Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 00-111075

Employee: Robert Grothaus

Employer: Mehlville Fire Protection District

Insurer: Missouri Fire & Ambulance District Insurance

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

Date of Accident: September 13, 2000

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

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated June 15, 2005. The award and decision of Administrative Law Judge John Howard Percy, issued June 15, 2005, 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 17th day of October 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

CONCURRING OPINION FILED
William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED
John J. Hickey, Member

Attest:

Secretary

CONCURRING OPINION

I submit this concurring opinion to disclose the fact that I was previously employed as a partner in the law firm of Evans and Dixon. While I was a partner the instant case was assigned to the law firm for defense purposes. I had no actual knowledge of this case as a partner with Evans and Dixon. However, recognizing that there may exist

the appearance of impropriety because of my previous status with the law firm of Evans and Dixon, I had no involvement or participation in the decision in this case until a stalemate was reached between the other two members of the Commission. As a result, pursuant to the rule of necessity, I am compelled to participate in this case because there is no other mechanism in place to resolve the issues in the claim. *Barker v. Secretary of State's Office*, 752 S.W.2d 437 (Mo. App. 1988).

Having reviewed the evidence and considered the whole record, I join in and adopt the award and decision of the administrative law judge.

_____

William F. Ringer, Chairman

DISSENTING OPINION

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

The administrative law judge erred in failing to find that employee is permanently and totally disabled due to the disability from his primary knee injury combined with his preexisting disabilities including osteoarthritis, obesity, cervical spine problems and knee conditions. The administrative law judge correctly found that employee suffered from these preexisting disabilities and that the disabilities were hindrances or obstacles to employment or reemployment.

The administrative law judge concedes in a footnote that employee may have been totally disabled as of the time of trial. The administrative law judge nonetheless denied permanent total disability benefits finding that if employee was totally disabled at the time of trial, it was due to post-accident weight gain and post-accident worsening of his preexisting osteoarthritis.

There is sufficient evidence in the record to establish that employee had preexisting obesity and osteoarthritis that were a hindrance or obstacle to employment at the time of his injury. The evidence also shows that, until the primary injury, employee was able to perform most work duties by modifying the way he worked. I would find that employee was rendered permanently and totally disabled by a combination of the primary injury with his preexisting disabilities.

I would affirm the administrative law judge's permanent partial disability award against employer/insurer for the primary injury. I would also award future medical care in the form of a knee replacement to be provided by employer/insurer. I would award permanent total disability benefits against the Second Injury Fund.

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

_____

John J. Hickey, Member

AWARD

Employee: Robert Grothaus

Injury No.: 00-111075

Dependents: N/A

Before the
Division of Workers'

Employer: Mehlville Fire Protection District

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

Additional Party: Second Injury Fund

Insurer: Missouri Fire & Ambulance District Insurance

Hearing Date: February 22, 2005

Checked by: JHP:tr

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: September 13, 2000
5. State location where accident occurred or occupational disease was contracted: St. Louis County, Mo.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? 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:
    Struck right knee with “jaws of life”.
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
14. Nature and extent of any permanent disability: 20% permanent partial disability of the right knee
15. Compensation paid to-date for temporary disability: $20,398.64
16. Value necessary medical aid paid to date by employer/insurer? $27,613.80

Employee: Robert Grothaus

Injury No.: 00-111075

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: @$1,400.00
19. Weekly compensation rate: $599.96 PTD/TTD; $314.26 PPD
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

    32 weeks of permanent partial disability from Employer $10,056.32

22. Second Injury Fund liability: No

TOTAL: $10,056.32

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 20% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Timothy O'Mara

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Robert Grothaus		Injury No.: 00-111075
Dependents:	N/A		Before the **Division of Workers' Compensation** Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Employer:	Mehlville Fire Protection District		
Additional Party:	Second Injury Fund		
Insurer:	Missouri Fire & Ambulance District Insurance		Checked by: JHP

A hearing in this proceeding was held on February 22, 2005. The parties submitted proposed awards on April 5, 2005. The record comprises 277 pages of medical and vocational records and reports and 207 pages of medical and vocational depositions. Additional time was required in issuing this award due to the voluminous record and complexities of this alleged permanent total disability case.

STIPULATIONS

The parties stipulated that on or about September 13, 2000:

1. the employer and employee were operating under and subject to the provisions of the Missouri Workers' Compensation Law;
2. the employer's liability was insured by Missouri Fire & Ambulance District Insurance;
3. the employee's average weekly wage was approximately $1,400.00;
4. the rate of compensation for temporary total disability and permanent total disability was $599.96 and the rate of compensation for permanent partial disability was $314.26; and

5. the employee sustained an injury by accident arising out of and in the course of employee's employment occurring in St. Louis County, Missouri.

The parties further stipulated that:

1. the employer had notice of the injury and a claim for compensation was filed within the time prescribed by law;
2. compensation has been paid in the amount of $20,398.64 representing 34 weeks of benefits covering the period from September 14, 2000 to May 16, 2001[1]; and
3. employer/insurer have paid $27,613.80 in medical expenses.

ISSUES

The issues to be resolved in this proceeding are:

1. whether some or all of employee's current symptoms are the result of a preexisting condition or the result of the work-related accident;
2. whether the employee should be provided with any future medical treatment;
3. the nature and extent of any permanent disability sustained by the employee as a result of the work-related injury of September 13, 2000; and
4. whether and to what extent employee has sustained any additional permanent partial or permanent total disability for which the Second Injury Fund would be liable as a result of the combination of any preexisting disabilities with the primary injury.

MEDICAL CAUSATION

Employee claims that he sustained tears of both his medial and lateral menisci of his right knee as a result of the work-related accident of September 13, 2000. Employer/insurer contend that those tears were degenerative and preexisted the work-related accident and that he sustained at most a temporary aggravation of his underlying degenerative osteoarthritis.

The employee must establish a causal connection between the accident and the claimed injuries. Davies v. Carter Carburetor Div., 429 S.W.2d 738 (Mo. 1968); McGrath v. Satellite Sprinkler Systems, 877 S.W.2d 704, 708 (Mo. App. 1994); Blankenship v. Columbia Sportswear, 875 S.W.2d 937, 942 (Mo. App. 1994); Fisher v. Archdiocese of St. Louis, 793 S.W.2d 195, 198 (Mo. App. 1990); Cox v. General Motors Corp., 691 S.W.2d 294 (Mo. App. 1985); Griggs v. A.B. Chance Company, 503 S.W.2d 697, 703 (Mo. App. 1974); Smith v. Terminal Transfer Company, 372 S.W.2d 659, 664 (Mo. App. 1963).

Amendments made to Section 287.020.2 in 1993 require that the injury be "clearly work related" for it to be compensable. An injury is clearly work related "if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor." The Supreme Court held in Kasl v. Bristol Care, Inc., 984 S.W.2d 852 (Mo. 1999) that the foregoing language overruled the holdings in Wynn v. Navajo Freight Lines, Inc., 654 S.W.2d 87 (Mo. 1983), Bone v. Daniel Hamm Drayage Company, 449 S.W.2d 169 (Mo. 1970), and many other cases which had allowed an injury to be compensable so long as it was "triggered or precipitated" by work. Injuries which are triggered or precipitated by work may nevertheless be compensable if the work is found to be a "substantial factor" in causing the injury. Kasl, supra at 853. A substantial factor does not have to be the primary or most significant causative factor. Bloss v. Plastic Enterprises, 32 S.W.3d 666, 671 (Mo. App. 2000); Cahall v. Cahall, 963 S.W.2d 368, 372 (Mo. App. 1998). An accident may be both a triggering event and a substantial factor in causing an injury. Id. Subsection 2 also provides that an injury must be incidental and not independent of employment relationship and that "ordinary, gradual deterioration or progressive degeneration of the body caused by aging" is not compensable unless it "follows as an incident of employment." The extent to which the 1993 amendments have further modified prior caselaw will be determined by the appellate courts. See Cahall, supra at 372.

The quantum of proof is reasonable probability. Davies, supra at 749; Downing v. Willamette Industries, Inc., 895 S.W.2d 650, 655 (Mo. App. 1995); White v. Henderson Implement Co., 879 S.W.2d 575, 577 (Mo. App. 1994); Fischer at 199; Banner Iron Works v. Mordis, 664 S.W.2d 770, 773 (Mo. App. 1983); Griggs at 703. "Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." Tate v. Southwestern Bell Telephone Co., 715 S.W.2d 326, 329 (Mo. App. 1986); Fischer 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. 1993); Griggs at 704; Downs v. A.C.F. Industries, Incorporated, 460 S.W.2d 293, 295-96 (Mo. App. 1970). Expert testimony is required where the cause and effect relationship between the claimed injury or condition and the alleged cause is not within the realm of common knowledge. McGrath v. Satellite Sprinkler Systems, 877 S.W.2d 704, 708 (Mo. App. 1994); Brundige v. Boehringer Ingelheim, 812 S.W.2d 200, 202 (Mo. App. 1991). Expert testimony is essential where the issue is whether a preexisting condition was aggravated by a subsequent injury. Modlin v. Sun Mark, Inc., 699 S.W.2d 5 (Mo. App. 1985). The fact finder may accept only part of the testimony of a medical expert and reject the remainder of it. Cole v. Best Motor Lines, 303 S.W.2d 170, 174 (Mo. App. 1957). Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. Hawkins v. Emerson Electric Co., 676 S.W.2d 872, 877 (Mo. App. 1984). 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. 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, 163 (Mo. App. 1986). An administrative law judge may not constitute himself or herself as an expert witness and substitute his or her personal opinion of medical causation of a complicated medical question for the uncontradicted testimony of a qualified medical expert. Wright v. Sports Associated, Inc., 887 S.W.2d 596 (Mo. 1994); Bruflat v. Mister Guy, Inc., 933 S.W.2d 829, 835 (Mo. App. 1996); Eubanks v. Poindexter Mechanical, 901 S.W.2d 246, 249-50 (Mo. App. 1995). However, even uncontradicted medical evidence may be disbelieved. Massey v. Missouri Butcher & Cafe Supply, 890 S.W.2d 761, 763 (Mo. App. 1995); Jones v. Jefferson City School Dist., 801 S.W.2d 486, 490 (Mo. App. 1990).

On the other hand, where the facts are within the understanding of lay persons, the employee's testimony or that of other lay witnesses may constitute substantial and competent evidence. This is especially true where such testimony is supported by some medical evidence. Lawton v. Trans World Airlines, Inc., 885 S.W.2d 768 (Mo. App. 1994); Pruteanu v. Electro Core Inc., 847 S.W.2d 203 (Mo. App. 1993); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 367 (Mo. App. 1992);Fisher v. Archdiocese of St. Louis, 793 S.W.2d 195, 199 (Mo. App. 1990); Ford v. Bi-State Development Agency, 677 S. W. 2d 899, 904 (Mo. App. 1984); Fogelsong v. Banquet Foods Corp, 526 S.W.2d 886, 892 (Mo. App. 1975). The trier of facts may even base its findings solely on the testimony of the employee. Fogelsong at 892. The trier of facts may also disbelieve the testimony of a witness even if no contradictory or impeaching testimony is given. Hutchinson v. Tri-State Motor Transit Co., supra at 161-2; Barrett v. Bentzinger Brothers, Inc., 595 S.W.2d 441, 443 (Mo. App. 1980). The uncontradicted testimony of the employee may even be disbelieved. Weeks v. Maple Lawn Nursing Home, 848 S.W.2d 515, 516 (Mo. App. 1993). Montgomery v. Dept. of Corr. & Human Res., 849 S.W.2d 267, 269 (Mo. App. 1993).

