

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

Injury No.: 01-070581

Employee: Tony Gross
Employer: Daimler-Chrysler (Settled)
Insurer: Self-Insured (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: April 18, 2001
Place and County of Accident: St. Louis County

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated August 22, 2007. The award and decision of Administrative Law Judge John K. Ottenad, issued August 22, 2007, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 10th day of January 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING
William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Tony Gross

Injury No.: 01-070581

Dependents: N/A

Employer: DaimlerChrysler Corp. (Settled)

Additional Party: Second Injury Fund

Insurer: Self-Insured (Settled)

Hearing Dates: April 9, 2007

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

Checked by: JKO

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: April 18, 2001
5. State location where accident occurred or occupational disease was contracted: St. Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? 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: Claimant worked on the assembly line for Employer and injured his right knee, as well as caused a worsening of his psychiatric condition, when he was struck on the right knee by an axle suspended on a hoist.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Right Knee and Body as a Whole referable to psychological impairment
14. Nature and extent of any permanent disability: 50% of the Right Knee and 25% of the Body as a Whole referable to the psychological impairment
15. Compensation paid to-date for temporary disability: \$55,684.98
16. Value necessary medical aid paid to date by employer/insurer? \$93,614.26

Employee: Tony Gross

Injury No.: 01-070581

17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$869.27
19. Weekly compensation rate: \$579.51 for TTD/ \$314.26 for PPD
20. Method wages computation: By agreement (stipulation) of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable:

Employer previously settled its risk of liability

22. Second Injury Fund liability:

\$265.25 per week for 180 weeks from 04/19/03 until 09/30/06 \$47,745.00

\$579.51 per week for Claimant's lifetime starting 10/01/06, subject to review and modification by law

TOTAL: \$47,745.00 THROUGH 09/30/06 PLUS CONTINUING WEEKLY BENEFITS AS DESCRIBED

23. Future requirements awarded: As awarded

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: Evan J. Beatty.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Tony Gross	Injury No.: 01-070581
Dependents:	N/A	Before the
Employer:	DaimlerChrysler Corp. (Settled)	Division of Workers'
		Compensation
Additional Party:	Second Injury Fund	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
Insurer:	Self-Insured (Settled)	Checked by: JKO

On April 9, 2007, the employee, Tony Gross, appeared in person and by his attorney, Mr. Evan J. Beatty, for a hearing for a final award on his claim against the Second Injury Fund. The employer, DaimlerChrysler Corp., which is duly self-insured, was not present or represented at the hearing since it had previously settled its risk of liability in this case. The Second Injury Fund was represented at the hearing by Assistant Attorney General Jennifer R. Chestnut. At this hearing, Claimant also submitted evidence and sought an award on his companion case of Injury No. 99-182682. A separate award has been issued to bring resolution to that Claim. At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of fact and rulings of law, are set forth below as follows:

STIPULATIONS:

- 1) On or about April 18, 2001, Tony Gross (Claimant), sustained an accidental injury arising out of and in the course of his employment that resulted in injury to Claimant.

- 2) Claimant was an employee of DaimlerChrysler Corp. (Employer).
- 3) Venue is proper in the City of St Louis.
- 4) Employer received proper notice.
- 5) The Claim was filed within the time prescribed by the law.
- 6) At the relevant time, Claimant earned an average weekly wage of \$869.27, resulting in applicable rates of compensation of \$579.51 for total disability benefits and \$314.26 for permanent partial disability (PPD) benefits.
- 7) Employer paid temporary total disability (TTD) benefits in the amount of \$55,684.98, representing a period of time from April 18, 2001 to April 18, 2003, or 103 6/7 weeks.
- 8) Employer paid medical benefits totaling \$93,614.26.
- 9) Claimant reached maximum medical improvement as of April 18, 2003.

ISSUES:

- 1) What is the nature and extent of Claimant's permanent partial and/or permanent total disability attributable to this accident?
- 2) What is the liability of the Second Injury Fund?

EXHIBITS:

The following exhibits were admitted into evidence:

Employee Exhibits:

- A. CLSS in Injury No. 99-182682 (between Claimant and Employer)
- B. CLSS in Injury No. 01-070581 (between Claimant and Employer)
- C. Certified medical records from Missouri Baptist Medical Center
- D. Medical records of Michael Gutwein, M.D.
- E. Certified medical records of Orthopedic Associates (Drs. Wagner & Hulsey)
- F. Certified medical records of HealthSouth
- G. Certified medical records of Aquatic Fitness, Inc.
- H. Certified medical records of Mercy Medical Arts-Eureka (Dr. Ballard)
- I. Certified medical records of Gregory Galakatos, M.D.
- J. Certified medical records of HealthSouth Surgery Center
- K. Certified medical records of St. John's Mercy Medical Center
- L. Certified medical records of Rashid Zia, M.D.
- M. Certified medical records of DePaul Health Center
- N. Certified medical records of St. Anthony's Medical Center
- O. Medical records of St. Louis Behavioral Medicine Institute
- P. CLSS in Injury No. 98-028316 (between Claimant and Employer)
- Q. CLSS in Injury No. 98-071031 (between Claimant and Employer)
- R. Medical records of the DaimlerChrysler Plant Dispensary
- S. Certified medical records of Missouri Baptist Medical Center
- T. Certified medical records of Henry Ollinger, M.D.
- U. CLSS in Injury No. 97-013155 (between Claimant and Employer)
- V. Certified medical records of Orthopedic Associates (Dr. Wagner)
- W. Certified medical records of West County Sports, Fitness & Rehabilitation Center
- X. Certified medical records of HealthSouth Surgery Center of West County
- Y. Certified medical records of St. John's Mercy Medical Center
- Z. Deposition of Dr. David T. Volarich dated September 21, 2006
- AA. Deposition of Delores Gonzalez, with attachments, dated November 6, 2006
- BB. Deposition of Dr. Richard Anderson, with attachments, dated October 2, 2006

Second Injury Fund Exhibits:

I. Vocational Rehabilitation Evaluation Report of James M. England, Jr.

Notes: 1) Exhibits AA and BB were admitted with objections contained in the record. Unless otherwise specifically noted below, the objections are overruled and the testimony fully admitted into evidence.

