

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

Injury No.: 08-118504

Employee: Richard R. Foley

Employer: Dennis Sneed Ford, Inc. (Settled)

Insurer: Missouri Automobile Dealers Association (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 § 287.480 RSMo. We have reviewed the evidence, read the briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the June 30, 2011, award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Introduction

The administrative law judge found the Second Injury Fund liable for 11.25 weeks of permanent partial disability benefits under § 287.220.1 RSMo. Employee filed an Application for Review arguing that the administrative law judge's disability ratings as to employee's preexisting conditions are too low. Employee also argues the administrative law judge improperly discounted employee's social phobia disorder from his calculation of Second Injury Fund liability. Employee argues this condition was more serious than the administrative law judge believed.

We agree that the administrative law judge improperly failed to include employee's preexisting social phobia disorder in determining Second Injury Fund liability, but for somewhat different reasons than argued by employee. We are of the opinion that the administrative law judge applied an improper analysis as to the thresholds for triggering Second Injury Fund liability and in calculating the extent of Second Injury Fund liability. Because employee's Application for Review implicates that analysis, and because we also wish to correct a mathematical error by the administrative law judge, we write this opinion and modify the award and decision of the administrative law judge as follows.

Discussion

On page 21 of his award, the administrative law judge found that employee suffered preexisting permanent partial disability referable to social phobia disorder, but discounted this disability from his calculation of Second Injury Fund liability on a finding that: "[the] permanent partial disability [referable to the social phobia condition] is not sufficient to meet the Second Injury Fund threshold required by Section 287.220.1, RSMo." These comments and the resulting award suggest the administrative law judge was of the opinion that if one of a worker's preexisting disabilities, considered in isolation, fails to meet one of the thresholds in § 287.220.1, then that condition is ignored when considering the liability of the Second Injury Fund. Such an approach has

Employee: Richard R. Foley

- 2 -

no support in the Missouri Workers' Compensation Law or in Missouri case law. We reject the administrative law judge's reasoning that the thresholds of § 287.220.1 operate in such a fashion. Our analysis of the operation of the Second Injury Fund thresholds follows.

Purpose of the Second Injury Fund

The purpose of the Second Injury Fund is "to encourage the employment of individuals who are already disabled from a preexisting injury, regardless of the type or cause of that injury." *Pierson v. Treasurer of Mo. As Custodian of the Second Injury Fund*, 126 S.W.3d 386, 390 (Mo. 2004) (citation omitted). The Second Injury Fund statute encourages such employment by ensuring that an employer is only liable for the disability caused by the work injury. Any disability attributable to the combination of the work injury with preexisting disabilities is compensated, if at all, by the Second Injury Fund.

Purpose of the thresholds

Before 1993, any preexisting disability that was a hindrance to employment or reemployment could open the door to possible Second Injury Fund liability. The Second Injury Fund statute was amended in 1993 to limit permanent partial disability awards against the Second Injury Fund to those cases where both the preexisting disabilities and the disabilities from the work injury are more than de minimis. The provision defining what disabilities will trigger Second Injury Fund liability now states:

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.

The thresholds found in the quoted provision serve to protect the Second Injury Fund from enhanced permanent partial disability claims of claimants with de minimis disabilities. And that is where the service of the thresholds ends. Section 287.220.1 goes on to say:

Employee: Richard R. Foley

- 3 -

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...(emphasis added).

Under the plain language of the statute, once it is determined that the thresholds are met, all disabilities that exist at the time of the work injury should be considered in the calculation of Second Injury Fund liability.

Application of the thresholds

The second threshold applies when a claimant has preexisting permanent partial disability of a single major extremity ("if a major extremity injury only"). In all other circumstances, the first threshold applies.

The legislature chose two different units of measurement to describe the thresholds: "fifty weeks of compensation" for preexisting disabilities of the body as a whole; and "fifteen percent permanent partial disability" for a preexisting disability to a major extremity only. We believe the legislature rested on different units of measurement to foster arithmetic simplicity.

Where a claimant has only a preexisting disability to a major extremity, the legislature made "a simple 15% disability to a major extremity the threshold rather than attempt a more complex formula based on weeks of disability to various body parts at various levels." *Motton v. Outsource Int'l*, 77 S.W.3d 669, 675 (Mo. App. 2002).

But where there is more than one preexisting disability, the simplicity described above cannot be achieved. In that event, we need a method to combine the various disabilities to determine claimant's overall preexisting disability as of the moment of the primary injury. In order to combine the disabilities for comparison to the threshold, the disabilities must be converted to a common unit of measure. The legislature selected weeks of compensation as the common unit of measure.

This claim

In the instant case, employee had more than a single preexisting disabling condition so the first threshold applies. We must determine if employee's overall preexisting permanent partial disability – stated in weeks – meets or exceeds this amount.

We adopt the administrative law judge's finding that employee's preexisting disabling left knee, lumbar spine, and social phobia conditions amounted to hindrances or obstacles to employment. We also find appropriate and affirm the administrative law judge's findings that employee suffered preexisting permanent partial disability of 12.5%

Employee: Richard R. Foley

- 4 -

of the body as a whole referable to the lumbar spine, 15% of the left knee, and 5% attributable to employee's social phobia disorder. Converting employee's preexisting disabilities into weeks of compensation yields the following results: 50 weeks for the lumbar spine, 24 weeks for the left knee, and 20 weeks for employee's social phobia condition. The sum of the preexisting disabilities is 94 weeks. Employee has easily met the 50-week threshold.