Findings of Fact

Based on my observations of claimant's demeanor during his testimony, I find that he is a credible witness and that his testimony is generally credible. Based on the credible testimony of claimant and on the medical records, I make the following findings of fact.

Description of Injury

Robert Grothaus, employee herein, was employed as a firefighter for the Mehlville Fire Protection District from 1972 until the time of his injury on September 13, 2000.

On September 13, 2000 while carrying the “jaws of life” to an automobile accident victim, claimant repeated struck his abdomen and right knee with the “jaws of life”. Claimant did not feel immediate pain; however, later in the day he began to experience pain on the outside of his kneecap with stiffness and grinding in the knee. He also noticed a large bruise on his stomach. Claimant reported the injury to his supervisor and was sent to St. Anthony’s Hospital. He was examined and then referred to Dr. Lawrence A. Kriegshauser, an orthopedic surgeon. (Claimant's Testimony)

Medical Treatment

Dr. Kriegshauser examined claimant on September 14, 2000. Heweighed 370 pounds.[2] Claimant described the accident and told him that he had experienced two episodes of locking since the accident. X-rays taken of employee’s right knee showed “advanced tricompartmental osteoarthritis and a possible small bony loose body.” Dr. Kriegshauser noted that employee’s severe arthritis preexisted the September 13 injury. Employee told him that he had previously been advised that he would probably eventually require a knee replacement. Dr. Kriegshauser recommended that employee live with his arthritis as long as possible. He suspected that a loose body was causing the locking. He injected the right knee with Xylocaine and Celestone, prescribed Darvocet and recommended that claimant rest his knee for the next six days. (Employer/Insurer's Exhibit 1, depo ex. 2, pp 45-46) Claimant was re-examined by Dr. Kriegshauser on September 20, 2000.

Employee complained of persistent locking and pain. Dr. Kriegshauser recommended an MRI of the right knee. However, due to a bullet being lodged near claimant's spine, an MRI was not ordered. Surgery was recommended and scheduled for October 24, 2000. He kept employee off work. (Employer/Insurer's Exhibit 1, depo ex. 2, p. 43)

On October 24, 2000 Dr. Kriegshauser performed arthroscopic surgery on claimant's right knee. He found tears of both medial and lateral menisci, grade 4 chondromalacia in the patellofemoral joint and medial compartment, grade 3 chondromalacia in the lateral compartment, and loose bodies in the medial compartment. He debrided the meniscal tears, removed the loose bodies, and performed chondroplasty in all three compartments. (Employer/Insurer's Exhibit 1, depo ex. 2, p. 36)

Dr. Kriegshauser reexamined claimant on October 30. Employee complained of soreness in his previously-operated left knee. Dr. Kriegshauser thought that the soreness would resolved as employee began putting more weight on his right knee. He prescribed physical therapy one to two times per week for 4 weeks. (Employer/Insurer's Exhibit 1, depo ex. 2, pp 40-41)

Claimant underwent physical therapy for his right leg at Healthsouth from early November, 2000 through February 6, 2001. At the conclusion of 31 visits claimant was still unable to descend stairs using a reciprocal/alternating pattern. (Claimant's Exhibit E) He underwent a functional capacity evaluation on February 1, 2001.He then weighed 375 pounds. The therapist noted that pain and poor endurance appeared to be his major limiting factors. The therapist concluded that employee was capable of functioning in the Heavy Physical Demand Level over an eight hour work day on an occasional basis. He had poor tolerance for climbing, squatting, walking, lifting, carrying, and standing. He was unable to crawl or kneel due to pain. (Employer/Insurer's Exhibit 1, depo ex. 2, pp 8-12) Dr. Kriegshauser concluded that claimant's preexisting advanced osteoarthritis caused him to be permanently unable to return to unrestricted status as a firefighter. (Employer/Insurer's Exhibit 1, depo ex. 2, pp 5-6)

Dr. Kriegshauser opined that claimant reached maximum medical improvement for his work-related injury as of April 19, 2001. He then weighed 375 pounds.[3] Dr. Kriegshauser opined that claimant could not return to work as a firefighter and placed permanent restrictions regarding standing on the feet most of the day, repetitive squatting, kneeling and crawling activities. (Employer/Insurer's Exhibit 1, depo ex. 2, p 4)

On October 4, 2001 claimant was examined by Dr. Robert A. Aisenstat, his personal physician. He then weighed 447 pounds. (Claimant's Exhibit C, Page 2)

On January 16, 2002 Dr. Kriegshauser reexamined claimant's right knee. He was still having persistent severe pain in his knees and crepitus in the patellofemoral and medial compartments. X-rays showed severe osteoarthritis. Claimant expressed a desire to undergo a total knee replacement. Dr. Kriegshauser again told him that his arthritis preexisted the work injury and was not caused by the work-related injury. (Employer/Insurer's Exhibit 1, depo ex 2, p. 3)

On December 10, 2002 Mr. Grothaus weighed 450 pounds. (Claimant's Exhibit B, Page 11)

Prior Injuries to the Right and Left Knees

Around 1988 Dr. Newton White performed an arthroscopic debridement and meniscectomy on claimant's right knee. Mr. Grothaus got along reasonably well for the next decade.[4] (Claimant's Exhibit D, Page 15)

In the spring of 1998 claimant developed swelling and pain and occasional grinding in his right knee. He sought treatment from Dr. Marc W. Weise, an orthopedic surgeon, on July 1, 1998. X-rays taken of both knees revealed bilateral degenerative changes with the right knee being worse. There was bone on bone contact in the medial compartment and osteophytes in all three compartments. He diagnosed claimant with degenerative arthritis in his right knee, probably resulting from the prior meniscus tear, and prescribed Relafen. (Claimant's Exhibit D, Pages 15-17)

On July 31, 1998 claimant was examined by Dr. Aisenstat for contact dermatitis. He then weighed 350 pounds. (Claimant's Exhibit C, Page 25)

In September of 1998, Dr. Weis performed an arthroscopic debridement of the right knee.[5] On January 6, 1999 Mr. Grothaus reported that his right leg had locked up during a fire five days earlier. Over the weekend he could barely walk. Dr. Weise noted that there was residual bruising over the lateral aspect of the patella and that the McMurray's test elicited mild pain medially and mild crepitation. Dr. Weise thought that claimant was experiencing a flare-up of his advanced

osteoarthritis. He prescribed anti-inflammatories. (Claimant's Exhibit D, Page 14)

On January 18, 1999 Mr. Grothaus reported some improvement in the popping of his right knee, but soreness in his left knee. On examination both knees had a flexion contracture of 10 degrees. X-rays demonstrated significant osteoarthritis of both knees with only 1 mm of joint space remaining in the right knee and 2 mm remaining on the medial side of the left knee. He injected each knee with Depo Medrol and Marcaine. (Claimant's Exhibit D, Page 13)

Mr. Grothaus returned to Dr. Weise on February 1, 1999. He reported that he had been off work and that his knees had been feeling better since the corticosteroid injections. Dr. Weise prescribed physical therapy and Relafen. On February 22 employee told Dr. Weise that he had been doing well until a couple days earlier when his knees began to ache. McMurray's test elicited pain on medial side of both knees. Dr. Weise injected both knees with Hyalgan. He re-injected both knees on March 1 and referred him to Dr. Daniel J. Schwarze who administered the third injection and fourth injections on March 10 and 22. (Claimant's Exhibit D, Pages 7-12)

Claimant missed work from January 4 through February 16 and from February 18 to February 21, 1999 due to his right knee problems. (Employer/Insurer's Exhibit 5, Page 9)

On March 9, 1999 claimant was examined by Dr. Aisenstat for an upper respiratory infection. He then weighed 350 pounds. (Claimant's Exhibit C, Page 23)

On May 3, 1999 Mr. Grothaus complained on increased tenderness in his right knee. Dr. Schwarze prescribed Ultram and home exercises. On July 2, employee complained of pain in his left knee. On examination Dr. Schwarze noted marked crepitation of the joint and was able to palpate osteophytes. X-rays showed marked narrowing of the medial compartment and global osteophytes. He recommended arthroscopy for claimant's advanced osteoarthritis. Dr. Schwarze performed an arthroscopic debridement of the left knee a few days later.[6] (Claimant's Exhibit D, Pages 4-6)

On September 8, 1999 Claimant complained of tenderness in the right knee. On examination there was marked crepitation of the patellofemoral joint. Dr. Schwarze diagnosed claimant with aggravation of his right knee osteoarthritis and recommended arthroscopic debridement of the right knee. Dr. Schwarze performed an arthroscopic debridement of the right knee about two weeks later.[7] On October 25 Dr. Schwarze noted that claimant was receiving physical therapy and taking Darvocet and Celebrex. He was still having some discomfort going up and down stairs and with prolonged sitting. (Claimant's Exhibit D, Pages 18-19 & 1-2)

On January 4, 2000 claimant was examined by Dr. Aisenstat for problems associated with his weight. He then weighed 430 pounds. Dr. Aisenstat told him that his sore back, sore knees, and other musculoskeletal aches and pains would improve if he would lose weight. He warned him that his morbid obesity was jeopardizing his health. (Claimant's Exhibit C, Page 20)

Claimant missed work from July 10, 1999 until June 2, 2000 due to the surgeries on both knees. (Employer/Insurer's Exhibit 5, Page 9)

Medical Opinions

Dr. Jerome F. Levy, a general surgeon, testified by deposition on behalf of employee on August 16, 2004. Dr. Levy took a present history, past history, present complaints, reviewed the medical records of Dr. Kriegshauser and performed a physical exam. He did not review the prior medical records concerning employee's right knee. (Claimant's Exhibit A, depo ex 2)

Dr. Levy testified that at the time of the April 3, 2001 examination, claimant was 6 feet tall and weighed 375 pounds. His gait was somewhat waddling. He could walk heel to toe, but had discomfort in his right knee when performing these maneuvers. Examination of the right knee revealed grating on motion, causing claimant pain and discomfort. (Claimant's Exhibit A, Page 13) Review of the September 13, 2000 x-rays of the knee showed visible degenerative arthritis. (Claimant's Exhibit A, Page 14) On cross examination he agreed that some of the arthritis and grating preexisted the work-related injury. (Claimant's Exhibit A, Pages 32-33)

Dr. Levy diagnosed claimant with medial and lateral menisci tears of the right knee which were surgically debrided, loose bodies in the right knee which were surgically removed, severe degenerative arthritis of the right knee, chronic strain of the right knee, and morbid exogenous obesity. He agreed that when claimant's right knee was struck and caused to twist,

that was the type of injury which would cause a tear of the meniscus. (Claimant's Exhibit A, Pages 11 & 14) On cross examination Dr. Levy agreed that employee's obesity and degenerative arthritis preexisted the work-related injury. He opined that the menisci were torn and loose bodies broke off from the chondromalacia as a result of the work-related accident. He also stated that the chronic knee strain resulted from the accident. (Claimant's Exhibit A, Pages 31, 33, 35 & 38)