2) Although Exhibit Z purports to contain attachments, and although such attachments are referenced in the body of the exhibit, no such attachments were included with the exhibit at the time it was admitted into evidence.

3) Any stray marks or handwritten comments contained on any of the exhibits were present on those exhibits at the time they were admitted into evidence, and no other marks have been made since their admission into evidence on April 9, 2007.

FINDINGS OF FACT:

Based on a comprehensive review of the substantial and competent evidence, including Claimant's testimony, the expert medical and vocational opinions and depositions, the medical records, the Stipulations for Compromise Settlement for various pre-existing injuries, and the Stipulation for Compromise Settlement resolving Employer's portion of this case, as well as based on my personal observations of Claimant at hearing, I find:

- 1) **Claimant** is a 43-year-old, currently unemployed individual, who last worked for DaimlerChrysler Corp. as an assembly line worker. Claimant currently receives a monthly payment from Social Security Disability.
- 2) Claimant testified that he completed the 12th grade, and then tried on two occasions to go to community college, but he flunked out both times.
- 3) Claimant testified extensively about emotional and psychological problems that started when he was a child. He described himself as a loner. He said that he was molested at around age 12. He had to hitch a ride to ball practice because his parents did not drive, and the person that picked him up, molested him. He said that after that incident, he felt "dirty" and had recurring intrusive thoughts. His parents divorced when he was 14 years old. He said he came home one day and everything was gone except for his father. Claimant said that he only saw his mother 3 times while he was in high school. He said that he often stayed with other families and rarely at home, because he always needed a ride to ball practice. He always felt like a "project" for them. He said that some nights he slept in the cold on the school steps if he could not find a family to stay with. He testified that he only saw his father once every couple of months. He described a family history of alcoholism in his aunts and uncles, as well as a family history of depression in his mother and younger sister. He described being "smacked around" by his family because he was the oldest.
- 4) Claimant said he first noticed the feelings of depression in high school. He thought about jumping off of a 40-foot bridge, and actually started to jump off several times, but he stopped himself. He said he portrayed himself as a jokester to hide his problems, and because he needed everyone else's help with rides, food, and other necessities. He said that he "ate a lot of crap." Claimant also testified that he played Russian roulette with a .38 special on several occasions, first with one bullet and then later with two. He said that he saw his uncles doing it, so he tried it too. He said he started playing that at 13 or 14 years old.
- 5) Claimant testified that around the age of 12 or 13, he also started with cutting and burning himself. He would use things such as a knife, piece of glass, saw, or carpet cutter to cut himself. He said the pain he caused himself took away the inside pain he was feeling. He then discovered that he could burn himself with a cigarette on his hand to create a new sensation and a new smell of burning flesh. At the hearing, I observed numerous scars all up and down his arms, both new and old. He testified that his son was in a car accident which caused a recent bout of cutting behavior. Claimant also described risk-taking behavior, including playing chicken with other cars and driving 125 to 130 miles an hour. He said that he would also lie down in the road while he was in school, because he was tired and just wanted it all to end. Finally, Claimant described obsessive-compulsive disorder that started while in school, but which got worse while working for Employer. He said he would wash his hands 500 times per day, and he felt that everything had to be perfect. He even described getting in trouble for stopping the line to fix things while working for Employer.
- 6) Claimant served in the Navy for 4 years in active duty from 1985 to 1989. He was responsible for maintenance on the planes, and for making sure they were ready for launch. He received an honorable discharge as a grade E3. He said he could not score high enough on the test to get the next rank. He said that he could not concentrate long enough to read. He said he also had bad intrusive thoughts and a bad vocabulary. Although he had a few injuries in the Navy, he had no on-going treatment for any injuries while in the service. He did get some treatment, however, for alcohol dependence, because he was (by his own description) a weekend alcoholic. He went to a class two times, and also went for some counseling to try to get him to quit drinking.