The administrative law judge calculated the sum of permanent partial disability resulting from the August 2008 work injury (21% of the right wrist, 19% of the left wrist, and 10% multiplicity) is equal to 38.5 weeks of permanent partial disability. This is incorrect. The sum is equal to 77 weeks of permanent partial disability (36.75 for the right wrist + 33.25 for the left wrist + 7 weeks multiplicity = 77). This sum exceeds the applicable 50-week threshold for disability resulting from a primary injury under § 287.220.1.

Both thresholds are met. As a result, employee is entitled to compensation from the Second Injury Fund if he proved his preexisting disabling conditions combined with the disability from the primary injury to result in a greater disability than that which would have resulted from the last injury by itself. See *Gassen v. Lienbengood*, 134 S.W.3d 75 (Mo. App. 2004).

We agree with the administrative law judge that employee met his burden. We find that employee's preexisting disabilities combine with employee's primary injury to result in greater disability than the simple sum. We find that a 10% load factor is appropriate to represent this synergistic effect.

We turn now to the calculation of Second Injury Fund liability for permanent partial disability benefits. The sum of permanent partial disability resulting from employee's primary injuries is equal to 77 weeks. Employee's preexisting conditions amount to 94 weeks of permanent partial disability. The sum of these two amounts is 171 weeks. When we multiply the sum by the 10% load factor, the result is 17.1 weeks.

We conclude that the Second Injury Fund is liable for 17.1 weeks of permanent partial disability benefits.

Award

We modify the award of the administrative law judge as to the extent of Second Injury Fund liability.

The stipulated rate of compensation is \$264.47 per week. The Second Injury Fund is liable to employee for \$4,522.44 in permanent partial disability benefits.

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.

Employee: Richard R. Foley

- 5 -

The award and decision of Administrative Law Judge Robert B. Miner, issued June 30, 2011, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

Given at Jefferson City, State of Missouri, this 14TH day of December 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Richard R. Foley

Injury No.: 08-118504

Employer: Dennis Sneed Ford, Inc. (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

Insurer: Missouri Automobile Dealers Ass'n (settled)

Hearing Date: May 2, 2011

Checked by: RBM

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: August 1, 2008.
5. State location where accident occurred or occupational disease was contracted:
Gower, Clinton 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 repetitively used his upper extremities to clean and detail automobiles resulting in injury to his right and left hands.

12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Right and left hands.
14. Nature and extent of any permanent disability: 21% permanent partial disability of the right upper extremity at the 175 week level and 19% of the left upper extremity at the 175 week level, plus a 10% combination factor combining with preexisting disability to result in Second Injury Fund permanent partial disability as described in Award.
15. Compensation paid to-date for temporary disability: \$2,525.18.
16. Value necessary medical aid paid to date by employer/insurer? \$30,597.38.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$396.70.
19. Weekly compensation rate: \$264.47 for temporary total disability and 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:

11.25 weeks of permanent partial disability from Second Injury Fund at the rate of \$264.47 per week = \$2,975.29.

TOTAL FROM SECOND INJURY FUND: \$2,975.29

23. Future requirements awarded: None.

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Kristi L. Pittman.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Richard R. Foley

Injury No.: 08-118504

Employer: Dennis Sneed Ford, Inc. (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

Insurer: Missouri Automobile Dealers Association (settled)

Hearing Date: May 2, 2011

Checked by: RBM

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 May 2, 2011 in St. Joseph, Missouri. Employee, Richard R. Foley, appeared in person and by his attorney, Kristi L. Pittman. The Treasurer of the State of Missouri as Custodian of the Second Injury Fund appeared by its attorney, Maureen T. Shine. Employer, Dennis Sneed Ford, Inc., and Insurer, Missouri Automobile Dealers Association, previously settled and did not appear or participate in the hearing. Kristi L. Pittman requested an attorney's fee of 25% from all amounts awarded.

STIPULATIONS

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

1. On or about August 1, 2008, Richard R. Foley ("Claimant") was an employee of Dennis Sneed Ford, Inc. ("Employer") and was working under the provisions of the Missouri Workers' Compensation Law.
2. On or about August 1, 2008, Employer was an employer operating under the provisions of the Missouri Workers' Compensation Law and was fully insured by Missouri Automobile Dealers Association ("Insurer").
3. On or about August 1, 2008, Claimant sustained an injury by occupational disease in Gower, Clinton 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 rate of compensation for temporary total disability is \$264.47 per week, and the rate of compensation for permanent partial disability is \$264.47 per week.
7. Employer/Insurer has paid \$2,525.18 in temporary total disability at the rate of \$264.47 per week.
8. Employer/Insurer has paid \$30,597.38 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:

- A. Medical records of Plattsburg Medical Clinic
- B. Medical records of Surgicenter of Kansas City
- C. Medical records of North Kansas City Hospital
- D. Medical records of Rockhill Orthopedics, P.C.
- E. Medical records of Shoal Creek Family Medicine
- F. Independent Medical Examination report of Michael J. Poppa, D.O. dated May 10, 2010
- G. Independent Medical Examination report of Michael J. Poppa, D.O. dated January 18, 2011
- H. Stipulation for Compromise Settlement
- I. Deposition of Michael J. Poppa, D.O. dated April 29, 2011
- J. Curriculum Vitae of Michael J. Poppa, D.O.