Dr. Kriegshauser testified by deposition on behalf of employer/insurer on July 15, 2004. He did not review the prior medical records concerning employee's right knee. Dr. Kriegshauser's postoperative diagnosis was advanced degenerative arthritis of all three compartments of the right knee with cartilaginous loose bodies and torn medial and lateral menisci of the right knee. (Employer/Insurer's Exhibit 1, Page 10) Dr. Kriegshauser testified that the torn menisci were a direct result of the work-related injury. He stated that the advanced arthritis in all three compartments of the knee preexisted the September 13, 2000 accident. He added that the loose bodies were wear debris from the arthritis. (Employer's Exhibit 1, Pages 8, 10 & 34) On cross examination Dr. Kriegshauser conceded that claimant's subjective complaints related to his arthritis worsened after the accident and that the injury and surgery may have aggravated employee's preexisting arthritis. (Employer/Insurer's Exhibit 1, Pages 23-26 & 33) He did not review any of claimant's previous treatment records concerning his right knee. (Employer/Insurer's Exhibit 1, Page 19)

Dr. Michael H. Ralph, an orthopedic surgeon, testified by deposition on behalf of employer/insurer on August 12, 2004. He examined claimant on May 21, 2003 and reviewed the medical records of Drs. Weise, Schwarze, and Kriegshauser. Claimant then weighed 450 pounds. He observed that claimant was morbidly obese. On examination he noted that Mr. Grothaus's right knee was swollen and that there was a loss of extension of 15 degrees. Dr. Ralph took x-rays of employee's knees. He indicated that the medial joint space in the right knee was almost completely obliterated and that only 20 to 30% of the joint space remained in the left knee. (Employer/Insurer's Exhibit 3, Pages 6-9) He diagnosed claimant with end-stage medial joint space arthritis of his right knee and very significant medial joint space arthritis in his left knee. (Employer/Insurer's Exhibit 3, Pages 10-11)

Dr. Ralph testified that claimant sustained no injury as a result of the September 13, 2000 accident. (Employer/Insurer's Exhibit 3, Page 10) On cross examination Dr. Ralph testified that he disagreed with Dr. Kriegshauser's diagnosis of the work-related injury. Dr. Ralph indicated that employee had preexisting severe degenerative arthritis with significant joint space narrowing and severely degenerated menisci. He said that employee did not tear his menisci on September 13, 2000. He testified that an object striking the knee will not cause a meniscus tear. A meniscus can tear as a result of a twisting movement of the knee. (Employer/Insurer's Exhibit 3, Pages 15-16, 18 & 20)

Additional Findings

All of the experts agree that claimant had severe osteoarthritis in all three compartments of his right knee prior to the September 13, 2000 accident and I so find. X-rays taken of the right knee by Dr. Weise on July 1, 1998 revealedbone on bone contact medially. X-rays taken of the right knee on January 18, 1999 demonstrated significant osteoarthritis of both knees with only 1 mm of joint space remaining in the right knee. X-rays taken of the right knee on September 14, 2000 showed "advanced tricompartmental osteoarthritis and a possible small bony loose body."

Though claimant underwent arthroscopic surgery on his right knee in 1988, September of 1998, and September of 1999, none of the operative notes was in evidence. They might have provided some evidence of the extent of the degeneration of the menisci in claimant's right knee. All of the experts speculated to some extent on whether the menisci tears found during the October 24, 2000 arthroscopic surgery were acute or chronic. Only Dr. Ralph reviewed the prior treatment records. However, Dr. Kriegshauser, as the operating surgeon, was able to examine claimant's menisci. That examination adds weight to his opinion. I therefore find Dr. Kriegshauser's opinions concerning the pathology caused by the September 13, 2000 accident to be more credible than the opinions of the other experts.

Based on the credible opinions of Dr. Kriegshauser, I find that claimant sustained tears to his medial and lateral menisci and a minor aggravation of his preexisting osteoarthritis as a result of the September 13, 2000 accident. I further find that the loose bodies were wear debris from claimant's preexisting osteoarthritis.

FUTURE MEDICAL CARE

Employee is requesting an award of future medical care for his right knee.

Section287.140 Mo. Rev. Stat. (2000) requires that the employer/insurer provide "such medical, surgical, chiropractic, and hospital treatment ... as may reasonably be required ... to cure and relieve [the employee] from the effects of the injury." Future medical care can be awarded even though claimant has reached maximum medical improvement.

Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 278 (Mo. App. 1996). It can be awarded even where permanent partial disability is determined. The employee must prove beyond speculation and by competent and substantial evidence that his or her work-related injury is in need of treatment. Williams v. A.B. Chance Co., 676 S.W.2d 1 (Mo. App. 1984). Conclusive evidence is not required. However, evidence which shows only a mere possibility of the need for future treatment will not support an award. It is sufficient if claimant shows by reasonable probability that he or she will need future medical treatment. Dean v. St. Luke's Hospital, 936 S.W.2d 601, 603 (Mo. App. 1997); Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 277 (Mo. App. 1996); Sifferman v. Sears, Roebuck and Co., 906 S.W.2d 823, 828 (Mo. App. 1995). "Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." Tate v. Southwestern Bell Telephone Co., 715 S.W.2d 326, 329 (Mo. App. 1986); Sifferman at 828.

Where the sole medical expert believes that it is "very likely" that the claimant will need future medical treatment, but is unable to say whether it is more likely than not that the claimant will need such treatment, that opinion, when combined with credible testimony from the claimant and the medical records in evidence, can be sufficient to support an award which leaves the future treatment issue open. This is particularly true where the medical expert states that the need for treatment will depend largely on the claimant's pain level in the future and how well the claimant tolerates that pain. Dean, supra at 604-06.

The amount of the award for future medical expenses may be indefinite. Section 287.140.1 does not require that the medical evidence identify particular procedures or treatments to be performed or administered. Dean, supra at 604; Talley v. Runny Meade Estates, Ltd., 831 S.W.2d 692, 695 (Mo. App. 1992); Bradshaw v. Brown Shoe Co., 660 S.W.2d 390, 393-394 (Mo. App. 1983). The award may extend for the duration of an employee's life. P.M. v. Metromedia Steakhouses Co., Inc., 931 S.W.2d 846, 849 (Mo. App. 1996). The award may require the employer to provide future medical treatment which the claimant may require to relieve the effects of an injury or occupational disease. Polavarapu v. General Motors Corporation, 897 S.W.2d 63 (Mo. App. 1995). It is not necessary that such treatment has been prescribed or recommended as of the date of the hearing. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 277 (Mo. App. 1996). Where future medical care and treatment is awarded, such care and treatment "must flow from the accident before the employer is to be held responsible." Modlin v. Sun Mark, Inc., 699 S.W.2d 5, 7 (Mo. App. 1985); Talley v. Runny Meade Estates, Ltd. at 694. The employer/insurer may be ordered to provide medical and hospital treatment to cure and relieve the employee from the effects of the injury even though some of such treatment may also give relief from pain caused by a preexisting condition. Hall v. Spot Martin, 304 S.W.2d 844, 854-55 (Mo. 1957). However, where preexisting conditions also require future medical care, the medical experts must testify to a reasonable medical certainty as to what treatment is required for the injuries attributable to the last accident. O'Donnell v. Guarantee Elec. Co., 690 S.W.2d 190, 191 (Mo. App. 1985).

Claimant's Testimony

Claimant testified that he has constant pain in his right knee, that it stiffens and swells, and that he has pain with walking and standing. He acknowledged that Dr. Schwarze told him in 1999 that he might require a total right knee replacement. He requested that the option of knee replacement surgery be left open on the award. He also requested that he be allowed to choose his own orthopedic surgeon.

On cross examination employee acknowledged that he told Dr. Kriegshauser on September 14, 2000 thathe had previously been advised that he would eventually require a right knee replacement. (Claimant's Testimony & Employer/Insurer's Exhibit 1, depo ex. 2, pp 45-46)

Medical Opinions

In his initial report Dr. Levy did not comment on whether claimant would require future medical treatment for his right knee. (Claimant's Exhibit A, depo ex. 2) Dr. Levy reexamined claimant on September 2, 2003. During that interval claimant's right knee gradually worsened. Claimant told him that his pain increased when he walked for even a few minutes, that the knee frequently swelled and had given way 8 times during the preceding weeks, and that he had difficulty with standing for more than 5 to 10 minutes. He opined that claimant's heavy weight increased the likelihood that he would experience additional symptoms following the arthroscopy. (Claimant's Exhibit A, Pages 16-17)

On examination Dr. Levy noted that claimant weighed 496 pounds, a gain of 121 pounds, and that his gait was slow and waddling. He had full range of motion with his knees except that his obesity limited his flexion to 110 degrees. There was moderate grating with the right knee and minimal grating of the left knee. (Claimant's Exhibit A, Pages 19-20 & 31)

Dr. Levy reviewed Dr. Kriegshauser's January 16, 2002 report in which he opined that claimant would require a total right knee replacement in the not too distant future due to his arthritis. Dr. Levy opined that claimant will need a total right

knee replacement in the future if it can be performed on a man weighing 500 pounds. He did not indicate whether the need for the future surgery was related to the September 13, 2000 accident. (Claimant's Exhibit A, Page 18 & 37-38 & depo ex 3)

On cross examination Dr. Levy conceded that given Mr. Grothaus's obesity the degenerative arthritis in his right knee would have worsened to some extent even in the absence of the September 13, 2000 injury. (Claimant's Exhibit A, Page 34) He indicated that claimant's obesity (496 pounds) would present a challenge to the orthopedic surgeon, but it would not necessarily be a contraindication for knee replacement surgery. (Claimant's Exhibit A, Page 37)

On February 9, 2001Dr. Kriegshauser suggested that claimant might eventually require a total right knee replacement. At that time claimant weighed 375 pounds. (Employer/Insurer's Exhibit 1, depo ex 2, pp 4 & 9) Dr. Kriegshauser repeated that recommendation in his January 16, 2002 report. However, he testified that the September 13, 2000 accident would not be a substantial factor in causing the need for that surgery. He stated that claimant's preexisting arthritis would be the primary cause for any future knee replacement. He testified that claimant's x-rays immediately after the accident and his age of 52 indicated that he would eventually require knee replacement surgery. He also noted that claimant's obesity was putting more stress on his right knee and aggravating his arthritis. (Employer/Insurer's Exhibit 1, Pages 14-16 & depo ex 2, p. 2)

On cross examination Dr. Kriegshauser testified that claimant is a candidate for a total right knee replacement based on severe arthritis of the knee and persistent pain. He added that some people who have radiographic evidence of severe arthritis and minimal symptoms can suffer significant symptoms related to the aggravation of that arthritis by even a minor injury. He stated that employee would have required the knee replacement even in the absence of the September 13, 2000 accident. He agreed that claimant reported a significant increase of symptoms following the work-related injury. He further agreed that employee's need for the total knee replacement "could have been pushed forward in time" because of the accident. He did not state his opinion on the amount of time by which the accident may have accelerated the need for the knee replacement. He also stated that the surgery could be performed notwithstanding employee's obesity. (Employer/Insurer's Exhibit 1, Pages 26-28)

Dr. Ralph testified that based on the physical examination and x-rays of employee's right knee performed on May 21, 2003, Mr. Grothaus would be a candidate for a knee replacement; however such surgery was contraindicated due to his morbid obesity. Mr. Grothaus then weighed 450 pounds. Dr. Ralph did not believe that the surgery would be related to the September 13, 2000 event. (Employer/Insurer's Exhibit 3, Pages 7 & 10-11) Dr. Ralph testified that claimant did not need any additional treatment as a result of the work event. (Employer/Insurer's Exhibit 3, Page 11)

Additional Findings

A direct order for medical care requires that the treatment "flow from the accident before the employer is to be held responsible." While Dr. Levy opined that claimant will need a total right knee replacement in the future if it can be performed on a man weighing 496 pounds, he did not indicate whether the need for the future surgery was related to the September 13, 2000 accident. On cross examination Dr. Levy conceded that given Mr. Grothaus's obesity the degenerative arthritis in his right knee would have worsened to some extent even in the absence of the September 13, 2000 injury.