- 7) Claimant testified that his emotional and psychological problems seemed to be well-controlled while in the Navy. He said they were always busy, and everyone was straightforward with no tricks and no agendas. He said those that worked hard got the benefits, and he liked that. He said that he also liked the physical nature and speed of the work. It was an adrenaline rush for him. He said this helped him cope. It helped keep his "pit bull" mind on a collar, so that he could function. He described a similar situation with his work for Superior Aviation (described below). He said hard work allowed him to be successful there.
- 8) Following his time in the Navy, Claimant worked at Superior Aviation in Lansing, Michigan from 1990 to 1995. He worked as a lineman, refueling, towing, washing, and de-icing the airplanes. He said it was very physical work, with a lot of bending, stooping, lifting and reaching. He denied having any injuries while he worked there.
- 9) Claimant moved to St. Louis with his wife and then began working for Employer in September 1995.
- 10) Claimant testified that his psychological problems did not fare as well while he worked for Employer. He said he got yelled at every day. He said he thought they were supposed to be a "team," but the union people and supervisors would yell at him for doing extra things. He said authority got to be a problem. He would see waste, ask questions, and get sent to the Union rep for asking. He testified that people were backstabbing each other there, and he felt more depressed. He said he really noticed it when he got injured the first time. He said he would talk to the EAP representative 2-3 times per year at Employer because of stress and how it was affecting him on the job.
- 11) He first injured his right knee in 1997 when he fell into a pit while working for Employer. He received initial care at **St. John's Mercy Medical Center** (Exhibit Y) and then came under the care of **Dr. John Wagner at Orthopedic Associates** (Exhibit V). On March 5, 1997, Dr. Wagner performed surgery to repair the torn medial meniscus of the right knee at the **HealthSouth Surgery Center of West County** (Exhibit X). He also noted quite a lot of chondromalacia and bone spurs in the knee. In fact, he commented that the knee was really in poor condition for someone as young as Claimant. Claimant received physical therapy at the **West County Sports, Fitness & Rehabilitation Center** (Exhibit W). Dr. Wagner released Claimant for this injury on May 6, 1997. He rated Claimant as having a residual disability of 10% of the right knee, of which 5% was for the pre-existing degenerative disease, and 5% was related to the injury at work in 1997.
- 12) Claimant and Employer entered into an agreement to resolve their portion of this 1997 claim (Injury No. 97-013155) by **Stipulation for Compromise Settlement** (Exhibit U) for \$8,599.04 or 20% permanent partial disability of the right knee.
- 13) Claimant described continued problems he had following this injury and the surgery. He said he could not stand all day, and he would go to the plant dispensary to get some ibuprofen. He testified that he also received other stronger pain medications from the plant doctor. Claimant testified that his depression also worsened after this 1997 injury, because he was "pegged as a whiner" by others on the line. He said that he missed some days at work, because he simply could not stand for 6 days on the line.
- 14) Medical records from **St. John's Mercy Medical Center** (Exhibit K) document counseling sessions with Claimant that began on August 1, 1997. The records document much of the same history regarding his family life that he described at hearing, except in these records, he denies emotional, physical or sexual abuse as a child. He had symptoms of obsessive-compulsive disorder, and he was diagnosed with depression and anxiety. He admitted to excessive alcohol use at times, and gambling, as well as periodic panic attacks. He admitted to having periodic suicidal thoughts when times got tough, and he was started on medications for his psychiatric problems. These records also document his inpatient admission at the hospital on September 30, 1997 because of the emergence of suicidal thinking with plans to shoot himself with a shotgun. He was diagnosed with major depression, recurrent, and a panic disorder.
- 15) Claimant said that he missed time from work as a result of his psychological condition. He said he had issues with co-workers and supervisors because they made him the whipping boy and treated him like a "piece of crap." He said he got into a fight with a co-worker over lunch when they were playing stickball. He pitched too close, and the guy threw his bat, so Claimant "slapped him around." On one occasion, he said he followed a supervisor home and then to a bar, and challenged him to a fight. Claimant said he had these problems because he could not work at the same level he once did. He said it made him mad when he was put back on a job worse than the one before, despite being on restrictions from his injuries. He said his mental health continued to worsen, and he told co-workers and supervisors that he would cut their throats.
- 16) In March 1998, Claimant appeared at the **DaimlerChrysler Plant Dispensary** (Exhibit R) complaining of his right ring and baby finger locking up on him. He was sent for treatment with **Dr. Henry Ollinger** (Exhibit T). Then on March 20, 1998, Claimant injured his right index finger when his hand slipped and he caught the edge of the transmission, lacerating his extensor tendon in the right index finger. Dr. Ollinger performed an extensor tendon repair of the right index finger on March 20, 1998. Dr. Ollinger then performed surgery on April 3, 1998

at **Missouri Baptist Medical Center** (Exhibit S) to release the A1 pulleys for the right little and ring fingers, to treat the trigger finger complaints. Following the surgeries, Claimant continued to follow-up with Dr. Ollinger and continued to have complaints regarding his hand and fingers. Claimant was finally released by Dr. Ollinger on April 19, 1999. He rated Claimant as having 2% permanent partial disability of the right index finger for the extensor tendon injury, and 2% permanent partial disability of each of the right ring and little fingers for the trigger finger injuries.