The Second Injury Fund did not offer any additional witnesses or exhibits.

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's Testimony

Claimant was born on August 30, 1950. He began working for Employer in May 2008. He cleans the building, does auto detailing, and washes cars on the lot. He works forty hours per week.

Claimant began having problems with his hands in late July or early August 2008. He had numbness and tingling in his fingers and his fingers would not straighten out. He reported his condition to Employer. Employer provided treatment for him. Claimant was first sent to Gower Clinic, and was then sent to Dr. Anne Rosenthal. Claimant first had conservative treatment, including splints. He had surgery on his left hand on July 2, 2009 and he had surgery on his right hand on July 16, 2009.

Claimant's hands felt better for a while after the surgeries. He had an additional nerve conduction study done after his last surgery and was treated with therapy. Claimant last saw Dr. Rosenthal on December 18, 2009. Dr. Rosenthal released Claimant at that time. Claimant told Dr. Rosenthal then that he was still having numbness and tingling. Claimant has not seen anyone for treatment of his hands since he was released by Dr. Rosenthal.

Claimant testified he had a left knee injury, a low back injury, and social phobia and anxiety before August 2008. He injured his left knee in about 1980 and had knee surgery. He stated the records of the knee surgery are not available. Claimant stated his left knee is bone on bone. His knee flares up and swells.

Claimant worked for thirty years at Ford Motor Company driving a fork lift before he worked at Employer. He worked fifty-eight hours per week at Ford. He worked on forklifts that were clutch driven for ten to eleven hours per day. Over-usage wore his knee down. Bending is a problem and causes his left knee to flare up. He has walked with a cane at times. He has continued to have left knee problems and has had steroid injections in his left knee.

When Claimant was released following his left knee surgery, he returned to his regular full duty job without restrictions. He had no ongoing treatment for his left knee before August 1, 2008. He did not take prescription pain medication for his left knee after his release. He did not miss time from work between the time of his release from his left knee surgery and August 1, 2008 due to his left knee. He never needed or received accommodations at work due to his left knee.

Claimant testified his low back problems started about thirty years ago. He was diagnosed with a herniated disk. He saw Dr. Roger Jackson for a surgical consultation. He has had one round of cortisone shots in his back. He was not on any restrictions relating to his low back and he worked full duty after he was released from the epidurals. He hired all of his yard work and house painting to be done one summer. He was on pain medication for a period of time.

When Claimant worked at Ford, he crossed railroad tracks on the fork lift. That "hammered him" and stressed his back at times. He was not able to perform at 100 percent at Ford. He decided to retire from Ford in July 2007 to get away from working on the forklift.

Claimant has never had back surgery. He missed some days at work due to his back. He was careful about what he did at work.

Claimant takes Skelaxin, a muscle relaxer, as well as naproxen for pain. He has taken Skelaxin since 2000.

Claimant had problems sitting, stooping, and bending because of his back before August 2008. It was difficult to take long trips and difficult to ride in a car. Claimant had to take breaks when he went on trips.

Claimant has difficulty shampooing carpets in cars at Employer. He tries to sit when he works on cars. It is easier to work on larger cars because he can stand up. He tries to compensate at work by starting low and working his way up to the top of the cars. He works on cars between six and six and one-half hours per day. He works on eight to ten cars in a normal day.

Claimant went from a sit down job at Ford to standing all day on concrete when he worked for Employer. That took a toll on his knee and back. He still sometimes puts an ice pack on his knee.

Claimant had pain in his back at Employer before the carpal tunnel condition. He took showers to relieve pain, but he still had pain toward the center right side of his back. He has back pain four days out of seven. His knee pain is pretty much continual.

When Claimant first worked for Employer, he used to do five cars in a day if it was a full detail job. Now he can only do three full detail cars if he is having a bad day. He fidgets a lot and moves around.

Claimant testified he has social phobia and anxiety. He was first diagnosed in January 2008. He said that for fifteen years he has had difficulty being around people for a long period of time. He is not good in a group. It is stressful for him to be in a group. When he is with other people too much, he giggles and sweats and runs out of breath.

Claimant was offered a sales job at Employer, but he was not able to do that work. He declined the sales job from Employer and took a lower paying job from Employer. Claimant's social phobia problem did not cause him to miss work. Claimant performed his regular duties for Employer before his August 2008 carpal tunnel injury.

A doctor prescribed a medication, Celexa, for Claimant's anxiety in 2008. He used Celexa daily from January 2008 until April 2008, but then stopped taking it.

Claimant did not like to be in groups when he worked at Ford. He left his Ford retirement party early. He has not been back to Ford since he left. It has been difficult for him to be around family and friends. He has difficulty at family events.

Claimant mostly spent his lunch breaks alone when he worked at Ford. He used to eat his lunch alone when he worked at Employer until two other workers began coming to his truck. It bothers him that those two workers have come. Claimant has reported these problems to Dr. Poppa. He had these problems before his carpal tunnel injury in 2008.