While Dr. Ralph agreed that claimant would be a candidate for knee replacement surgery, he opined that it would be contraindicated due to claimant's morbid obesity (450 pounds). He also stated that claimant did not require any future medical care related to the September 13, 2000 event.

Dr. Kriegshauser opined that claimant would eventually require a total right knee replacement and that his weight of 375 pounds would not prevent such surgery. Dr. Kriegshauser further opined that the primary reason for such surgery would be employee's severe preexisting osteoarthritis and that the September 13, 2000 accident would not be a substantial factor in causing the need for that surgery. On the other hand Dr. Kriegshauser agreed that employee's need for the total knee replacement "could have been pushed forward in time" because of the accident. However, he did not state his opinion on the amount of time by which the accident may have accelerated the need for the knee replacement. He also noted that claimant's obesity was putting more stress on his right knee and aggravating his arthritis.

Dr. Kriegshauser's opinion concerning the possible acceleration of the need for further surgery lacks sufficient definiteness to treat it as meeting the substantial factor test. The phrase "could have been pushed forward in time" is similar to "might" or "may". Such verbs are equivocal; they are not sufficient for a reasonable degree of medical certainty. In addition to the equivocal nature of this opinion, Dr. Kriegshauser did not quantify the extent of the acceleration by either using a percentage or time frame. It is not known whether Dr. Kriegshauser thought that the acceleration might be by 1 month or 1 year. Lastly, given claimant's substantial weight gain since last seeing Dr. Kriegshauser (121 pounds), it is not

known whether that additional weight would affect his opinion concerning the safety and possible efficacy of the proposed knee replacement surgery.

Based on the medical opinions in this case, I find that while claimant will eventually require a total right knee replacement, it will be the result of the natural progression of his preexisting osteoarthritis and the aggravation of his arthritis by his morbid obesity. I further find that the September 13, 2000 accident was not a substantial factor in either causing or accelerating the need for the future knee replacement.

PERMANENT DISABILITY AGAINST EMPLOYER

Employee claims that he sustained permanent partial disability as a result of the work-related accident of September 13, 2000 and that he became permanently and totally disabled as a result of the combination of the work-related injury to right knee and employee's alleged preexisting disabilities in his neck, right and left knees and due to obesity, for which the Second Injury Fund would be liable. There was no evidence that employee was rendered permanently and totally disabled as a result of the injuries caused by work-related accident considered alone and without regard to his alleged preexisting disabilities. An employer is liable for permanent total disability compensation under Section 287.200 Mo. Rev. Stat. (2000) only where there is evidence in the record that the primary accident alone caused employee to be permanently and totally disabled. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 276 (Mo. App. 1996); Feldman v. Sterling Properties, 910 S.W.2d 808, 810 (Mo. App. 1995); Moorehead v. Lismark Distributing Co., 884 S.W.2d 416, 419 (Mo. App. 1994); Kern v. General Installation, 740 S.W.2d 691, 692 (Mo. App. 1987); accord, Terrell v. Board of Education, City of St. Louis, 871 S.W.2d 20, 23 (Mo. App. 1993); Roby v. Tarlton Corp., 728 S.W.2d 586, 589 (Mo. App. 1987).

Compensation in cases where there has been a "previous disability" are to be determined under Section 287.220.1 Mo. Rev. Stat. (2000). In partial disability cases the employer is liable "only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability." In total disability cases the employer is liable "only for the disability resulting from the last injury considered alone and of itself ...."[8]

The employer's liability for permanent partial disability compensation is determined under Section 287.190. Stewart v. Johnson, 398 S.W.2d 850 (Mo. 1966). The employee must prove the nature and extent of any disability by a reasonable degree of certainty. Downing v. Willamette Industries, Inc., 895 S.W.2d 650, 655 (Mo. App. 1995); Griggs v. A. B. Chance Company, 503 S.W.2d 697, 703 (Mo. App. 1974). Such proof is made only by competent and substantial evidence. It may not rest on speculation. Idem. Expert testimony may be required where there are complicated medical issues. Goleman v. MCI Transporters, 844 S.W.2d 463, 466 (Mo. App. 1993); Griggs at 704; Downs v. A.C.F. Industries, Incorporated, 460 S.W.2d 293, 295-96 (Mo. App. 1970). The fact finder may accept only part of the testimony of a medical expert and reject the remainder of it. Cole v. Best Motor Lines, 303 S.W.2d 170, 174 (Mo. App. 1957). Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. Hawkins v. Emerson Electric Co., 676 S.W.2d 872, 877 (Mo. App. 1984). 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. 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, 163 (Mo. App. 1986).

However, where the facts are within the understanding of lay persons, the employee's testimony or that of other lay witnesses may constitute substantial and competent evidence. This is especially true where such testimony is supported by some medical evidence. Pruteanu v. Electro Core Inc., 847 S.W.2d 203 (Mo. App. 1993); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 367 (Mo. App. 1992); Ford v. Bi-State Development Agency, 677 S.W.2d 899, 904 (Mo. App. 1984); Fogelsong v. Banquet Foods Corporation, 526 S.W.2d 886, 892 (Mo. App. 1975). The trier of facts may even base its findings solely on the testimony of the employee. Fogelsong at 892. The trier of facts may also disbelieve the testimony of a witness even if no contradictory or impeaching testimony is given. Hutchinson v. Tri-State Motor Transit Co., supra at 161-2; Barrett v. Bentzinger Brothers, Inc., 595 S.W.2d 441, 443 (Mo. App. 1980). The uncontradicted testimony of the employee may even be disbelieved. Weeks v. Maple Lawn Nursing Home, 848 S.W.2d 515, 516 (Mo. App. 1993); Montgomery v. Dept. of Corr. & Human Res., 849 S.W.2d 267, 269 (Mo. App. 1993).

The determination of the degree of disability sustained by an injured employee is not strictly a medical question. 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. Sellers v. Trans World Airlines, Inc., 776 S.W.2d 502, 505 (Mo. App. 1989); Quinlan v. Incarnate Word Hospital, 714 S.W.2d 237, 238 (Mo. App. 1986); Banner Iron Works v. Mordis, 663 S.W.2d 770, 773 (Mo. App. 1983); Barrett v. Bentzinger Brothers, Inc., 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. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences from such testimony. Fogelsong v. Banquet Foods Corporation, 526 S.W.2d 886, 892 (Mo. App. 1975). The finding of disability may exceed the percentage testified to by the medical experts. Quinlan v. Incarnate Word Hospital, at 238; Barrett v. Bentzinger Brothers, Inc., at 443; McAdams v. Seven-Up Bottling Works, at 289. 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 v. Jefferson City School Dist., 801 S.W.2d 486 (Mo. App. 1990). The fact finding body may reject the uncontradicted opinion of a vocational expert. Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995).

Aggravation of a preexisting symptomatic condition caused by a work-related accident is compensable. Rector v. City of Springfield, 820 S.W.2d 639 (Mo. App. 1991); see also Sansone v. Joseph Sansone Const. Co., 764 S.W.2d 751 (Mo. App. 1989); Plaster v. Dayco Corp., 760 S.W.2d 639 (Mo. App. 1988).

Employer is not liable for any post-accident worsening of an employee's preexisting disabilities which is not caused or aggravated by the last work-related injury. Kern v. General Installation, 740 S.W.2d 691, 692 (Mo. App. 1987).

Claimant's Testimony

Mr. Grothaus testified that the surgery performed by Dr. Kriegshauser helped initially, but that his right knee subsequently became worse. He stated that the pain became constant with the knee locking up. He currently complains of grinding, stiffness, swelling and pain in his right knee. He explained that he needs assistance getting in and out of the bathtub. He began using a cane in late 2003 for stability after his right knee gave out and he fell. He described walking as painful, and he testified he feels he can no longer do chores such as cleaning, housework, and grocery shopping. He takes two to three naps a day and may spend up to twenty hours a day in bed on a bad day. He is not taking any pain medications for his knee. He guessed that he weighed 450 pounds at the time of the hearing.

Claimant acknowledged that he was off work for approximately nine months in 1999 and 2000 while he received treatment for both knees. On cross examination he agreed that he had returned to work in June of 2000 and had worked only three months prior to the September 13, 2000 accident. He testified that from 1984 to 1990 he was an engineer and drove the fire truck 95% of the time. On direct examination he claimed that he had no limitations with his right knee in June of 2000. Yet he admitted on cross examination that his right knee ached when he washed the fire trucks.

Medical Opinions

Dr. Levy noted that claimant complained of pain in the right knee, discomfort on walking, frequent popping, an inability to kneel, and an inability to climb ladders or ascend stairs. On his physical examination of April 3, 2001, he found that claimant had discomfort in his right knee with motion and while standing on his heels and toes, as well as grating in the knee and limited flexion due to his obesity. (Claimant's Exhibit A, Pages 9 & 13)

Dr. Levy opined that Mr. Grothaus had 25% permanent partial disability of the right knee prior to the September 13, 2000 injury and that he sustained 25% permanent partial disability of the right knee due to the September 13, 2000 injury. Based on his April 3, 2001 examination Dr. Levy testified that claimant could not return to work as a firefighter. He testified that the injury of September 13, 2000 was the event which disabled him from his job. (Claimant's Exhibit A, Page 15)

During the September 2, 2003 reexamination Dr. Levy noted that claimant's weight had increased to 496 pounds. Claimant told him that his right knee had gradually worsened subsequent to April 3, 2001. Dr.Levy reported that claimant stated that his right knee pain increased when he walked for even a few minutes, that it frequently swelled, and that it had given way on 8 occasions during the preceding 6 weeks. (Claimant's Exhibit A, Pages 16-17 & depo ex 3, p.1)

On cross examination Dr. Levy conceded that given Mr. Grothaus's obesity the degenerative arthritis in his right knee would have worsened to some extent even in the absence of the September 13, 2000 injury. (Claimant's Exhibit A, Page 34) He also agreed that the restrictions on his employment as a firefighter were due to a combination of his preexisting problems as well as the event of September 13, 2000. (Claimant's Exhibit A, Page 36)

Dr. Kriegshauser opined, based on employee's performance during the functional capacity evaluation, that Mr. Grothaus would not be able to climb ladders or crawl on his knees and consequently would not be able to perform his job as

an active-duty firefighter. He felt that the primary cause of these restrictions was the preexisting osteoarthritis in both knees. He stated that had claimant not had preexisting arthritis, he would have been able to return to his job as a firefighter within a month following the surgery. Dr. Kriegshauser added that employee's obesity was putting more stress on his right knee and was aggravating his advanced osteoarthritis. (Employer/Insurer's Exhibit 1, Pages 12-15 & 33 & depo ex p. 4) On cross examination he reiterated his opinion that employee's preexisting arthritis was the main factor in preventing him from returning to work. (Employer/Insurer's Exhibit 1, Page 25) On cross examination by the Second Injury Fund, Dr. Kriegshauser opined that claimant could work a sedentary level position. (Employer/Insurer's Exhibit 1, Page 32)