- 17) Claimant and Employer entered into an agreement to resolve their portion of the March 9, 1998 claim (Injury No. 98-028316) by **Stipulation for Compromise Settlement** (Exhibit P) for \$3,417.61 or 22.5% permanent partial disability of the right ring finger (proximal) and 20% permanent partial disability of the right little finger (proximal). Employer paid a total of 12.275 weeks of permanent partial disability in this settlement.
- 18) Claimant and Employer entered into an agreement to resolve their portion of the March 20, 1998 claim (Injury No. 98-071031) by **Stipulation for Compromise Settlement** (Exhibit Q) for \$3,382.23 or 25% permanent partial disability of the right index finger (proximal) and 1 week of disfigurement. Employer paid 11.25 weeks of permanent partial disability in this settlement.
- 19) Claimant next injured his right knee at work for Employer on March 14, 1999, when he tripped over some metal bands on the floor, causing him to fall onto his right knee. He said he started getting a lot of swelling, and so he got more narcotic pain medications to deal with the complaints.
- 20) Claimant had an MRI of the right knee taken at **Missouri Baptist Medical Center** (Exhibit C) on February 19, 1999. The report indicated that Claimant had a recent fall at work and was now having significant knee pain. The MRI findings revealed a complete tear of the anterior cruciate ligament and a marked deformity of the medial meniscus, both of which were unchanged when compared to the prior MRI from 1997. Osteoarthritis was also found, as was an apparent bone bruise or bone contusion involving the posterior aspect of the medial tibial plateau.
- 21) Claimant had no other significant treatment for the right knee from the date of this injury until he next injured his right knee on April 18, 2001, although Claimant testified that he was missing work because of the continued problems he was having with the knee. He testified that he was actually missing more time than he was working in between these two knee injuries.
- 22) Medical treatment records from **Dr. Rashid Zia** (Exhibit L) document the psychological treatment Claimant received both before and after the 2001 injury. Dr. Zia's records contain off-work slips for numerous periods of time dating back to 1999, when Claimant was kept out of work on account of his psychological problems. Claimant was given a number of medications by Dr. Zia during this time, including Prozac and Depakote, to try to regulate his mental status.
- 23) Claimant was admitted to **DePaul Health Center** (Exhibit M) on January 20, 2000 for depression. He expressed problems on the job and in his marriage, as well as a concern about a paternity suit against him. He reported an increase in his self-mutilation (cutting). The record indicates he had been seeing a therapist, Brenda Potts, since 1996. He was diagnosed with major depression, obsessive-compulsive disorder, generalized anxiety disorder and self-mutilation.
- 24) Claimant was hospitalized again for his psychological condition at **St. John's Mercy Medical Center** (Exhibit K) on April 27, 2000. According to the records, he got drunk, fell off a bar stool, hit his head, and began making homicidal and suicidal threats. He expressed having a plan and 2 back-up plans for his suicide, and also expressed having a number of people he would like to kill by running them over. The records referred to his history of sexual abuse while growing up, and his self-mutilation behavior, as well as his prior admission and continued treatment for depression. He was diagnosed with alcohol dependence and a depressive disorder, as well as perhaps obsessive-compulsive disorder and a panic disorder.
- 25) On April 18, 2001, Claimant again injured his right knee at work for Employer when he was struck on the right knee by an axle that was up on a hoist. He said the guard was missing from the button, and his knee was struck when the button was hit.
- 26) Claimant again received treatment from **Dr. John Wagner at Orthopedic Associates** (Exhibit E) for his right knee. On June 12, 2001, Dr. Wagner performed a debridement and chondroplasty of the medial femoral condyle, and an abrasion arthroplasty of the patella and tibia to remove anterior spurs. When Claimant continued to have problems and complaints with the knee, Dr. Wagner eventually recommended a total knee replacement procedure. Dr. Wagner performed the total right knee replacement on October 16, 2001 at **Missouri Baptist Medical Center** (Exhibit C).
- 27) Claimant followed up with Dr. Wagner after the knee replacement surgery, and was readmitted to Missouri Baptist Medical Center on October 31, 2001 because of a suspected infection in the knee. He came under the care