Claimant described his current problems. He said he still has numbness, tingling, and an achy pain in his hands. He has difficulty working and performing his job duties. He struggles a lot. He rotates his hands. He pre-plans what he does.

Claimant's job for Employer requires that he grip brooms, a power wand to wash cars, and vacuum hoses. He suffers more as the day goes by. He does the more difficult things at work early in the day. There are times when he tries to limit his work.

Claimant has tingling in his hands when he drives. He swaps his hands back and forth when he drives to keep his hands from going to sleep. He has trouble sleeping due to numbness in his hands. He has trouble holding light objects like car keys. He has trouble with his hands when he gets home at night.

Claimant has problems lifting because of his hands. Pulling makes his hands feel like they will come apart. His hands are not as strong as they used to be. His lifting limits are 25 pounds with his right hand and 35 to 40 pounds with both hands. He can lift a gallon of milk but he cannot hold it without support. Claimant also has difficulty moving the carpet sweeper. He takes naproxen to relieve the pain.

Claimant relaxes at home on weekends. He does not work on any cars at home and is better by Sunday. He does not do yard work. He moved to a one level home two years ago. Someone else does his lawn and snow removal. Before he moved, he had his yard mowed and his snow removed a couple of years because of his back. Cold weather makes his joints worse.

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

Medical Evidence

Exhibit E contains records of Shoal Creek Family Medicine, Dr. Stephan Pecoraro, Dr. Christopher Trimble, and Dr. Kendall Walker pertaining to Claimant.

Exhibit E includes a note of Dr. Stephen Pecoraro dated March 27, 2001 documenting Claimant's complaint of back pain. Dr. Pecoraro assessed lumbosacral strain and prescribed Skelaxin. Claimant saw Dr. Pecoraro again on August 28, 2001 for back pain. Dr. Pecoraro assessed acute lumbosacral strain and prescribed Skelaxin and Vioxx.

Exhibit E includes a Diagnostic Imaging report dated August 29, 2001 pertaining to Claimant's lumbar spine. The report notes in part: "There is very mild early degeneration." The Impression is: "Mild Spondylosis."

Exhibit E includes Dr. Trimble's note dated December 28, 2001 documenting Claimant's complaints of back pain. Dr. Trimble assessed scoliosis and prescribed Skelaxin, Vioxx, and Lortab.

Exhibit C contains records of North Kansas City pertaining to Claimant. These records include Dr. Scowcroft's April 11, 2002 report documenting Claimant's report of right leg pain. The report notes the referring physician was Dr. Roger Jackson. Dr. Scowcroft's impression was "right sided lumbar radiculitis involving the L5 nerve root." Dr. Scowcroft administered an epidural steroid injection.

Dr. Trimble's December 28, 2006 note in Exhibit E states Claimant presented for his annual exam. The note states in part: "In regard to the low back pain, the discomfort is most prominent in the lumbar spine. This radiates to the buttocks. He characterizes it as constant, moderate in intensity, and throbbing. This is an acute episode with no prior history of back pain.

Exhibit C includes an MRI Lumbar Spine report dated January 3, 2007 pertaining to Claimant that documents lumbar loss of disk height, annular disk bulging, and mild degenerative changes.

Dr. Trimble's January 10, 2008 note in Exhibit E states in part: "Patient presents with social phobia. His anxiety disorder was originally diagnosed several weeks ago. His symptom complex includes apprehension and a choking or smothering sensation. . [sic] has [sic] been taking the celexa for one week and no better yet but no side effects noted." Dr. Trimble's Assessment included social phobia and hypertension. Celexa 20 mg was refilled.

Dr. Trimble's March 17, 2008 note states Claimant presented with essential hypertension. Dr. Trimble's March 17, 2008 note states in part under "HPI": "Social phobia details; his anxiety disorder was originally diagnosed several weeks ago. His symptom complex includes apprehension and a choking or smothering sensation. . [sic] has [sic] been taking the celexa for one week and no better yet but no side effects noted he is not yet better with the celexa wonders if a higher dose would help. Dx with shortness of breath; this has been noted for the past 3 months." Dr. Trimble's assessment was "Essential hypertension; Shortness of breath; Social phobia." Current medications included Celexa 20mg. Medications prescribed included Celexa 40mg.

Dr. Trimble's April 14, 2008 note in Exhibit E states in part under "Exams": "Psychiatric: mental status: alert and oriented x 3; appropriate affect and demeanor."

Dr. Trimble's July 9, 2008 note in Exhibit E states in part under "Exams": "Psychiatric: mental status: alert and oriented x 3; appropriate affect and demeanor."

Dr. Trimble's January 22, 2009 note in Exhibit E states in part: "Psychiatric: Negative for anxiety, crying spells, depression, anhedonia, personality change, sadness, sleep disturbance and suicidal thoughts." Psychiatric exam states: "mental status: alert and oriented x 3; appropriate affect and demeanor."

Exhibit E contains a report documenting that Claimant saw Dr. Trimble on June 8, 2009. "HPI" notes carpal tunnel and trigger fingers, shoulder pain and heel pain in right foot. Current problems are noted to include degenerative disc disease, hand pain, low back pain, and social phobia. Current medications are noted to include Naprosyn. Celexa

is not included as a current medication. Dr. Trimble's Assessment is: "Generalized pain; Shoulder pain seems to be bursitis; heel pain." Naprosyn was refilled and Lortab was prescribed.