On cross examination, Dr. Kriegshauser admitted he did not review any of the claimant's previous treatment records on his right knee. He also acknowledged that while claimant initially improved after the surgery, he then began to worsen. Dr. Kriegshauser explained that claimant "fell into a pattern that … was pretty much compatible with somebody with advanced arthritis." (Employer/Insurer's Exhibit 1, Pages 19-21) Although Dr. Kriegshauser thought that employee reached medical improvement as of April 19, 2001, he felt that employee's knees would continue to bother him due to the arthritis. He agreed that standing for an extended period of time, kneeling, crawling, and climbing ladders would cause him pain. (Employer/Insurer's Exhibit 1, Pages 30-31)

Dr. Kriegshauser opined that Mr. Grothaus had 40% permanent partial disability of the right knee prior to the September 13, 2000 injury and that he sustained 10% permanent partial disability of the right knee due to the September 13, 2000 injury. (Employer/Insurer's Exhibit 1, depo ex. 2, p. 1)

Dr. Ralph testified that none of claimant's current complaints was medically related to the September 13, 2000 event. He opined that employee had no restrictions related to the work event, and that he sustained no permanent partial disability as a result of that event. (Employer/Insurer's Exhibit 3, Pages 11-12)

Additional Findings

I previously found that claimant had significant osteoarthritis in all three compartments of his right knee prior to the September 13, 2000 injury, that he had undergone surgeries on the right knee in 1988, September of 1998, and September of 1999 for meniscal tears and arthritis.[9]

Based on the medical records and my observations of claimant's demeanor during his testimony, I find that claimant minimized the extent of the problems which he was having with his right knee prior to September 13, 2000. During the two years prior to his injury he suffered extensive problems related to the progression of severe osteoarthritis and underwent two arthroscopic debridements. He was advised by Dr. Schwarze, his treating surgeon, that he might eventually need a total knee replacement. X-rays taken on September 14, 2000 demonstrated that he was bone on bone in the medial compartment. He had grating on examination. Though he claimed on direct examination that he was able to perform all of his regular duties without problems, he admitted on cross examination that he felt pain in his right knee while washing the fire truck.

I previously found that on April 19, 2001 claimant weighed 375 pounds, that on October 4, 2001 he weighed 447 pounds, and that when he was reexamined by Dr. Levy on September 2, 2003 he weighed 496 pounds.[10] Dr. Aisenstat warned claimant in January of 2000 when he weighed 430 pounds that his morbid obesity was seriously jeopardizing his health and that his sore knees would greatly improve if he lost weight. (Claimant's Exhibit C, Page 20) Dr. Kriegshauser testified that claimant's weight was putting more stress on his right knee and an aggravating factor with respect to his osteoarthritis. (Employer/Insurer's Exhibit 1, Pages 14-15) Dr. Levy also agreed that employee's morbid obesity contributed to his symptoms following the meniscectomies on October 24, 2000 and the progression of his arthritis. (Claimant's Exhibit A, Pages 17 & 34) Mr. Grothaus, rather than maintaining or reducing his weight of 375 pounds when he concluded treatment for the primary injury, apparently stopped exercising, lived a sedentary life, and gained a massive amount of additional weight.

Based on my prior findings that claimant's work-related injury comprised medial and lateral meniscal tears and Dr. Kriegshauser's opinions that had claimant not had preexisting arthritis he would have been able to return to his job as a firefighter, that the primary reason for his inability to work as a firefighter is his preexisting arthritis, and that his morbid obesity was aggravating his arthritis, and taking into account claimant's massive gain of weight subsequent to April 19, 2001, I find that the condition of employee's right knee has worsened considerably since he was released from treatment in April of 2001, that such worsening is due largely to the natural progression of his preexisting severe osteoarthritis and due to its aggravation by employee's morbid obesity and massive weight gain subsequent to April 19, 2001, and that many of his current difficulties, including the use of the cane, are due to the non-work-related progression of his arthritis rather than to the work-related injury.

Based on all of the evidence and the medical opinions, I find that claimant had 30% permanent partial disability of the right knee prior to the September 13, 2000 injury and that he sustained 20% permanent partial disability of the right knee due to the work-related accident. I also find that to the extent that claimant's current disability in his right knee exceeds 50%, such excess is due to the non-work-related progression of his preexisting arthritis.

SECOND INJURY FUND LIABILITY
ALLEGED PERMANENT TOTAL DISABILITY

The employee claims that he is permanently and totally disabled as a result of the combination of the September 13, 2000 injury to his right knee with employee's alleged preexisting disabilities in his neck, right and left knees, and due to obesity. There was no evidence that employee was rendered permanently and totally disabled as a result of the injuries caused by work-related accident of September 13, 2000 considered alone and without regard to his alleged preexisting disabilities.

Section 287.220.1 Mo. Rev. Stat. (2000) provides that where a previous partial disability or disabilities, whether from a compensable injury or otherwise, and the last injury combine to result in total and permanent disability, the employer at the time of the last injury is liable only for the disability which results from the last injury considered by itself[11] and the Second Injury Fund shall pay the remainder of the compensation that would be due for permanent total disability under Section 287.200; Grant v. Neal, 381 S.W.2d 838, 840 (Mo. 1964); Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 366 (Mo. App. 1992); Brown v. Treasurer of Missouri, 795 S.W.2d 479, 482 (Mo. App. 1990). The employee must prove that a prior permanent partial disability, whether from a compensable injury or not, combined with the subsequent compensable injury to result in total and permanent disability.

Preexisting Permanent Partial Disabilities

Employee must next prove that he or she had a permanent partial disability or disabilities preexisting the present injury and the amount thereof which existed at the time of the compensable injury. Garcia v. St. Louis County, 916 S.W.2d 263, 267 (Mo. App. 1995); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 366 (Mo. App. 1992); Anderson v. Emerson Elec. Co., 698 S.W.2d 574, 577 (Mo. App. 1985). It is not necessary that the "previous disability" be due to an injury. Section 287.220.1 was amended in 1993 to define the nature of the preexisting disability as "of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed ...." The appellate courts have held that the portion of the 1993 amendment to Section 287.220.1 Mo. Rev. Stat. (2000) which modified the definition of preexisting disability was applicable to all pending cases without regard to the date of injury. Leutzinger v. Treasurer, 895 S.W.2d 591 (Mo. App. 1995); Lane v. Schreiber Foods, Inc., 903 S.W.2d 616 (Mo. App. 1995); Faulkner v. St. Luke's Hospital, 903 S.W.2d 588 (Mo. App. 1996). In Wuebbeling v. West County Drywall, 898 S.W.2d 615 (Mo. App. 1995), the court of appeals stated in dicta that "a previously existing condition that a cautious employer could perceive as having the potential to combine with a work related injury so as to produce a greater degree of disability than would occur in the absence of such condition" would constitute a hindrance or obstacle to employment or reemployment. Id. at 620. That test was adopted in Garibay v. Treasurer of Missouri, 930 S.W.2d 57, 60 (Mo. App. 1997). Being able to work, though in pain, following a previous injury is not incompatible with that injury being treated as a preexisting permanent partial disability. Hedrick v. Chrysler Corp., 900 S.W.2d 233, 236 (Mo. App. 1995).

The nature and extent of the preexisting disabilities are determined as of date of the primary injury. Garcia v. St. Louis County, 916 S.W.2d 263, 267 (Mo. App. 1995); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 366 (Mo. App. 1992); Anderson v. Emerson Elec. Co., 698 S.W.2d 574, 577 (Mo. App. 1985). The Second Injury Fund is not liable for any post-accident worsening of an employee's preexisting disabilities which are not caused or aggravated by the last work-related injury or for any conditions which arise after the last work-related injury. Garcia v. St. Louis County, supra; Frazier v. Treasurer of Missouri, 869 S.W.2d 152 (Mo. App. 1994); Lawrence v. Joplin R-VIII School Dist., 834 S.W.2d 789 (Mo. App. 1992); see also Wilhite v. Hurd, 411 S.W.2d 72 (Mo. 1967).

Employee claims that the following conditions constitute "previous disabilities" under Section 287.220.1: osteoarthritis in both knees and a prior meniscal tear in the right knee, 1994 injury to the cervical spine, and morbid obesity.

Right and Left Knees

Specific findings of fact concerning prior injuries and medical treatment of both knees are set out on Pages 7 to 9 supra. Medical opinions concerning the preexisting medical conditions in both knees are discussed on Pages 9 to 10 supra.

Findings concerning the nature of the preexisting medical conditions in both knees are made on Pages 10 to 11 supra.

Obesity

Based on the medical records and employer's personnel records, I make the following findings of fact.

Claimant is 6 feet tall.

On October 30, 1995 and November 9, 1995, claimant ran out of energy during a training session at the Mehlville Fire Protection District and was observed "having difficulty initially donning [his] SCBA and then after advancing hose to the entrance door to the building, [taking] [his] face piece off twice for some reason and seem[ing] to be exhausted leaning against the open door for support." (Employer/Insurer's Exhibit 5, Pages 1-2)

On January 4, 1996 Mr. Grothaus was examined by Dr. Robert A. Aisenstat, his personal physician, for an incisional hernia. His "massive" obesity was thought to be causing increasing pain. (Claimant's Exhibit C, Page 28)

On April 1, 1997 Mr. Grothaus was examined by Dr. Aisenstat for hypertension. He then weighed greater than 350 pounds. (Claimant's Exhibit C, Page 27)

On July 31, 1998 claimant was examined by Dr. Aisenstat for contact dermatitis. He then weighed 350 pounds. (Claimant's Exhibit C, Page 25)

On March 9, 1999 claimant was examined by Dr. Aisenstat for an upper respiratory infection. He then weighed 350 pounds. (Claimant's Exhibit C, Page 23)

On June 29, 1999 claimant was examined by Dr. Aisenstat for stress-related depression. He then weighed greater than 350 pounds. (Claimant's Exhibit A, Page 22)

On December 9, 1999 Mr. Grothaus was examined by Dr. Aisenstat for hypertension. He then weighed 430 pounds. Dr. Aisenstat recommended that employee lose weight and counseled him about a proper diet and exercise program. (Claimant's Exhibit C, Page 21)

On January 4, 2000 claimant was examined by Dr. Aisenstat for problems associated with his weight. He still weighed 430 pounds. Dr. Aisenstat advised him that his health was in serious jeopardy due to his morbid obesity and that his sore back, sore knees, and other musculoskeletal aches and pains would improve if he would loseweight. Mr. Grothaus indicated that he would make a valiant effort to exercise and lose weight. (Claimant's Exhibit C, Page 20)

On July 20, 2000, employee was observed becoming short of breath at work upon minimal exertion while performing such duties as washing an apparatus and during a fire response and an emergency medical service response. (Employer/Insurer's Exhibit 5, Page 6)

On August 29, 2000, claimant could not fit behind the steering wheel of Pumper 1752. (Employer/Insurer's Exhibit 5, Page 5)

On September 5, 2000, claimant was observed taking several breaks to sit down and rest while stocking the pantry shelves. (Employer/Insurer's Exhibit 5, Page 4)

When Dr. Aisenstat examined claimant on September 7, 2000 for exertional dyspnea, employee weighed 370 pounds. (Claimant's Exhibit C, Page 12)

When Mr. Grothaus underwent a functional capacity evaluation on February 1, 2001, he weighed 375 pounds. (Employer/Insurer's Exhibit 1, depo ex. 2, p. 9)

On April 6, 2001 when Dr. Levy first examined claimant, employee weighed 375 pounds. (Claimant's Exhibit A, Page 13)

On October 4, 2001 claimant was examined by Dr. Aisenstat. He then weighed 447 pounds. (Claimant's Exhibit C, Page 2)

On December 10, 2002 Mr. Grothaus weighed 450 pounds. (Claimant's Exhibit B, Page 11)

When Mr. Grothaus was examined by Dr. Michael H. Ralph on May 21, 2003, employee weighed 450 pounds. He observed that claimant was morbidly obese. (Employer/Insurer's Exhibit 3, Pages 6-7)

On September 2, 2003 Dr. Levy reexamined claimant, employee then weighed 496 pounds, Dr. Levy noted that that his gait was slow and waddling and that his obesity limited his flexion of his knees to 110 degrees. There was moderate grating with the right knee and minimal grating of the left knee. (Claimant's Exhibit A, Pages 19-20 & 31)

Claimant's Testimony

On direct examination Mr. Grothaus testified that his large size prevented him from getting behind the wheel of the pumper. He also stated that on returning to his job in June of 2000 he was able to perform his regular functions without any problem. Claimant testified on cross examination that during the last 6-7 years of his employment he drove a truck 95% of the time. He admitted that after June of 2000 he had pain in his right knee from standing while washing trucks at work. He acknowledged that in July and September of 2000 his captain was concerned about his shortness of breath.