- of **Dr. Michael Gutwein** (Exhibit D) for an Infectious Disease consultation. He continued to treat with Dr. Gutwein, while he was still seeing Dr. Wagner for his orthopedic knee complaints. Dr. Wagner's reports contain numerous references to the knee giving out and Claimant having continued significant pain. Dr. Wagner eventually performed another surgery on the right knee on June 6, 2002 at Missouri Baptist Medical Center. He performed a debridement of a fibrosis of the right knee (synovectomy). When Claimant continued to have significant pain and problems with the knee despite this additional surgery, Dr. Wagner recommended a second-opinion evaluation with **Dr. Richard Hulsey** (Exhibit E). Dr. Hulsey examined Claimant on November 18, 2002. Dr. Hulsey could find no specific reason for the pain, and merely recommended a continued home exercise program. Dr. Wagner issued his final report in this case on September 11, 2003 (Exhibit E). In it, he opined that Claimant had 15% permanent partial disability at the level of the right knee due to the injury of April 18, 2001 and the total knee replacement.
- 28) During this whole period of recovery after the April 18, 2001 injury, Claimant had extensive courses of physical therapy and a work hardening evaluation at **HealthSouth** (Exhibit F). He also had an extensive course of physical therapy at **Aquatic Fitness, Inc.** (Exhibit G) where they worked on increasing his range of motion and functioning in the knee, while decreasing his complaints.
- 29) Claimant testified that he tried to go back to work in 2003, but Dr. Malec at the plant disregarded all of his restrictions, and Claimant was walking, bending and lifting even more than he was doing before his last injury. He said they moved him around for a half a day and then sent him out for a week. He said that all the walking, stooping and kneeling made his symptoms in the right knee worse.
- 30) On June 4, 2003, Claimant was admitted directly to the outpatient psychiatric program at **St. Anthony's Medical Center** (Exhibit N) by Dr. Zia. He reported increasing depression over the last several months. He reported mood swings with feelings of being very depressed to very angry. His GAF (Global Assessment of Functioning) at admission was 35. He was discharged from the program on June 25, 2003 to follow-up with Dr. Zia. His diagnoses were major depression, recurrent, and obsessive-compulsive disorder.
- 31) Medical records from the **St. Louis Behavioral Medicine Institute** (Exhibit O) document visits Claimant has had there since 2003 for psychological counseling. There are references to depression and anxiety, as well as stress and cutting behaviors. There are also indications that he tried to work, and he wants to work, but it is "torture" on his knees, and he simply cannot do it.
- 32) Claimant testified that his mental status grew progressively worse following this last injury because he could not do anything physical anymore. He said he used to be obsessive about exercise as a coping skill, but he could not run or even really pedal a bicycle anymore because of the right knee. He said he gained 60 pounds since 2001. Claimant testified that at one point he loaded up his guns and was going to head to Chrysler because he was "going to kill 10 or 12 of those SOB's." He said that he also got involved with obsessive gambling, and was in debt thousands and thousands of dollars. He said that his wife gives him an allowance now every two weeks, and she handles all of the money. He said he continues to take antidepressant and anti-anxiety medications, but they are not helping him. He testified though that if he does not take his medication, then bad things happen to people. He said, for example, that he got into an altercation with his neighbor, and had to go to the hospital. He said that generally he does okay with people as long as it is on his terms. He admitted that he has several weapons, but his psychologist will not let him have them, because of a fear that he would use them to kill people at Chrysler, or other people in general.
- 33) Following his release from Dr. Wagner for his right knee, Claimant then came under the care of **Dr. Gregory Galakatos** (Exhibit I) for his left knee. Dr. Galakatos performed a left knee arthroscopy with a partial medial meniscectomy, and a chondroplasty of the patella, at the **HealthSouth Outpatient Surgery Center** (Exhibit J) on November 18, 2003. This left knee condition was apparently not treated under the Workers' Compensation statute and no benefits were paid by Employer on account of it.
- 34) The deposition of **Dr. David T. Volarich** was taken by Claimant on September 21, 2006 to make his opinions in this case admissible at trial (Exhibit Z). Dr. Volarich is an osteopathic physician with a certification as an independent medical examiner. He examined Claimant on one occasion, April 13, 2004, at the request of Claimant's attorney. This single examination occurred after Claimant had sustained his 2001 injury and also underwent his knee replacement surgery as a result of that last injury. Interestingly, Dr. Volarich describes the 1999 injury as having occurred on February 14, 1999, not March 14, 1999 as is pled in the Claim. He describes the same mechanism of injury of Claimant tripping over a metal band from an axle that was on the floor, causing him to twist his knee and fall onto it.
- 35) Referable to the February 14, 1999 (March 14, 1999) injury, Dr. Volarich diagnosed aggravation of right knee syndrome including degenerative arthritis and chondromalacia with a bone contusion, which was not surgically repaired. Referable to the April 18, 2001 injury, he diagnosed another contusion of the knee causing a significant aggravation of his degenerative arthritis and chondromalacia, and resulting in a total knee joint replacement, which was complicated by post-surgery infection. He opined that the work injuries of February 14, 1999 and

April 18, 2001 were the substantial factors in causing these respective diagnoses, and need for treatment. He rated Claimant at 15% permanent partial disability of the right knee for the February 14, 1999 injury, and 60% permanent partial disability of the right knee for the April 18, 2001 injury. Dr. Volarich also rated pre-existing disabilities to the right knee (20%) and to the right hand (20%). He opined that there was considerable psychiatric disability, but deferred to a psychiatric evaluation for that assessment. Dr. Volarich further opined that the combination of the disabilities creates a substantially greater disability than the simple sum or total of each separate injury or illness, and so a loading factor should be added.

