enhancement or loading factor was appropriate and, as a result of the combination of his preexisting – I'm sorry, primary conditions, work conditions, involving his neck, back, and elbow and that the combination of multiple body parts, extremities, neck, in combination with a lumbar disability, did create a situation where the simple arithmetic sum of the separate disabilities – the combined disabilities, I'm sorry, combined disabilities, did arise above the simple arithmetic sum of the separate disabilities in combination.

Q. Did you consider the synergistic effects of the two injuries?

A. Yes.

Dr. Poppa did not rate Claimant's diabetic condition as being part of the preexisting condition because he did not think it rose to the level that would constitute a hindrance or obstacle to employment at 12 ½% of the body as a whole. Dr. Poppa stated his answers had been within a reasonable degree of medical certainty.

Dr. Poppa did not do any vocational testing for Claimant.

Dr. Poppa acknowledged on cross-examination that the 2004 St. Luke's Hospital intake record references an acute back complaint, not a chronic complaint. Dr. Poppa testified that he was not given any other medical records on the lumbar spine between 2004 and 2007 after the April 2004 St. Luke's emergency room record.

Dr. Poppa agreed that in his review of the medical records, he did not see any references in the low back where Claimant was on narcotic pain medication from any doctor. He did not see any records where Claimant had any work restrictions regarding his lumbar back. He did not see anything in the records where Claimant said he could not perform any work because of his lumbar back prior to July 31, 2007.

Dr. Poppa did not see in his review of the records that Claimant complained that he could not do any lifting or squatting because of his lumbar condition prior to July 31, 2007, or that he was having trouble climbing on ladders, bending, twisting, or turning side to side because of his lumbar condition. He did not see any complaints prior to July 31, 2007 in the records where Claimant said he was having trouble using vibrating tools,

sitting long periods, or driving long periods aggravating his lumbar condition. He did not see any complaints in the records stating that Claimant could not push or pull or was having trouble lifting certain amounts because of his lumbar condition prior to July 31, 2007.

Dr. Poppa agreed that Claimant did not have surgery on the lumbar condition. The records he reviewed did not indicate that Dr. Zarr offered Claimant epidural shots.

Dr. Poppa was asked the following questions and gave the following answers (Poppa deposition, pp. 41-42):

Q. Because, in your earlier testimony, you said enhancement, then you used the word "load," then you used the word "synergism." So I'm a little confused.

A. Okay.

Q. Are those words, according to you, interchangeable?

A. Loading and enhancement are.

Q. Okay.

A. Synergistic effect doesn't, in my opinion, the synergistic effect – or synergism applies to the medical conditions when combined do they – do they create a greater problem for an individual from a medical standpoint than either of those individual conditions separately. The loading factor and enhancement factor then is an arithmetic number placed upon a synergism that is created by the combined medical conditions.

Q. So why are you placing an enhancement factor of 20 on a condition, according to the medical facts, he's got one condition that he, according to the medical records that you referred to, he didn't have an operation for, he has another condition which I believe, according to your medical records that you referred – that you reviewed, the lumbar condition, he had no surgery, he was under no restrictions, he had no – under no pain medication, no narcotic pain medication, he was receiving no ongoing treatment, is that correct, I guess, according to the records that you received, he only saw the doctor, according to the records that you have, three times over a 20-year period, is that right?

A. Well, from a medical standpoint, the wedge deformities of his thoracic spine is permanent and he's had problems.

Dr. Poppa was asked the following questions and gave the following answers (Poppa deposition, pp. 43-44):

Q. What I'm trying to understand is why you gave a 20 percent load factor.

A. Okay. First – well, then I'll start with his medical conditions. The preexisting lumbar condition was, in my opinion, significant. He demonstrated – he does have a wedge deformity of T12 which is chronic and permanent and painful. He has Grade 1 retrolisthesis of L5, which is also permanent and causes chronic pain. That chronic pain, the bulging disk, the fact that – just that alone warrants a, in my opinion, a 12.5 percent disability, given the treatment that we have and treatment we don't know about -- I can only assume – combined, so now we have an individual with a – what I'm going to describe as a chronic bad back. He has problems with it all the time, and you combine that with an individual who has a chronically painful neck, shoulder, and elbow and has undergone significant treatment and that case was ultimately settled for 30.5 percent body as a whole, from a medical standpoint, somebody with a bad neck, shoulder, and elbow combined with a bad back, there are multiple or – there are many problems that that individual has and baggage associated with that individual as it relates to activities of daily living and work duties that maybe now they can't do because of the combination.

Dr. Poppa was asked the following questions and gave the following answers (Poppa deposition, p. 51):

Q. So, in an entire span of medical history of the records that you have from 1989 until 2007, he seeks treatment two times for his lumbar condition, is that correct?