Medical Opinions

Dr. Levy noted on April 3, 2001 that flexion of both of claimant's knees was limited by his obesity (375 pounds). He agreed that claimant was morbidly obese prior to September 13, 2000. (Claimant's Exhibit A, Pages 31 & 34)

While he agreed that claimant was carrying out his job, Dr. Levy felt that his weight would have made it more difficult for him. (Claimant's Exhibit A, Page 39) [12]

Dr. Levy agreed that he did not express an opinion in either of his two written report concerning the extent of any permanent partial disability referable to claimant's obesity. (Claimant's Exhibit A, Pages 39-40)

Dr. Kriegshauser testified that employee's obesity was putting more stress on his right knee and was aggravating his advanced osteoarthritis. (Employer/Insurer's Exhibit 1, Pages 14-15 & 33 & depo ex p. 4)

Cervical Spine

Based on the medical records, I make the following findings of fact.

On April 27, 1994 Mr. Grothaus strained his left shoulder and neck while pulling on a fire hose. His initial symptoms were treated by his family physician. When they persisted he was examined by Dr. Stephen Benz, an orthopedist, who, on May 20, 1994, diagnosed claimant with a cervical strain. As claimant's symptoms persisted he underwent a CT scan of the cervical spine. It showed mild spondylosis at several levels with encroachment of the neural canals at C5-6. Claimant was referred to Dr. Dennis Mollman, a neurosurgeon, who initially prescribed conservative treatment. When claimant's cervical pain became intractable, he underwent a cervical myelogram and post-myelogram CT scan. It revealed a prominent posterior disk bulge with osteophytic ridging producing spinal canal stenosis and spinal cord compression at C5-6 and neural foraminal stenosis bilaterally at C5-6. It also showed mild posterior disk bulges and osteophytic riding at C3-4, C4-5, and C6-7 without evidence of cord compression, but with neural foraminal stenosis on the left at C3-4, C4-5, and C6-7. Dr. Mollman diagnosed claimant with a herniated disk at C5-6 and recommended an anterior discectomy and fusion of C5-6. (Claimant's Exhibit G, Pages 4-6)

This surgery was performed by Dr. Mollman at St. Luke's Hospital on September 7, 1994. Dr. Mollman removed the herniated disk material at C5-6 and an osteophyte which was extending into the spinal canal and performed bilateral foraminotomies. He achieved good decompression of the spinal cord. A cadaver bone graft was used for the fusion. (Claimant's Exhibit G, Pages 8-9) Employee underwent physical therapy in December of 1994. In January of 1995 he progressed to work hardening and conditioning. (Claimant's Exhibit G, Pages 16-17) On February 21, Dr. Mollman noted that employee's only complaint was some occasional right trapezius spasm. He had full range of motion. Pinprick testing was normal in both hands. Claimant was released to return to work without any restrictions on February 27, 1995. (Claimant's Exhibit G, Page 19)

Medical Opinions

Dr. Mollman assigned 10% permanent partial disability of the body referable to the neck due to the work-related injury and subsequent surgery. (Claimant's Exhibit G, Page 20)

Dr. Ralph J. Graff, a surgeon, examined claimant at the request of his attorney on August 3, 1995. Employee complained of numbness in his left index finger, continued pain in his neck and left shoulder girdle. On examination claimant had normal range of motion of the neck with discomfort at the extremes of all motions. Dr. Graff opined that claimant had sustained 25% permanent partial disability of the body referable to the neck due to the work-related injury. (Employer/Insurer's Exhibit 6, Pages 30-31)

Claimant's Testimony

Claimant settled his claim against Mehlville Fire Protection District on September 8, 1995 for 17-1/2% permanent partial disability of the body referable to the neck. (Employer/Insurer's Exhibit 6, Page 28)

Claimant testified that he continues to experience pain in his neck. On cross examination, he also acknowledged that he continues to experience numbness in the left index finger and trouble gripping with the left hand.

Additional Findings

I previously found that claimant underwent a meniscectomy on the right knee in 1988, that on July 1, 1998 x-rays taken of both knees revealed bilateral degenerative changes with the right knee being worse with bone on bone contact in the medial compartment and osteophytes in all three compartments, that he underwent arthroscopic debridement of the right knee in September of 1998, and that his right knee worsened in September of 1999, that he underwent another arthroscopic debridement of the right knee in September of 1999.[13]

I previously found that January 18, 1999 Mr. Grothaus reported soreness in his left knee that x-rays demonstrated significant osteoarthritis of both knees with only 1 mm of joint space remaining in the right knee and 2 mm remaining on the medial side of the left knee and that he underwent an arthroscopic debridement in July of 1999.[14]

I previously found that claimant missed work from July 10, 1999 until June 2, 2000 due to the surgeries on both knees.[15] After returning to work claimant's supervisor on at least two occasions wrote reports about episodes of claimant apparently experiencing shortness of breath.

I previously found that during 1997 and 1998 claimant weighed 350+ pounds and that between July of 1999 and January of 2000 claimant's weight increased from 350+ pounds to 430 pounds. On January 4, 2000 Dr. Aisenstat warned employee that his morbid obesity was seriously jeopardizing his health.[16] Sometime thereafter claimant began losing weight so that he weighed 370 pounds at the time of the primary injury and 375 when he reached maximum medical improvement on April 19 2001.

Based on all of the evidence and my prior findings, I find that the employee had the following disabilities which were "of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed ...." immediately prior to the September 13, 2000 injury to his right knee: 30% permanent partial disability of the right knee due to a meniscectomy in 1988, two additional surgeries in 1998 and 1999 and severe osteoarthritis[17], 20% permanent partial disability of the left knee due to a arthroscopic debridement in 1999, 17-1/2% permanent partial disability of the body referable to the neck due to 1994 work-related injury, and 20% permanent partial disability of the body due to morbid obesity.

Thresholds

The 1993 amendment to Section 287.220.1 also established separate minimum threshold requirements with respect to the disabilities caused by preexisting conditions and the disability from the primary injury of 50 weeks for a body as a whole injury and 15% for a major extremity injury. The thresholds do not apply in the context of a claim for permanent total disability.

Combination of Preexisting and Primary Disabilities

Lastly, it must be determined whether the preexisting disabilities to his right and left knees, neck and due to morbid

obesity as of September 13, 2000 together with the disability to his right knee which he sustained as a result of the work-related accident of September 13, 2000 result in total and permanent disability.[18] Normally, the determination as to whether an injured employee is permanently and totally disabled would be made as of the date of the primary injury, the Second Injury Fund not being liable for the post-injury worsening of an employee's preexisting disabilities which are not caused or aggravated by the last work-related injury or for any conditions which arise after the last work-related injury.[19] Where, however, the disability caused by the primary injury continues to progress after the date of the accident, it may be appropriate to make the determination as of a later date, while assessing the extent of the preexisting disabilities as of the date of the primary injury.

Section 287.020.7 Mo. Rev. Stat. (2000) defines total disability as the "inability to return to any employment and not merely...[the] inability to return to the employment in which employee was engaged at the time of the accident." The words "inability to return to any employment" mean "that employee is unable to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment." Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919, 922 (Mo. App. 1982). The words "any employment" mean "any reasonable or normal employment or occupation; it is not necessary that Employee be completely inactive or inert in order to meet this statutory definition." Id. at 922; Brown v. Treasurer of Missouri, 795 S.W.2d 479, 483 (Mo. App. 1990); Crum v. Sachs Elec., 769 S.W.2d 131, 133 (Mo. App. 1989). "[W]orking very limited hours at rudimentary tasks [is not] reasonable or normal employment." Grgic v. P & G Const., 904 S.W.2d 464, 466 (Mo. App. 1995). The primary determination with respect to the issue of total disability is whether, in the ordinary course of business, any employer would reasonably be expected to employ claimant in his or her present physical condition and reasonably expect him or her to perform the work for which he or she is hired. Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 367 (Mo. App. 1992); Talley v. Runny Mead Estates, Ltd., 831 S.W.2d. 692, 694 (Mo. App. 1992); Brown v. Treasurer of Missouri, at 483; Fischer v. Archdiocese of St. Louis, 793 S.W.2d 195, 199 (Mo. App. 1990); Sellers v. Trans World Airlines, Inc., 776 S.W.2d 502, 504 (Mo. App. 1989). The test for permanent and total disability is whether given Employee's condition, he or she would be able to compete in the open labor market; the test measures Employee's prospects for obtaining employment. Reiner at 367; Brown at 483; Fischer at 199. A claimant who is "only able to work very limited hours at rudimentary tasks is a totally disabled worker." Grgic v. P & G Const., 904 S.W.2d 464, 466 (Mo. App. 1995).

Findings of Fact

Based on my observations of claimant's demeanor during his testimony, I find that he is a reasonably credible witness and that his testimony is generally credible. Based on the credible testimony of claimant, I make the following findings of fact.

Educational and Employment History

Claimant graduated from DeBourg High School in 1967. He had no formal vocational training. He served in the U.S. Navy during 1970 and received a medical discharge. In 1971 he became employed by the Mehlville Fire Protection District. He received on the job training as a firefighter. He slowly worked his way up to lead man and permanent driver. He last worked as an engineer for the District. His duties included responding to EMS calls and motor vehicle accidents, operating the jaws of life, performing CPR, washing the fire trucks, logging mileage of the trucks, and supervising other firemen. His position also required ladder climbing, kneeling, crawling, and the ability to carry approximately 100 pounds of heavy equipment. (Claimant's Testimony)

Employee was born on January 12, 1948 and was 53 years old when he reached maximum medical improvement for the primary injury in April of 2001. (Claimant's Testimony)

Claimant's Testimony

Mr. Grothaus has not worked in any capacity since September 13, 2000. Nor has he sought any other employment since being reaching maximum medical improvement.