The medical records in Exhibit D document Claimant's carpal tunnel release and trigger finger release surgeries by Dr. Anne Rosenthal on his right hand on July 2, 2009 and on his left hand on July 16, 2009. Dr. Rosenthal's December 18, 2009 report notes Claimant was last seen by Dr. Rosenthal on December 18, 2009 at which time she released Claimant to full duty work at maximum medical improvement. Claimant reported he was having problems with tingling. Dr. Rosenthal's January 31, 2010 report rated Claimant at 7% permanent partial impairment at the 175 week level of the right upper extremity and 6% permanent partial impairment at the 175 week level of the left upper extremity.

Dr. Trimble's January 13, 2010 note states Claimant was evaluated for annual exam. Left hip pain and right foot pain are noted. The note also states in part: "Dx with social phobia; his anxiety disorder was originally diagnosed several weeks ago. His symptom complex includes apprehension and a choking or smothering sensation. has [sic] been taking the Celexa for one week and no better yet but no side effects noted." The note under "ROS" states in part: "Psychiatric: Negative for anxiety, depression, and sleep disturbances." The "Assessment" notes several conditions, including "social phobia."

Dr. Trimble's March 31, 2010 report in Exhibit E states that Claimant reported left hip pain radiating to the low back. Past medical history of carpal tunnel and trigger finger repair in 2009, and left knee scope 1980 meniscus tear are noted. The records in Exhibit E include Dr. Walker's June 15, 2010 note stating Claimant presented with complaints of knee pain. His left knee was injected. The records do not show that Claimant was provided any treatment on March 31, 2010 or June 15, 2010 relating to social phobia or anxiety.

Evaluations of Dr. Michael Poppa

Dr. Michael Poppa evaluated Claimant on May 20, 2010 and on January 18, 2011 (Exhibits F and G). He took Claimant's history, reviewed records, and conducted a physical examination of Claimant. His reports summarize Claimant's medical treatment, Claimant's report of symptoms, and the results of his physical examinations of Claimant. Claimant reported pain in his palm, weakness in his wrists, and difficulty gripping. He reported left knee pain and back pain. He reported being turned down for a job with the railroad because of his back. The medical records in evidence that document Claimant's treatment of his right and left hand injuries are consistent with Dr. Poppa's summary of treatment.

Dr. Poppa's Curriculum Vitae (Exhibit J) notes that since February 18, 2002, Dr. Poppa has been President/Corporate Medical Director of Occupational Consulting Services. He is also the plant physician for Sanofi-Aventis Pharmaceutical Company. He is Board Certified by the American Osteopathic Board of Preventive Medicine. He has active licenses in Missouri, Kansas and Oklahoma, and has hospital affiliations at Overland Park Medical Center and Mid-American Rehabilitation Hospital.

Dr. Michael Poppa's May 20, 2010 report sets forth the following conclusions:

7) As a result of MR. Foley's work related conditions involving his right hand with post-operative residuals secondary to right open carpal tunnel release with right long finger trigger release and right small finger trigger release, it is my opinion he has an overall 30% permanent partial disability of his right upper extremity between the wrist and elbow (200 week level).

8) As a result of Mr. Foley's work-related conditions involving his left upper extremity with post-operative residuals secondary to open left carpal tunnel release and left small finger trigger release, it is my opinion he has an overall 27.5% permanent partial disability of his left upper extremity between the wrist and elbow (200 week level).

9) Then taking into consideration both upper extremity conditions with post-operative residuals, it is my opinion Mr. Foley has an overall 35% permanent partial disability of the body as a whole. This rating takes into consideration a 20% loading factor due to bilateral nature of his upper extremity conditions with residuals.

10) Prior to Mr. Foley's series of repetitive trauma through 8/21/08, he did have residual permanent partial disability regarding his left knee secondary to previous surgery. His work injury did occur in Decatur, Illinois around the age of 26 while employed by Tolly's Market resulting in pain and dysfunction secondary to a meniscus tear requiring surgery. It is my opinion Mr. Foley's present condition involving his status-post knee represents 20% permanent partial disability of his lower extremity at the knee.

11) It is my opinion that Mr. Foley's left knee condition prior to his series of repetitive trauma through 8/21/08, did constitute a hindrance or obstacle to employment or re-employment if he became unemployed.

12) It is my opinion that when one combines the permanent partial disability involving his left knee impairment (20%) with the additional permanent partial disability involving his bilateral upper extremities secondary to repetitive trauma through 8/21/08 (35% body as a whole), a significant enhancement of the combined disabilities arises above the simple arithmetic sum of the separate disabilities. In combination, an enhancement factor 20% above the simple arithmetic of the separate disabilities is felt to be appropriate.