A. That I know of, yes.

Q. That you've been provided, is that correct?

A. Correct, yes.

Dr. Poppa was asked the following questions and gave the following answers (Poppa deposition, p. 54):

Q. These conditions were present 20 years ago?

A. Yes.

Q. Serious medical conditions of his lumbar spine?

A. Yes.

Q. They are not going to go away?

A. Correct.

Q. He had no surgery to correct them?

A. Correct.

Q. Are they likely to become worse over time?

A. Absolutely.

Q. Okay. And, with reference to when he went into the emergency room at St. Luke's in 2004, he did have an acute strain on his back that day as noted in the records, correct?

A. Yes.

Medical Treatment Records

No medical treatment records were offered in evidence.

Rulings of Law

Based on a comprehensive review of the substantial and competent evidence and the application of the Workers' Compensation Law, I make the following Rulings of Law:

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

Section 287.808, RSMo² provides:

The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation under this chapter is on the employee or dependent. In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true.

Section 287.800, RSMo provides:

1. Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts shall construe the provisions of this chapter strictly.

2. Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, and the division of workers' compensation shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.

The claimant in a workers' compensation proceeding has the burden of proving all elements of the claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 912 (Mo.App. 2008); *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo.App. 1997), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 226 (Mo. banc 2003).³ The quantum of proof is reasonable probability. *Thorsen v. Sachs Elec. Co.*, 52 S.W.3d 616, 620 (Mo.App.2001); *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655

² All statutory references are to RSMo 2006 unless otherwise indicated. In a workers' compensation case, the statute in effect at the time of the injury is generally the applicable version. *Chouteau v. Netco Construction*, 132 S.W.3d 328, 336 (Mo.App. 2004); *Tillman v. Cam's Trucking Inc.*, 20 S.W.3d 579, 585-86 (Mo.App. 2000). *See also Lawson v. Ford Motor Co.*, 217 S.W.3d 345 (Mo.App. 2007).

³ Several cases are cited herein that were among many overruled by *Hampton* on an unrelated issue (*Id.* at 224-32). Such cases do not otherwise conflict with *Hampton* and are cited for legal principles unaffected thereby; thus *Hampton's* effect thereon will not be further noted.

(Mo.App. 1995); *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 199 (Mo.App. 1990). "Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." *Thorsen*, 52 S.W.3d at 620; *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 329 (Mo.App 1986); *Fischer*, 793 S.W.2d at 198. Such proof is made only by competent and substantial evidence. It may not rest on speculation. *Griggs v. A. B. Chance Company*, 503 S.W.2d 697, 703 (Mo.App. 1974). Expert testimony may be required where there are complicated medical issues. *Goleman v. MCI Transporters*, 844 S.W.2d 463, 466 (Mo.App. 1992). "Medical causation of injuries which are not within common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause." *Thorsen*, 52 S.W.3d at 618; *Brundige v. Boehringer Ingelheim*, 812 S.W.2d 200, 202 (Mo.App 1991).

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

Section 287.190, RSMo provides for permanent partial disability benefits. Section 287.190.6(2), RSMo provides:

Permanent partial disability or permanent total disability shall be demonstrated and certified by a physician. Medical opinions addressing compensability and disability shall be stated within a reasonable degree of medical certainty. In determining compensability and disability, where inconsistent or conflicting medical opinions exist, objective medical findings shall prevail over

subjective medical findings. Objective medical findings are those findings demonstrable on physical examination or by appropriate tests or diagnostic procedures.

The determination of the degree of disability sustained by an injured employee is not strictly a medical question. *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 284 (Mo.App. 1997); *Cardwell*, 249 S.W.3d at 908 (Mo.App. 2008); *Sellers v. Trans World Airlines, Inc.*, 776 S.W.2d 502, 505 (Mo.App. 1989). While the nature of the injury and its severity and permanence are medical questions, the impact that the injury has upon the employee's ability to work involves factors, which are both medical and nonmedical. Accordingly, the Courts have repeatedly held that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission. *Sharp v. New Mac Elec. Co-op*, 92 S.W.3d 351, 354 (Mo.App. 2003); *Elliott v. Kansas City, Mo., School District*, 71 S.W.3d 652, 656 (Mo.App. 2002); *Sellers*, 776 S.W.2d at 505; *Quinlan v. Incarnate Word Hospital*, 714 S.W.2d 237, 238 (Mo. App. 1985); *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983); *Barrett v. Bentzinger Bros.*, 595 S.W.2d 441, 443 (Mo.App. 1980); *McAdams v. Seven-Up Bottling Works*, 429 S.W.2d 284, 289 (Mo.App. 1968). The fact-finding body is not bound by or restricted to the specific percentages of disability suggested or stated by the medical experts. *Cardwell*, 249 S.W.3d at 908; *Lane v. G & M Statuary, Inc.*, 156 S.W.3d 498, 505 (Mo.App. 2005); *Sharp*, 92 S.W.3d at 354; *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 885 (Mo.App. 2001); *Landers*, 963 S.W.2d at 284; *Sellers*, 776 S.W.2d at 505; *Quinlan*, 714 S.W.2d at 238; *Banner*, 663 S.W.2d at 773. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences in arriving at the percentage of disability. *Cardwell*, 249 S.W.3d at 908; *Fogelsong v. Banquet Foods Corporation*, 526 S.W.2d 886, 892 (Mo.App. 1975).