Mr. Grothaus testified that the surgery performed by Dr. Kriegshauser helped initially, but that his right knee subsequently became worse. He stated that the pain became constant with the knee locking up. He currently complains of grinding, stiffness, swelling and pain in his right knee. He explained that he needs assistance getting in and out of the bathtub. He began using a cane in late 2003 for stability after his right knee gave out and he fell. He described walking as painful, and he testified he feels he can no longer do chores such as cleaning, housework, and grocery shopping. He takes two to three naps a day and may spend up to twenty hours a day in bed on a bad day. He is not taking any pain medications

for his knee. He guessed that he weighed 450 pounds at the time of the hearing.

Medical Opinions

As previously noted Dr. Levy reexamined claimant on September 2, 2003. During that interval claimant's right knee gradually worsened. Claimant told him that his pain increased when he walked for even a few minutes, that the knee frequently swelled and had given way 8 times during the preceding weeks, and that he had difficulty with standing for more than 5 to 10 minutes. He opined that claimant's heavy weight increased the likelihood that he would experience additional symptoms following the arthroscopy. (Claimant's Exhibit A, Pages 16-17)

On examination Dr. Levy noted that claimant weighed 496 pounds, a gain of 121 pounds, that his gait was slow and waddling. He had full range of motion with his knees except that his obesity limited his flexion to 110 degrees. There was moderate grating with the right knee and minimal grating of the left knee. (Claimant's Exhibit A, Pages 19-20, 31 & 37)

Dr. Levy reviewed vocational reports of Dr. Samuel Bernstein and James England. De. Levy opined that claimant was permanently and totally disabled and unable to compete in the open labor market. (Claimant's Exhibit A, depo ex 3) He testified that his unemployability was based upon his preexisting knee problems, his current knee problems as well as the need for a knee replacement, his arthritis and his extreme obesity. (Claimant's Exhibit A, Pages 22-23)

Dr. Levy agreed on cross examination that given claimant's morbid obesity some of his degenerative arthritis would have worsened even in the absence of the work-related event. (Claimant's Exhibit A, Page 34)

On cross examination by the Second Injury Fund Dr. Levy testified that he had not opined after his first examination that claimant was permanently and totally disabled, that the physical findings with respect to the right knee had not changed since the first examination, that claimant had gained an additional 121 pounds between his two examinations, that he had not changed his rating of the right knee between the two examinations, and that this weight gain factored into his conclusion after the September 2, 2003 examination that claimant was unemployable. (Claimant's Exhibit A, Pages 40-41)

As previously noted Dr. Ralph examined claimant on May 21, 2003. He weighed 450 pounds. Dr. Ralph took x-rays of employee's knees. He indicated that the medial joint space in the right knee was almost completely obliterated and that only 20 to 30% of the joint space remained in the left knee. (Employer/Insurer's Exhibit 3, Pages 6-9) He diagnosed claimant with end-stage medial joint space arthritis of his right knee and very significant medial joint space arthritis in his left knee. He indicated that claimant would be a candidate for a knee replacement; however, it was contraindicated due to his morbid obesity. (Employer/Insurer's Exhibit 3, Pages 10-11) On cross examination Dr. Ralph indicated that employee had preexisting severe degenerative arthritis with significant joint space narrowing and severely degenerated menisci. (Employer/Insurer's Exhibit 3, Pages 15-16 & 18)

Dr. Kriegshauser testified on cross examination by the Second Injury Fund that he did not completely disable him. Dr. Kriegshauser told claimant that he was disabled from his prior job as an active-duty firefighter or any type of work which would require heavy physical stress, squatting, kneeling, or climbing on his knees. In rendering that opinion Dr. Kriegshauser was assuming that claimant was actively fighting fires prior to the September 13, 2000 injury. He did not know whether claimant could continue to drive a fire truck and regulate the water supply. On the other hand Dr. Kriegshauser indicated that employee could perform a desk job at a fire department. He agreed that based on employee's performance at the functional capacity evaluation, employee could perform at a sedentary to light level. (Employer/Insurer's Exhibit 1, Pages 32-33) On re-direct examination Dr. Kriegshauser stated that any sedentary would have allow employee to get up and move around when he needs to. (Employer/Insurer's Exhibit 1, Page 36)

Vocational Opinions

Dr. Samuel Bernstein, a psychologist and vocational expert, testified by deposition on behalf of employee on July 13, 2004. He evaluated claimant on December 10, 2002. He obtained a medical history concerning claimant's 1994 neck surgery and prior surgeries to both knees and reviewed Dr. Kriegshauser's treating records. He also reviewed Dr. Levy's report of April 6, 2001. Dr. Bernstein noted that employee was 54 years and within a month would be of advanced age for employment purposes[20] and was 6 feet tall and weighed 450 pounds. Dr. Bernstein noted that claimant seemed to have made a relatively good adjustment to his post-injury status and did not have any psychological impairments. (Claimant's Exhibit B, Pages 11-13, 22-23 & 57)

Claimant apparently told Dr. Bernstein that he had problems with sitting as little as 30 minutes and standing for short

[21]

periods of time, sometimes as little as a minute. He was not taking any pain medication because it made him groggy. He told him that he was experiencing persistent locking on a daily basis and that he had fallen because his right knee gave out. He was not using a cane because of embarrassment.[22] (Claimant's Exhibit B, Pages 16 & 19)

Dr. Bernstein concluded that claimant is permanently and totally disabled (i.e. that he was not going to be hired nor could he carry out substantial gainful work activity on any type of basis). Dr. Bernstein based his opinion on "some preexisting problems in the knees, obesity, and neck problems. Added to that, of course, the additional knee problems." He added that he was taking into account that claimant was then over 55 years old and considered advanced age, that he had essentially done only thing his whole life, and that he had extreme difficulties with sitting and standing. (Claimant's Exhibit B, Pages 25-26) He further opined that Mr. Grothaus was not capable of light or sedentary work because sedentary work presupposes the ability to sit two-thirds of the workday and requires some standing. He stated that claimant had problems with both sitting and standing. (Claimant's Exhibit B, Page 27)

On cross examination, Dr. Bernstein testified that claimant's obesity (450 pounds) by itself was be a hindrance and an obstacle to many employments. (Claimant's Exhibit B, Page 34) He agreed that there were no physician restrictions on the claimant's ability to sit and that the claimant's claimed difficulties with sitting were based on claimant's statements. (Claimant's Exhibit B, Pages 44-45)

On cross examination by the Second Injury Fund, Dr Bernstein noted that claimant's psychological difficulties, hearing loss, high blood pressure, and high cholesterol were not significant factors in claimant's inability to work. (Claimant's Exhibit B, Pages 57-60) He reiterated that he gave greatest weight to claimant's obesity, problems with both knees, and the cervical problems. (Claimant's Exhibit B, Page 59) On redirect examination Dr. Bernstein stated that his opinion concerning claimant's unemployability was based only on his obesity, the neck, both knees, his advanced age, and the fact that he had one employment his whole life. (Claimant's Exhibit B, Pages 64-65) On re-cross examination Dr. Bernstein acknowledged that claimant did not indicate to him during the evaluation that his obesity hindered his employment before September of 2000. (Claimant's Exhibit B, Page 65)

James England, a vocational expert, testified by deposition on behalf of employer/insurer on August 10, 2004. Mr. England reviewed the medical records of Drs. Mollman, Weise, Schwarze, Aisenstat, and Kriegshauser, the April 6, 2001 report of Dr. Levy, the vocational report of Dr. Bernstein and claimant's deposition. (Employer/Insurer's Exhibit 2, Pages 6-20) Mr. England noted that claimant's cervical fusion would be an obstacle to heavier-type employments and a significant limitation in his ability to compete in the open labor market. (Employer/Insurer's Exhibit 2, Page 8) He noted that claimant weighed 447 pounds in October of 2001. (Employer/Insurer's Exhibit 2, Pages 16-17) Mr. England also noted the claimant was a high school graduate and had worked his whole adult life as a firefighter. (Employer/Insurer's Exhibit 2, Page 21) Mr. England opined that claimant's skills as a firefighter could be used as a dispatcher for a fire fighting operation providing he could hear over the telephone.[23] He stated that there are openings for 911 dispatchers on a regular basis in the St. Louis area. He added that claimant's experience as a firefighter would help him transition into a dispatcher position. (Employer/Insurer's Exhibit 2, Pages 22 & 28-29)

Mr. England indicated that while the findings of the functional capacity evaluation showed that employee could lift into the heavy range of exertion, Dr. Kriegshauser indicated that he should not be on his feet for prolonged period of time and recommended that he avoid repetitive squatting, kneeling, and crawling. (Employer/Insurer's Exhibit 2, Page 23) Mr. England noted that claimant testified that he could sit about 45 minutes to an hour, that he could drive for about an hour, and that he could not stand more than 10 to 15 minutes. (Employer/Insurer's Exhibit 2, Page 20) He indicated that claimant was 55 years old when he made the evaluation. (Employer/Insurer's Exhibit 2, Page 23)

In reviewing the medical restrictions Mr. England opined that employee would be able to perform some kinds of sedentary to light work. Mr. England felt claimant would be employable as a dispatcher, cashier, night clerk or in other jobs where there would be flexibility with sitting and standing. (Employer/Insurer's Exhibit 2, Page 24) However, he felt that claimant would have tremendous difficulty actually competing for and securing employment because of his tremendous obesity. He observed that a potential employer is going to be very reluctant to hire someone of Mr. Grothaus's size who also limps. He stated that his obesity preexisted the primary work-related injury and kept him from being able to do a lot of different things. (Employer/Insurer's Exhibit 2, Pages 24-25 & 30-32)

On cross examination by the Second Injury Fund, Mr. England also testified that claimant's opportunities for employment would be great increased if he lost weight. (Employer/Insurer's Exhibit 2, Page 31)

Findings on Combination of Disabilities

Both of the vocational experts and Dr. Levy incorrectly based their opinions on his post-September 13, 2000 worsened conditions of claimant's preexisting obesity and osteoarthritis. Because claimant's morbid obesity is a disabling condition which was neither caused by nor aggravated by the work-related injury of September 13, 2000, any post-primary injury weight gain must be ignored. Only employee's weight as of September 13, 2000 may be used in the assessment of liability against the Second Injury Fund. Similarly, only the extent of claimant's osteoarthritis of both knees as of September 13, 2000 may be considered in the assessment of liability against the Second Injury Fund.

I previously found that the September 13, 2000 injury caused only a minor aggravation of employee's right knee osteoarthritis.[24] I also previously found that the condition of employee's right knee has worsened considerably since he was released from treatment in April of 2001, that such worsening is due largely to the natural progression of his preexisting severe osteoarthritis and due to its aggravation by employee's morbid obesity and massive weight gain subsequent to April 19, 2001, and that many of his current difficulties, including the use of the cane, are due to the non-work-related progression of his arthritis rather than to the work-related injury.[25] The disability attributable to that aggravation was included in the assessment of permanent partial disability against the employer/insurer.

The nature and extent of the preexisting disabilities are determined as of date of the primary injury. Garcia v. St. Louis County, 916 S.W.2d 263, 267 (Mo. App. 1995); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 366 (Mo. App. 1992); Anderson v. Emerson Elec. Co., 698 S.W.2d 574, 577 (Mo. App. 1985). The Second Injury Fund is not liable for any post-accident worsening of an employee's preexisting disabilities which are not caused or aggravated by the last work-related injury or for any conditions which arise after the last work-related injury. Garcia v. St. Louis County, supra; Frazier v. Treasurer of Missouri, 869 S.W.2d 152 (Mo. App. 1994); Lawrence v. Joplin R-VIII School Dist., 834 S.W.2d 789 (Mo. App. 1992); see also Wilhite v. Hurd, 411 S.W.2d 72 (Mo. 1967).