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

Dr. Poppa's January 18, 2011 report sets forth the following conclusions:

Conclusions

Consistent with Mr. Foley's chronic lumbar disc herniation with back spasm and intermittent lower extremity radicular symptoms, he should avoid repetitive waist bending. He should avoid lifting greater than 35 pounds from floor to waist level on an occasional basis; no lifting greater than 20 pounds from waist to chest high on an occasional basis and no lifting greater than 10 pounds overhead on an occasional basis. Pushing, pulling and carrying should be limited to 20 pounds on an occasional basis. Mr. Foley's pre-existing chronic lumbar disc herniation with lower extremity radiculopathy represents a 20% permanent partial disability of the body as a whole.

Consistent with Mr. Foley's pre-existing and chronic social phobia with anxiety disorder, he should avoid working around crowds or in a crowded work place. Mr. Foley's pre-existing chronic social phobia with anxiety represents a 15% permanent partial disability of the body as a whole.

Consistent with Mr. Foley's pre-existing and chronic left knee condition, he should avoid repetitive knee bending or stooping. He should avoid kneeling and/or crawling. Mr. Foley's pre-existing chronic status-post left knee condition represents a 20% permanent partial disability of his left lower extremity at the knee.

It is my opinion that Mr. Foley's pre-existing conditions involving his lumbar spine, social phobia with anxiety disorder and status-post left

knee condition prior to his series of repetitive trauma through 8/1/08, did constitute a hindrance or obstacle to employment or re-employment if he became unemployed.

It is my opinion that when one combines the permanent partial disabilities involving his status-post left knee impairment (20%), lumbar spine impairment (20% body as a whole) and social phobia with anxiety disorder impairment (15% body as a whole) with the additional permanent partial disability secondary to his work injury, which occurred as a result of repetitive trauma through 8/1/08 involving his bilateral upper extremities, 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 medically appropriate. The combined disabilities creates a synergistic effect in which he has greater disability in accomplishing activities of daily living and work duties.

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

Dr. Poppa testified on April 28, 2011 (Exhibit I) regarding portions of his reports. His testimony is consistent with his reports.

Dr. Poppa testified he agreed that persons taking Celexa could be highly functioning individuals in the workplace. Dr. Poppa did not review any records indicating Claimant had any restrictions on his work prior to August 1, 2008 due to anxiety or social phobia. He was not aware of any work restrictions prior to August 1, 2008 due to social phobia. He did not review anything indicating Claimant had missed any time from work due to social phobia prior to August 1, 2008. He did not review anything indicating Claimant needed or was given any help or accommodation with his work prior to August 1, 2008 due to social phobia. He did not know how Claimant was affected at work prior to August 1, 2008 from his social phobia.

Claimant settled his claim with Employer in the case at hand for 21% permanent partial disability of the right upper extremity at the 175 week level and 19% of the left upper extremity at the 175 week level, plus a 10% combination factor as noted in Exhibit H.

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, RSMo¹ 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*

¹ 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).

Hampton v. Big Boy Steel Erection, 121 S.W.3d 220, 226 (Mo. banc 2003).² 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 (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).

² 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.

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; *Fogelson 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.

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

The first issue that must be determined in order to find Second Injury Fund liability is that Claimant sustained additional permanent partial disability from a compensable injury that qualifies for the Second Injury Fund threshold pursuant to Section 287.220.1, RSMo. I find by a preponderance of the credible evidence that Claimant did sustain additional permanent partial disability from a compensable injury on August 1, 2008 that meets the Second Injury Fund threshold requirement pursuant to Section 287.220.1, RSMo.

The parties stipulated, and I find that on or about August 1, 2008, Claimant sustained an injury by accident in Gower, Clinton County, Missouri, arising out of and in the course of his employment for Employer.

Claimant had carpal tunnel release and trigger finger release surgeries by Dr. Anne Rosenthal on his right hand on July 2, 2009 and on his left hand on July 16, 2009. Claimant has numbness, tingling, and an achy pain in his hands. There are times when he tries to limit his work. Claimant has tingling in his hands when he drives. He has trouble sleeping due to numbness in his hands. He has trouble holding light objects like car keys. Claimant has problems lifting because of his hands. His hands are not as strong as they used to be.

I find Claimant’s description of his medical treatment, limitations, and complaints to be credible. I find Dr. Poppa’s description of Claimant’s complaints and limitations to be credible. Claimant’s testimony is corroborated by the medical records admitted in evidence at the hearing that substantiate Claimant’s medical treatment.

Claimant settled his claim with Employer in the case for 21% permanent partial disability of the right upper extremity at the 175 week level and 19% of the left upper extremity at the 175 week level, plus a 10% combination factor as noted in Exhibit H. Such an agreement to settle does not bind the Commission, but “does serve as relevant evidence of the nature and extent of the employee's permanent disability attributable to the primary injury.” *Totten v. Treasurer of the State of Missouri, as Custodian of the Second Injury Fund*, 116 S.W.3d 624, 628 (Mo.App. 2003)).

Dr. Poppa assessed permanent partial disability of 30% of the right upper extremity at the 200 week level and 27.5% of the left upper extremity at the 200 week

level attributable to the injury that occurred on August 1, 2008. I find this assessment of permanent partial disability for the August 1, 2008 injury is not credible.

I find, based on the competent and substantial evidence, including the medical records and reports, and the testimony of Claimant and Dr. Poppa, that as a result of the work injury that Claimant sustained on August 1, 2008, Claimant has sustained an additional 21% permanent partial disability of the right upper extremity at the 175 week level and 19% of the left upper extremity at the 175 week level, plus a 10% combination factor, or 38.5 weeks. In addition, I find that this new permanent partial disability is sufficient to meet The Second Injury Fund threshold required by Section 287.220.1, RSMo.