- 36) On the issue of permanent total disability, Dr. Volarich testified that he was uncertain if there was anything Claimant would be able to do in the open labor market, so that is why he recommended a vocational assessment. He noted that if a job could be found within his capabilities that he was able to do, then he would have no objection to him attempting to go back to work. However, he opined that if the vocational assessment was unable to identify a job he could do, then Claimant would be considered permanently and totally disabled as a result of the 1999 and 2001 injuries, in combination with each other, as well as in combination with his pre-existing medical conditions, including his significant psychiatric disease. Dr. Volarich further confirmed that his finding of permanent total disability did not include the subsequent left knee, and in fact, Claimant would have been deemed permanently and totally disabled even before the development of the left knee symptoms.
- 37) The deposition of **Dr. Richard Anderson** was taken by Claimant on October 2, 2006 to make his opinions in this case admissible at trial (Exhibit BB). Dr. Anderson is a board certified psychiatrist. He examined Claimant on one occasion, February 24, 2004, at the request of Claimant's attorney. After taking an extensive history from Claimant, including a past psychiatric and medical history, and after reviewing some medical treatment records, Dr. Anderson also administered psychological testing and performed a mental status examination. He noted that Claimant was already on high doses of antidepressant and anti-anxiety medications, and he described this combination of medications as "unusual" and used "only in the most severe cases of depression and anxiety." He also noted the scars on Claimant's arms attributable to the self-mutilating behavior.
- 38) Dr. Anderson diagnosed a mood disorder, probably bipolar type II disorder with depression being most prominent, and/or major depressive disorder; obsessive-compulsive disorder by history; generalized anxiety disorder; and ethanol abuse/dependence. He opined that Claimant had a GAF (Global Assessment of Functioning) of 50 at best. Dr. Anderson testified that 50 or below in the GAF would be criteria for starting to think about some inpatient or day hospital program for his psychiatric symptoms. On the basis of these diagnoses, Dr. Anderson opined that Claimant had 50% permanent partial disability of the body as a whole referable to psychiatric conditions related to the right knee injury at work in 2001. He further opined that on the basis of his overall psychiatric condition including both the 2001 work injury and his pre-existing mental status, Claimant was 100% psychiatrically disabled.
- 39) The deposition of **Delores Gonzalez** was taken by Claimant on November 6, 2006 to make her opinions in this case admissible at trial (Exhibit AA). Ms. Gonzalez is a certified rehabilitation counselor. She has experience in providing counseling and vocational rehabilitation services to disabled veterans, and she is also a clinical educator in this area at Maryville University. She met with Claimant on one occasion, and generated a report dated June 24, 2005, at the request of Claimant's attorney. After reviewing additional medical records, she generated a second report dated July 17, 2006. She reviewed extensive medical treatment records. She performed a Transferability of Work Skills Analysis, and determined that Claimant could not perform his past work, nor did he have transferable skills to perform other work within his physical and mental residual functional capacities.
- 40) Ms. Gonzalez concluded that based on the combination of his injuries and psychiatric impairments, Claimant is not capable of any competitive work in the open labor market. He is also not a candidate for vocational rehabilitation. She believed his combination of factors would preclude any employment now and in the future. She also opined that even if you did not consider the subsequent left knee, he would still be vocationally permanently and totally disabled based on the combination of all of his other problems.
- 41) The Second Injury Fund obtained a Vocational Rehabilitation Evaluation report from **James M. England, Jr.** (Exhibit I). Mr. England is a certified vocational rehabilitation counselor. He did not personally meet with Claimant, but instead formulated his opinions based on a review of the medical records and Claimant's deposition testimony. He generated a report containing his opinions and conclusions, dated January 13, 2006. In terms of functional restrictions or limitations, Mr. England noted that Claimant described functioning in the sedentary to light range overall, but he had severe psychiatric problems. This characterization of his psychiatric problems was supported by Dr. Anderson's findings. He found that Dr. Volarich's restrictions would limit him to a sedentary or light type of job. He saw no restrictions from the treating doctors, except no running or jumping.
- 42) Mr. England opined that assuming only the physical restrictions, even from Dr. Volarich, there would still be entry-level service types of employment available to Claimant. However, when the psychiatric impairment is added, Claimant is then unemployable. In fact, Mr. England believed that the psychiatric impairment (represented by the GAF score of 50 from Dr. Anderson) by itself would prevent him from sustaining competitive employment, and the only reason he kept his job with Employer was because of the power of the Union that represented him.

- 43) Claimant and Employer entered into an agreement to resolve their portion of the March 14, 1999 claim (Injury No. 99-182682) by **Stipulation for Compromise Settlement** (Exhibit A) for \$21,220.56 or 45% permanent partial disability of the right knee. According to the Stipulation, Employer paid no medical benefits or temporary total disability benefits in connection with this injury
- 44) Claimant and Employer entered into an agreement to resolve their portion of the April 18, 2001 claim (Injury No. 01-070581) by **Stipulation for Compromise Settlement** (Exhibit B) for \$24,512.28 or 15% permanent partial disability of the right knee and 13.5% permanent partial disability of the body as a whole referable to psychological impairment. According to the Stipulation, Employer paid medical benefits totaling \$93,614.26, and temporary total disability benefits totaling \$55,684.98 in connection with this injury.
- 45) In terms of his current functioning, Claimant said that he can only stand for 45 minutes; walk for a half a mile to a mile; bend, stoop and kneel very little; and drive mostly with his left foot. He said he spends his days angry, with intrusive thoughts, and “wishing this was over.” He said that 3-4 days a week, he does not get out of bed because he cannot deal with people. He said the medications he is on take away his focus and his short-term memory. He said he does not get much sleep. He has panic and anxiety attacks, and wakes up sweating and feeling like he has had a heart attack.

RULINGS OF LAW:

Based on a comprehensive review of the substantial and competent evidence described above, including Claimant’s credible testimony, the expert medical opinions and depositions, the medical records, the vocational opinions and deposition, and the Stipulations for Compromise Settlement for the various injuries, as well as my personal observations of Claimant at hearing, and based on the applicable statutes of the State of Missouri, I find:

Claimant sustained a compensable injury to his right knee on April 18, 2001, when his knee was struck by an axle suspended on a hoist, in the course and scope of his employment. The accident caused an acceleration and worsening of his right knee condition, which resulted ultimately in a total right knee replacement. This finding on Claimant’s orthopedic condition, and the medical causation of it, is supported by the records and reports of Dr. Wagner, Dr. Hulsey, Dr. Gutwein, Missouri Baptist Medical Center, and the report and testimony of Dr. Volarich.

I find that the accident also caused a frank worsening of his pre-existing psychiatric condition, which resulted in additional hospitalizations and continued treatment from mental health professionals. This finding on Claimant’s psychiatric condition, and the medical causation of it, is supported by the uncontradicted testimony of Dr. Anderson.

I find that Employer paid appropriate medical benefits and temporary total disability benefits while Claimant was recovering from the injury and subsequent surgeries. Claimant reached maximum medical improvement as of April 18, 2003.

Given the nature of this Claim and the evidence submitted, both issues in this case can be effectively addressed at the same time.

Issue 1: What is the nature and extent of Claimant’s permanent partial and/or permanent total disability attributable to this accident?