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

Section 287.220.1, RSMo provides in part:

All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for.

“To create Second Injury Fund liability, the pre-existing disability must combine with the disability from the subsequent injury in one of two ways: (1) the two disabilities combined result in a greater degree of disability than the sum of the degree of disability from the pre-existing condition and the degree of disability from the subsequent injury; or (2) the pre-existing disability combines with the disability from the second injury to create

permanent total disability.” *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173, 178 (Mo.App. 1995).

In order for a claimant to recover against the Second Injury Fund, he or she must prove that he or she sustained a compensable injury, referred to as “the last injury,” which resulted in permanent partial disability. Section 287.220.1 RSMo. A claimant must also prove that he or she had a pre-existing permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment should he or she become unemployed; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15% for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo.App. 2008) (Citations omitted). In order for a claimant to be entitled to recover permanent partial disability benefits from the Second Injury Fund, he or she must prove that the last injury, combined with his or her pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. *Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 138 S.W.3d 714, 717-18 (Mo. banc 2004).

“When a claim is made against the Fund for permanent disability compensation, statutory language and case law make it mandatory that the Claimant provide evidence to support a finding, among other elements, that he had a preexisting permanent “disability.” (Omitting citations). The disability, whether known or unknown, must exist at the time the work-related injury was sustained, *and* be of such seriousness as to constitute a hindrance or obstacle to employment or re-employment should the employee become unemployed.” *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 214 (Mo.App. 1999); *Luetzinger v. Treasurer of Mo.*, 895 S.W.2d 591 (Mo.App. 1995) (emphasis added). “The nature and the extent of the permanent-partial preexisting condition must be proven by a reasonable degree of certainty. (Omitting citation). Expert opinion evidence is necessary to prove the extent of the preexisting disability.” *Messex*, 989 S.W.2d at 215.

Claimant must show that: (1) he or she has preexisting disability that reaches Second Injury Fund threshold, (2) he or she has additional disability from a compensable injury that qualifies for Second Injury Fund threshold, and (3) that his or her preexisting disability combines with his or her present injury to result in a greater degree of disability than the sum of either disabilities alone, “. . . that is, a synergistic enhancement in which the combined totality is greater than the sum of the independent parts.” *Searcy*, 894 S.W.2d at 178.

The parties stipulated, and I find that on or about July 31, 2007, Claimant sustained an injury by accident in Kansas City, Platte County, Missouri, arising out of and in the course of his employment for Employer.

Claimant does not allege permanent total disability in his claim against the Second Injury Fund.

The nature and extent of any preexisting disability, and whether that disability meets the statutory threshold for Second Injury Fund liability required by Section 287.220, RSMo must be determined. Based on substantial and competent evidence, I find Claimant did not have preexisting permanent partial disability at the time of his July 31, 2007 accident that meets the statutory threshold for Second Injury Fund liability. I find Claimant's preexisting permanent partial disability at the time of his July 31, 2007 accident was 5% of the body as a whole (400 week level), and that this preexisting permanent partial disability relates to Claimant's low back condition. Claimant's claim against the Second Injury Fund is therefore denied. Factors which support these findings include the following.

Dr. Poppa did not rate Claimant's diabetic condition as being part of the preexisting condition because he did not think it rose to the level that would constitute a hindrance or obstacle to employment at 12 ½% of the body as a whole. Claimant did not offer any medical records or testimony to support a claim that he had a preexisting permanent partial disability at the time of his July 31, 2007 accident that relates to his diabetic condition. I find Claimant did not prove that he had a preexisting permanent partial disability at the time of his July 31, 2007 accident that relates to his diabetic condition.

Dr. Poppa's report concludes Claimant had preexisting 12.5% preexisting permanent partial disability of the body as a whole "judged to be of a moderate severity with persistent lumbar pain and lower extremity radiculopathy." Dr. Poppa testified Claimant "does have a wedge deformity of T12 which is chronic and permanent and painful. He has Grade 1 retrolisthesis of L5, which is also permanent and causes chronic pain. That chronic pain, the bulging disk, the fact that – just that alone warrants a, in my opinion, a 12.5 percent disability. . . ." (Poppa deposition page 43-44.) I do not find these opinions of Dr. Poppa to be credible.