The next issue to be determined is whether Claimant had preexisting permanent partial disability at the time the August 1, 2008 injury was sustained, and whether his preexisting permanent partial disability was a hindrance or obstacle to Claimant's employment or to obtaining reemployment if he becomes unemployed, and whether the preexisting permanent partial disability equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15% for major extremities.

Claimant had arthroscopic surgery to repair a torn meniscus before the August 1, 2008 injury. He took pain medication for his left knee before the August 1, 2008 injury. Bending is difficult for him. He has had steroid injections in his left knee. He still sometimes puts an ice pack on his knee. Claimant reported to Dr. Poppa that he had pain in his left knee.

Claimant saw Dr. Roger Jackson for a surgical consultation before the August 1, 2008 injury. Claimant reported to Dr. Poppa that he had pain in his back and that he had been turned down for a job with the railroad because of his back. The medical treatment records document that Claimant received treatment for low back complaints on several occasions before August 1, 2008. Claimant received an epidural steroid injection in his low back before August 1, 2008. An MRI lumbar spine report dated January 3, 2007 documents lumbar loss of disk height, annular disk bulging, and mild degenerative changes.

Claimant took Skelaxin, a muscle relaxer, and naproxen for pain before August 1, 2008. He missed some days at work due to his back. He was careful about what he did at work. Claimant had problems sitting, stooping, and bending because of his back before August 2008.

Claimant has had difficulty being around people for a long period of time for fifteen years. He did not like to be in groups when he worked at Ford. He is not good in a group. It is stressful for him to be in a group. Claimant's social phobia problem did not

cause him to miss work. Dr. Trimble prescribed a medication, Celexa, for Claimant's anxiety in 2008. Claimant used Celexa daily from January 2008 until April 2008, but then stopped taking it.

Dr. Poppa found Claimant had preexisting permanent partial disabilities prior to his August 1, 2008 injury regarding his left knee, lumbar spine, and social phobia. Dr. Poppa also found these preexisting conditions constituted a hindrance or obstacle to employment or re-employment if he became unemployed prior to December 18, 2008. I find Dr. Poppa's opinion that Claimant had preexisting disabilities relating to Claimant's back, left knee, and social phobia with anxiety, and that those preexisting conditions constituted a hindrance or obstacle to employment or re-employment if he became unemployed prior to Claimant's August 1, 2008 injury to be credible. However, I find the percentages assessed by Dr. Poppa for Claimant's preexisting left knee, lumbar spine, and social phobia with anxiety disabilities are not credible.

The Second Injury Fund did not present any evidence regarding the issue of preexisting disability.

I find that Claimant had preexisting permanent partial disability 15 % of the left knee at the 160 week level, or 24 weeks, due to his operated left knee, at the time the August 1, 2008 injury was sustained, and that this preexisting permanent partial disability was a hindrance or obstacle to Claimant's employment or to obtaining reemployment if he becomes unemployed. I find this permanent partial disability is sufficient to meet the Second Injury Fund threshold required by Section 287.220.1, RSMo.

I find that Claimant had preexisting permanent partial disability 12.5% of the body as a whole at the 400 week level, or 50 weeks, due to his low back, at the time the August 1, 2008 injury was sustained, and that this preexisting permanent partial disability was a hindrance or obstacle to Claimant's employment or to obtaining reemployment if he becomes unemployed. I find this permanent partial disability is sufficient to meet the Second Injury Fund threshold required by Section 287.220.1, RSMo.

I find Claimant had preexisting permanent partial disability of 5% of the body as a whole (400 week level), or 20 weeks, due to his social phobia or anxiety, at the time the August 1, 2008 injury was sustained, and that this preexisting permanent partial disability was a hindrance or obstacle to Claimant's employment or to obtaining reemployment if he becomes unemployed. I find this permanent partial disability is not sufficient to meet the Second Injury Fund threshold required by Section 287.220.1, RSMo.

While Claimant has experienced discomfort in crowds and being around other people, I find Claimant has failed to prove that his social phobia with anxiety condition has resulted in significant permanent partial disability. Claimant is not taking any

medication and is not undergoing any counseling for this condition. He has worked continuously for many years. He did not miss time from work because of social phobia with anxiety.

I find Dr. Poppa's disability rating pertaining to Claimant's social-phobia is not credible. Dr. Poppa is not a psychologist or a psychiatrist. He performed no psychological testing of Claimant. He evaluated Claimant before Claimant stopped taking Celexa.

Dr. Poppa agreed in his deposition that persons taking Celexa could be highly functioning individuals in the workplace. Dr. Poppa did not review any records indicating Claimant had any restrictions on his work prior to August 1, 2008 due to anxiety or social phobia. He was not aware of any work restrictions prior to August 1, 2008 due to social phobia. He did not review anything indicating Claimant had missed any time from work due to social phobia prior to August 1, 2008. He did not review anything indicating Claimant needed or was given any help or accommodation with his work prior to August 1, 2008 due to social phobia. He did not know how Claimant was affected at work prior to August 1, 2008 from his social phobia.