Issue 2: What is the liability of the Second Injury Fund?

Under **Mo. Rev. Stat. § 287.020.7**, “total disability” is defined as “inability to return to any employment and not merely ... inability to return to the employment in which the employee was engaged at the time of the accident.” The test for permanent total disability is claimant’s ability to compete in the open labor market. The central question is whether any employer in the usual course of business could reasonably be expected to employ claimant in his present physical condition. *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173 (Mo.App. E.D. 1995)

In cases such as this one where the Second Injury Fund is involved and there is an allegation of permanent total disability, we must also look to **Mo.Rev.Stat. § 287.220** for the appropriate apportionment of benefits under the statute. The analysis of the case essentially takes on a three-step process:

First, is Claimant permanently and totally disabled?;

Second, what is the extent of Employer’s liability for that disability from the last injury alone?; and

Finally, is the permanent total disability caused by a combination of the disability from the last injury and any pre-existing disabilities?

In determining this case, I will follow this three-step approach to award all appropriate benefits under the Statute.

Considering the competent and substantial evidence listed above, I find that Claimant is permanently and totally disabled. Claimant credibly described the continuing pain and problems he has with his right knee that keep him from functioning normally on a daily basis. He also credibly described the continuing effects of his psychiatric conditions and how that condition impacts his ability to deal with others and function in society. He is continuing to take medication on a daily basis to deal with the pain and psychiatric complaints.

Based on the reports in evidence and the testimony, I find that doctors have placed significant restrictions on Claimant's ability to function in the work place. Dr. Volarich, who provided the most comprehensive report on Claimant's condition, placed significant restrictions on his physical activities from an orthopedic standpoint. Finally, he was uncertain if there were jobs in the open labor market which Claimant could do, so he recommended a vocational assessment. Dr. Volarich, however, did not provide any opinions regarding Claimant's psychiatric condition or disability. Dr. Anderson, specifically dealing with Claimant's mental condition, opined that Claimant was 100% psychiatrically, permanently and totally disabled. Claimant's GAF number was 50, indicating, according to the doctor, that Claimant would have significant enough problems to start considering hospitalization for his condition. I find these opinions from Dr. Volarich and Dr. Anderson, as well as all of the opinions contained in their reports and testimony, to be competent, credible and persuasive evidence in this case. Dr. Volarich's and Dr. Anderson's opinions, and Claimant's allegation of permanent total disability, was further bolstered by the testimony of Ms. Delores Gonzalez and the report of Mr. James England, vocational rehabilitation counselors, who confirmed that Claimant was not employable in the open labor market given the totality of his condition, including his psychiatric disability.

Based on the totality of the evidence submitted at hearing, I find the opinions of Dr. Volarich, Dr. Anderson, Ms. Gonzalez and Mr. England to be credible and properly supported by the rest of the medical evidence in this case. I found no evidence in the record, either medical or vocational, to support the proposition that Claimant was only permanently partially disabled and able to work, when the totality of his condition was considered (including his psychiatric condition).

Since Claimant is found to be permanently and totally disabled, the next step of the inquiry then is to determine the extent of Employer's liability for the last injury alone, and specifically to determine if Employer is solely responsible for that permanent total disability.

Based on my review of the competent and substantial evidence, I do not believe the last injury alone caused Claimant to be permanently and totally disabled. I do not find any credible evidence to suggest that Claimant's permanent total disability is the result of the last injury on April 18, 2001 alone. None of the experts who provided opinions on disability, or on ability to work, including Dr. Volarich, Dr. Wagner, Dr. Anderson, Ms. Gonzalez or Mr. England, indicated that just the last injury alone was responsible for permanent total disability.

Claimant has had a history of injuries to various parts of his body for which he received permanent partial disability payments going back to an injury at least in 1997. These pre-existing injuries to the right knee and right hand caused Claimant to miss time from work and take medications for his complaints. Additionally, Claimant's pre-existing mental health conditions, including depression, Obsessive Compulsive disorder and anxiety, had a profound effect on Claimant's ability to work and function, with and around other people. I believe Claimant when he testified to the problems he experienced with both the right knee and the mental health conditions prior to the 2001 injury at work. Dr. Volarich and Dr. Anderson testified that the combination of the primary and pre-existing injuries and conditions was the reason Claimant was permanently totally disabled. Ms. Gonzalez and Mr. England also similarly opined that the combination of the disabilities rendered Claimant permanently and totally disabled. Quite simply, there is no medical or vocational evidence in the record to support a finding that the last injury alone caused the permanent total disability in the case.

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

In trying to assess the percentage of permanent partial disability related to this injury for which Employer would have responsibility, it is also necessary to take into account the pre-existing permanent partial disability to the same body part. Claimant testified about the prior right knee injuries, including the treatment he received. There is also the settlement of Injury No. 97-013155 and the award of disability in Injury No. 99-182682 that attributes a specific amount of pre-existing disability to the right knee. The medical treatment records from Dr. John Wagner, St. John's Mercy Medical Center, and Missouri Baptist Medical Center document treatment Claimant received and complaints he had regarding the right knee before the injury in 2001. Additionally, medical records from Dr. Zia, St. John's Mercy Medical Center, and DePaul Health Center document the problems Claimant had and the treatment he received for his various mental health conditions. Finally,

Dr. Volarich diagnosed pre-existing problems and disability in the right knee, and Dr. Anderson diagnosed pre-existing psychiatric conditions and rated disability attributable to these conditions.