The lack of medical treatment records and employment records in evidence relating to Claimant's low back condition convinces me that Claimant's low back condition is not as severe as Dr. Poppa has found it to be. I believe if Claimant had a chronic "bad back" as described by Dr. Poppa, Claimant would have received significantly more medical treatment than he received. The records described by Dr. Poppa demonstrate three visits to a medical provider for back complaints, including treatment in 1989 and 2004. Claimant testified he went to the emergency room between six and eight times for x-rays for his back condition. I find this testimony to be true, and I find Claimant went to the emergency room between six and eight times for x-rays before

July 31, 2007 because of back pain. However, no emergency room records were provided to Dr. Poppa to review, and none were offered in evidence. The nature and extent of Claimant's complaints, the diagnoses, and the treatment recommendations set forth in the medical records relating to those emergency room visits is unknown.

Dr. Poppa acknowledged the medical history in the records that he had from 1989 until 2007 show Claimant sought treatment only two times for his lumbar condition. Dr. Poppa agreed that in his review of the medical records, he did not see any references in the low back where Claimant was on narcotic pain medication from any doctor, where Claimant had any work restrictions regarding his lumbar back, or where Claimant said he could not perform any work because of his lumbar back, prior to July 31, 2007.

Dr. Poppa did not see in his review of the records that Claimant complained that he could not do any lifting or squatting because of his lumbar condition, or that he was having trouble climbing on ladders, bending, twisting, or turning side by side because of his lumbar condition. He did not see any complaints in the records where Claimant said he was having trouble using vibrating tools, sitting long periods, or driving long periods aggravating his lumbar condition, or that Claimant could not push or pull or was having trouble lifting certain amounts because of his lumbar condition, prior to July 31, 2007.

Dr. Poppa examined Claimant and noted Claimant's lower extremity reflexes were active and symmetrical bilaterally. Dr. Poppa made no reference to Claimant having low back fracture, muscle guarding, or lower extremity atrophy. He did not quantify the extent of Claimant's lumbar loss of motion. Dr. Poppa's report makes no reference to him having obtained or reviewed any current x-rays, MRI's, or other electrodiagnostic studies relating to Claimant's low back.

Dr. Poppa testified Claimant had problems with his back "all the time." I find that statement is not accurate. While I believe and find that Claimant has had occasional periodic episodes of low back pain before his July 31, 2007 accident, I find his pain has come and gone and has not been constant. His medical treatment has been limited. He worked in the printing industry for 25 years before his July 31, 2007 accident, loading paper and handling cases of reams weighing 40 pounds. He did not have any permanent work restrictions relating to his low back before his July 31, 2007 accident.

Claimant has not had back surgery. While Claimant has continued to have back pain every week or every two and has needed to occasionally change plans, he was not taking pain medication on a consistent basis prior to his July 31, 2007 accident. He has not had follow-up pain management treatment for his back pain. He has not had epidural shots for his back. He has not had chiropractic treatment or physical therapy for his back.

Claimant testified, and I find, that his back problems caused him to have problems at work and to miss work over twenty times before July 31, 2007. However, he offered no employment records that demonstrated he had chronic difficulties at work because of his low back. He offered no attendance records. He offered no work evaluations. He did not offer documentation showing that he was unable to do his regular job duties, that he turned down jobs, that he had any work restrictions, or that he requested or received accommodations from coworkers prior to his July 31, 2007 accident. Claimant did not offer convincing evidence that his low back condition permanently limited his ability to perform certain job functions or permanently caused him to be unable to perform certain job functions.

I find Claimant did not establish that at the time of his July 31, 2007 accident, he was unable to perform his regular job duties, that he had any permanent work restrictions, that he requested or received accommodations from coworkers, or that his low back condition permanently limited his ability to perform certain job functions or permanently caused him to be unable to perform certain job functions.

I find Claimant did not prove that at the time he had his July 31, 2007 accident, that he was having trouble climbing on ladders, bending, twisting, or turning side to side, or could not lift, squat, push or pull, or was having trouble lifting, or trouble using vibrating tools, sitting long periods, or driving long periods because of his lumbar condition.

I find Claimant's preexisting permanent partial disability at the time of his July 31, 2007 accident was 5% of the body as a whole (400 week level), and that this preexisting permanent partial disability relates to Claimant's low back condition. That amounts to twenty weeks of compensation. I find Claimant did not have sufficient preexisting permanent partial disability at the time of his July 31, 2007 accident to meet the Second Injury Fund threshold of Section 287.220, RSMo, which requires an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury. All other issues are moot.

Claimant's claim against the Second Injury Fund is denied. Claimant's attorney is not allowed any attorney's fee.

Made by: /s/ Robert B. Miner

Robert B. Miner

Administrative Law Judge

Division of Workers' Compensation

This award is dated and attested to this 7th day of February, 2011.

/s/ Naomi Pearson

Naomi Pearson

Division of Workers' Compensation