No evidence was offered at the hearing that Claimant ever received any treatment for social phobia or anxiety from a psychiatrist or psychologist. No evidence was offered at the hearing that Claimant was ever evaluated or tested by a psychiatrist or psychologist for social phobia or anxiety.

Based on the medical records and reports, and the testimony of Claimant and Dr. Poppa, I find that Claimant had preexisting permanent partial disability relating to his left knee, lumbar spine, and social phobia with anxiety at the time his August 1, 2008 injury was sustained. I find that Claimant's preexisting permanent partial disabilities were of such seriousness as to constitute a hindrance or obstacle to Claimant's employment or to obtaining reemployment if he becomes unemployed as required by Section 287.220.1, RSMo. In addition, I find that Claimant had preexisting permanent partial disability of 15% of the left knee at the 160 week level, or 24 weeks, due to his operated left knee, and 12.5% of the body as a whole (400 week level), or 50 weeks, due to his lumbar spine condition, and 5% of the body as a whole (400 week level), or 20 weeks, due to his social phobia with anxiety condition at the time his August 1, 2008 injury was sustained. The preexisting permanent partial disabilities relating to Claimant's left knee condition and lumbar spine condition are sufficient to meet the Second Injury Fund threshold required by Section 287.220.1, RSMo. The preexisting permanent partial disability of 5% of the body as a whole for Claimant's social phobia with anxiety condition is not sufficient to meet the Second Injury Fund threshold required by Section 287.220.1, RSMo.

The last issue to be determined is whether Claimant's preexisting permanent partial disability combined with the work injury sustained on August 1, 2008 to result in a greater degree of disability than the sum of either disability alone. I find that it does.

Dr. Poppa concluded that that when one combines the permanent partial disabilities involving Claimant's preexisting conditions with the additional permanent partial disability secondary to his August 1, 2008 work accident, a significant enhancement of the combined disabilities arises above the simple arithmetic sum of the separate disabilities. Dr. Poppa also concluded that "in combination, an enhancement factor of 20% above the simple arithmetic sum of the separate disabilities was felt to be appropriate."

I agree with Dr. Poppa that the combination of Claimant's permanent partial disability from his preexisting left knee, lumbar spine, and social phobia with anxiety conditions and the additional permanent partial disability secondary to his August 1, 2008 work accident, results in enhancement of the combined disabilities above the simple arithmetic sum of the separate disabilities, and I so find. I find that that the last injury, combined with Claimant's pre-existing left knee and lumbar spine permanent partial disabilities (which meet the minimum thresholds required by Section 287.220.1, RSMo), causes greater overall disability than the independent sum of the disabilities. However, I find Dr. Poppa's opinion that an enhancement factor of 20% above the simple arithmetic sum of the separate disabilities was appropriate is not credible. I find that the synergistic effect of Claimant's preexisting left knee and lumbar spine disabilities combined with his bilateral upper extremity disability for the August 1, 2008 injury is 10% above the simple sum of the disabilities, or 11.25 weeks of compensation.

Calculation of Second Injury Fund Liability

Based on the competent and substantial evidence, I find that Claimant's preexisting left knee and lumbar spine permanent partial disabilities combine with the work injury of August 1, 2008 to produce a synergistic effect to result in a greater degree of overall disability than the simple sum of those disabilities. I find that the synergistic effect of Claimant's disabilities is 10% above the simple sum of the disabilities, or 11.25 weeks of compensation.

The Second Injury Fund liability of 11.25 weeks in this case is calculated as follows: For preexisting permanent partial disability—15% of the left knee at the 160 week level, or 24 weeks, plus 12.5% of the body as a whole (400 week level), or 50 weeks, due to his lumbar spine condition at the time the August 1, 2008 injury was sustained. For the August 1, 2008 injury (Injury No. 08-118504)—21% permanent partial disability of the right upper extremity at the 175 week level and 19% of the left upper extremity at the 175 week level, plus a 10% combination factor, or 38.5 weeks. Total of

weeks of disability: 112.5 weeks. $112.5 \times 10\% = 11.25$ weeks. Accordingly, I find that The Second Injury Fund is liable to Claimant for 11.25 weeks of compensation at the stipulated weekly compensation rate of \$264.47, or \$2,975.29. I award the sum of \$2,975.29 in favor of Claimant against the Second Injury Fund in this case.

Attorney's Fees

Claimant's attorney is entitled to a fair and reasonable fee in accordance with Section 287.260, RSMo. An attorney's fee may be based on all parts of an award, including the award of medical expenses. *Page v. Green*, 758 S.W.2d 173, 176 (Mo.App. 1988). During the hearing, and in Claimant's presence, Claimant's attorney requested a fee of 25% of all benefits to be awarded. Claimant did not object to that request. I find Claimant's attorney is entitled to and is awarded an attorney's fee of 25% of all amounts awarded for necessary legal services rendered to Claimant. The compensation awarded to Claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to Claimant: Kristi L. Pittman.

Made by: /s/ Robert B. Miner
Robert B. Miner
Administrative Law Judge
Division of Workers' Compensation

This award is dated, attested to and transmitted to the parties this 30th day of

June, 2011 by:

/s/ Naomi Pearson
Naomi Pearson
Division of Workers' Compensation