Case law in this area has stood for the proposition that since pre-existing permanent partial disability to the same part of the body is conclusively presumed to continue undiminished, it is appropriate for the total amount of permanent partial disability to be reduced by the prior amount, leaving the balance to be paid by the Employer in the instant case. *Helm v. SCF, Inc.*, 761 S.W.2d 199 (Mo.App. 1988).

Based upon all of these findings, as well as based on Claimant's testimony and the medical evidence, I find that Claimant has a total of 75% permanent partial disability of the right knee. I further find that Claimant had pre-existing permanent partial disability of 25% of the right knee (20% attributable to Injury No. 97-013155 and 5% attributable to Injury No. 99-182682). Accordingly, I find that Employer was responsible for 50% permanent partial disability of the right knee. I also find Claimant has a total of 60% permanent partial disability of the body as a whole referable to psychiatric conditions. I further find that Claimant had pre-existing permanent partial disability of 35% of the body as a whole referable to psychiatric conditions. Accordingly, I find Employer was responsible for 25% permanent partial disability of the body as a whole referable to psychiatric conditions related to the April 18, 2001 injury.

The final step of the inquiry then is whether the permanent total disability is the result of the combination of the primary (last) injury and pre-existing disabilities so that the Second Injury Fund would have liability for the permanent total disability. As alluded to above, the medical opinions of Dr. Volarich and Dr. Anderson, the vocational opinions of Ms. Gonzalez and Mr. England, as well as the credible testimony of Claimant, all support the finding that Claimant is permanently and totally disabled as a result of the combination of his primary and pre-existing disabilities, and thus the Second Injury Fund has liability for that disability.

With regard to the pre-existing injuries and disabilities Claimant has alleged, I find Claimant has provided credible testimony and/or evidence to explain the nature of the injuries to his right knee, right wrist (hand) and psychiatric condition. He also credibly explained the various ways in which these disabilities impacted his ability to work. In reviewing the medical records submitted into evidence, I did find notes regarding the right knee and right wrist (hand) to substantiate the extent of those injuries. Additionally, I found the medical treatment records regarding the psychiatric conditions adequately showed the nature and extent of that condition prior to the April 18, 2001 injury. It is clear to me from Claimant's testimony and from review of the medical records that the prior right knee, right wrist (hand) and psychiatric conditions were all hindrances or obstacles to employment or re-employment prior to the April 18, 2001 injury. Then, of course, there are the credible and uncontradicted medical opinions from Dr. Volarich and Dr. Anderson, as well as the vocational opinions of Ms. Gonzalez and Mr. England, all of whom opine Claimant is permanently and totally disabled as a result of the combination of his primary right knee and psychiatric disability with his pre-existing disabilities to multiple parts of his body.

Accordingly, based on all of this evidence, I find that Claimant has met his burden of proof to show that he is permanently and totally disabled as a result of the combination of his primary right knee disability and psychiatric disability with his pre-existing disabilities to the right knee, right wrist (hand) and psychiatric disability. Since the permanent total disability is the result of the combination of his disabilities, the Second Injury Fund has liability for this disability.

Having established the responsibility of the Second Injury Fund for the permanent total disability exposure in this Claim, there is yet one issue regarding the amount and timing of the payments under the statute. Since Claimant reached maximum medical improvement on April 18, 2003 and Employer was responsible for all appropriate temporary total disability up through that date, I find that Claimant is permanently and totally disabled as of April 19, 2003.

By the terms of this award, Employer was responsible for 180 weeks of permanent partial disability at a rate of \$314.26. Therefore, from April 19, 2003 until September 30, 2006 (180 weeks), Employer had liability for \$314.26 per week, which Claimant and Employer settled by the terms of the Stipulation for Compromise Settlement that extinguished Employer's liability for this case.

Because the PTD and PPD rates are different, there is a differential due from the Second Injury Fund. Therefore, from April 19, 2003 until September 30, 2006 (180 weeks), Claimant is to receive \$265.25 per week, or the difference between the permanent partial and permanent total disability rates ($\$579.51 - \$314.26 = \$265.25$), for a total of \$47,745.00 from the Second Injury Fund.

Starting then on October 1, 2006, the Second Injury Fund is to pay \$579.51 per week for Claimant's lifetime, subject to review and modification by law.

CONCLUSION:

Claimant sustained a compensable accident arising out of and in the course of his employment for Employer. The injuries to his right knee and body as a whole referable to a worsening of his psychiatric condition are medically causally connected to that April 18, 2001 injury at work. Employer is responsible for 180 weeks of compensation (50% of the right

knee and 25% of the body as a whole referable to psychological impairment) for permanent partial disability attributable to the April 18, 2001 injury. Claimant is permanently and totally disabled as a result of the combination of the primary injury and pre-existing disabilities to the right knee, right wrist (hand) and body as a whole for psychological conditions. Compensation from the Second Injury Fund is payable in the amount of \$265.25 per week from April 19, 2003 until September 30, 2006, or 180 weeks (\$47,745.00). Compensation from the Second Injury Fund is then payable from October 1, 2006 for the rest of Claimant's life in the amount of \$579.51 per week, subject to review and modification by law. Compensation awarded is subject to a lien in the amount of 25% of all payments in favor of Evan J. Beatty, for necessary legal services.

Date: _____

Made by: _____

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

A true copy: Attest:

Jeffrey W. Buker
Director
Division of Workers' Compensation