On September 7, 2000 claimant weighed 370 pounds. When Dr. Levy first examined claimant on April 6, 2001 claimant weighed 375 pounds. Dr. Levy did not opine that claimant was permanently and totally disabled as of the day of that examination. However when Dr. Levy reexamined claimant on September 2, 2003 claimant weighed 496 pounds. Though Dr. Levy felt that claimant's arthritis in the right knee had worsened, he did not change his rating of disability attributable to the primary injury. Hence it is obvious that the worsening of the right knee symptoms was due to the progression of claimant's preexisting arthritis and was not due to the primary injury. Dr. Levy opined following the September 2, 2003 evaluation that claimant was permanently and totally disabled. Dr. Levy acknowledged that claimant's morbid obesity was a major factor in his opinion that claimant was totally disabled.

When Dr. Bernstein examined claimant on December 10, 2002 claimant weighed 450 pounds. Dr. Bernstein acknowledged that claimant's morbid obesity was a major factor in his opinion that claimant was totally disabled.

Though Mr. England thought that claimant was physically capable of performing sedentary jobs, he stated that claimant's weight of 447 pounds would cause tremendous difficulty in competing for and securing employment. As Mr. England should not have considered the additional 77 pounds in his evaluation of claimant's employability, the qualification which he placed on his opinion that claimant was employable should be ignored. Mr. England also noted that he limped. This was not the case on April 19, 2001 when he reached maximum medical improvement. The limp or waddling was clearly due to the progression of his massive weight gain and his osteoarthritis. It should also have been ignored. Hence, Mr. England's opinion without these qualifications is that claimant is employable in the open labor market.

Turning to his right knee osteoarthritis, when Dr. Levy examined Mr. Grothaus on April 6, 2001, he told Dr. Levy that sitting or standing for over 30 minutes caused great difficulty. He stated that standing while showering caused his right knee to stiffen up and be uncomfortable. (Claimant's Exhibit A, depo ex 2, p. 2) On September 2, 2003 he told Dr. Levy that his right knee pain increased when he walked for even a few minutes and that he could not stand for over 5 to 10 minutes before pressure built up. (Claimant's Exhibit A, depo ex 3, p. 1)

On April 6, 2001 Mr. Grothaus did not describe any locking or giving out of his knee or falls. (Claimant's Exhibit A, depo ex 2, p. 2) On September 2, 2003 Mr. Grothaus told Dr. Levy that his knee had given way 8 times during the preceding 6 weeks His gait was described as slow and waddling. (Claimant's Exhibit A, depo ex 3, pp 1-2)

When Dr. Kriegshauser last examined claimant on January 16, 2002 employee was still having persistent severe pain in his knees and crepitus in the patellofemoral and medial compartments. X-rays showed severe osteoarthritis. Claimant expressed a desire to undergo a total knee replacement. Dr. Kriegshauser again told him that his arthritis preexisted the work injury and was not caused by the work-related injury. (Employer/Insurer's Exhibit 1, depo ex 2, p. 3) Dr. Kriegshauser

testified that claimant was capable of sedentary work.

Dr. Bernstein relied on claimant's statement that he could stand for only a short period of time, sometimes only one minute and that his right knee was locking on a daily basis and that he had fallen because his right knee gave out. These symptoms clearly exceed what they were on April 19, 2001 when he reached maximum medical improvement. At that point claimant's right knee was not locking; he had not fallen because of his right knee. He was able to stand and walk for up to 30 minutes.

When Dr. Levy change his opinion on claimant's disability to total disability claimant told him that he could only stand or walk for 5 minutes. He told him that his right knee had given way 8 times during the preceding 6 weeks. His gait was slow and waddling. This was certainly a dramatic change from the symptoms which he reported to Dr. Levy on April 6, 2001.

Because Dr. Levy and Dr. Bernstein relied on claimant's massive gain of weight after the primary injury and the significant worsening of his right knee osteoarthritis after April 19, 2001, I find their opinions concerning the disability resulting from the combination of claimant's preexisting conditions and the disability from the primary injury and his unemployability are not credible.[26]

I find Mr. England's opinion concerning employee's employability to be credible.[27]

Taking into account claimant's age of 53 years and 4 months as of April 19, 2001, hisaverage intelligence, his employment history, Dr. Kriegshauser's opinion that he could perform sedentary work, and Mr. England's opinion that he was employable in the open labor market in a sedentary capacity, I find that claimant was employable in the open labor market as of April 19, 2001 when he reached maximum medical improvement with respect to his work-related right knee injury and that he was not then permanently and totally disabled from employment in the open labor market as a result of the combination of his disability from the right knee injury of September 13, 2000 with his preexisting disabilities in his neck and both knees and due to obesity as of September 13, 2000. Accordingly, the claim against the Second Injury Fund for permanent and total disability is denied.

Additional Permanent Partial Disability

Having found that employee was not permanently and totally disabled as a result of the combination of the primary injury sustained on September 13, 2000 with the preexisting disabilities as of September 13, 2000, it is next necessary to determine whether employee is entitled to an award of additional permanent partial disability from the Second Injury Fund pursuant to Section 287.220.1 Mo. Rev. Stat. (2000). Under that Section an employee who has a permanent partial disability and who subsequently sustains a compensable injury may recover from the Second Injury Fund any additional permanent disability caused by the combination of the preexisting disability and the disability from the subsequent injury. The employer is liable only for the disability caused by the work-related accident. The Second Injury Fund is liable for the difference between the sum of the two disabilities considered separately and independently and the disability resulting from their combination. Cartwright v. Wells Fargo Armored Serv, 921 S.W.2d 165, 167 (Mo. App. 1996); Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995); Brown v. Treasurer of Missouri, 795 S.W.2d 479 (Mo. App. 1990); Anderson v. Emerson Elec. Co., 698 S.W.2d 574, 576-77 (Mo. App. 1985). In order to recover from the Second Injury Fund the employee must prove a prior permanent partial disability, whether from a compensable injury or not, a subsequent compensable injury, and a synergistic combination of the preexisting and subsequent disabilities.

I have previously determined the extent of claimant's preexisting disabilities and the extent of the disability from the primary injury.

Thresholds

The 1993 amendment to Section 287.220.1 also established minimum threshold requirements with respect to both the preexisting disability and the subsequent compensable injury of 50 weeks for a body as a whole injury or 15% of a major extremity.

Based on my prior findings, I find that the preexisting disabilities to both knees, the neck and due to obesity and the primary injury to the right knee meet the minimum threshold requirements.

Combination of Preexisting and Primary Disabilities

The employee must next prove a combination effect. The amendment also added the word "substantially" in describing the greater overall disability. The employee must show that his or her present compensable injury combines with the preexisting permanent partial disability to cause a substantially greater overall disability than the sum of the disabilities considered independently. Cartwright v. Wells Fargo Armored Serv., 921 S.W.2d 165, 167 (Mo. App. 1996); Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995); Brown v. Treasurer of Missouri, 795 S.W.2d 479, 482 (Mo. App. 1990); Anderson v. Emerson Elec. Co., 698 S.W.2d 574, 576-77 (Mo. App. 1985).

Findings on Additional Permanent Partial Disability

There was no expert testimony that the combination preexisting disabilities and the disability from the primary injury produced a substantially greater overall disability than their simple sum.

Dr. Levy evaluated claimant on two occasions. On April 3, 2001 he opined only that claimant had sustained 25% permanent partial disability to his right knee due to the primary injury and had 25% permanent partial disability of the right knee prior to the primary injury. He did not evaluate any preexisting disabilities other than of the right knee. On September 2, 3003 Dr. Levy reevaluated claimant and opined that employee was totally disabled. He did not testify that the preexisting disabilities combined with the disability to the right knee to cause a greater degree of permanent disability than the sum of the disabilities, but not total disability.

Dr. Ralph opined that claimant sustained no disability from the primary injury.

Dr. Kriegshauser opined that claimant sustained 10% permanent partial disability of the right knee due to the primary injury and had 40% preexisting permanent partial disability of the right knee. He did not evaluated any other conditions.

Claimant has failed to prove that his present compensable injuries combine with the preexisting permanent partial disabilities to cause a substantially greater overall disability than the sum of the disabilities considered separately. Cartwright v. Wells Fargo Armored Serv., 921 S.W.2d 165, 167 (Mo. App. 1996); Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995); Brown v. Treasurer of Missouri, 795 S.W.2d 479, 483 (Mo. App. 1990); Anderson v. Emerson Elec. Co., 698 S.W.2d 574, 576-77 (Mo. App. 1985). Accordingly, the claim against the Second Injury Fund is denied.

ATTORNEY'S FEES

This award is subject to a lien in the amount of 20% of the additional payments hereunder in favor of the employee's attorney, Timothy O'Mara, for necessary legal services rendered to the employee.

Date: _____ Made by: _____

John Howard Percy
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

_____

Patricia "Pat" Secrest
Director
Division of Workers' Compensation

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 00-176865

Employee: Robert Grothaus

Employer: Mehlville Fire Protection District

Insurer: Missouri Fire & Ambulance District Insurance

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

Date of Accident: September 13, 2000

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

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated June 15, 2005. The award and decision of Administrative Law Judge John Howard Percy, issued June 15, 2005, 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 17th day of October 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

CONCURRING OPINION FILED
William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED
John J. Hickey, Member

Attest:

Secretary

CONCURRING OPINION

I submit this concurring opinion to disclose the fact that I was previously employed as a partner in the law firm of Evans and Dixon. While I was a partner the instant case was assigned to the law firm for defense purposes. I had no actual knowledge of this case as a partner with Evans and Dixon. However, recognizing that there may exist the appearance of impropriety because of my previous status with the law firm of Evans and Dixon, I had no involvement or participation in the decision in this case until a stalemate was reached between the other two members of the Commission. As a result, pursuant to the rule of necessity, I am compelled to participate in this case because there is no other mechanism in place to resolve the issues in the claim. *Barker v. Secretary of State's Office*, 752 S.W.2d 437 (Mo. App. 1988).

Having reviewed the evidence and considered the whole record, I join in and adopt the award and decision of the administrative law judge.

William F. Ringer, Chairman

DISSENTING OPINION

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

> An employee seeking workers' compensation benefits for an occupational disease must present "substantial and competent evidence that he [or] she has contracted an occupationally induced disease rather than an ordinary disease of life."…The employee must also establish, usually through medical testimony, the probability that the occupational disease was caused by workplace conditions.

Smith v. Tiger Coaches, Inc., 73 S.W.3d 756 (Mo. App. 2002).

Employee has established through his testimony and the testimony of Dr. McKinney that he was exposed to loud occupational noises during his employment, including air horns and sirens. Dr. McKinney explained a link between exposure to high levels of industrial noise and the incidence of tinnitus. I believe employee has met his burden of showing that the industrial noise to which he was exposed caused his tinnitus. I would award permanent partial disability of 5% of the body as a whole referable to employee's tinnitus.

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

John J. Hickey, Member

AWARD

Employee: Robert Grothaus

Injury No.: 00-176865

Dependents: N/A

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

Employer: Mehlville Fire Protection District

Additional Party: Second Injury Fund

Insurer: Missouri Fire & Ambulance District Insurance

Hearing Date: February 22, 2005

Checked by: JHP:tr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes

3. 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

6. Date of accident or onset of occupational disease: September 13, 2000

7. State location where accident occurred or occupational disease was contracted: St. Louis County, Mo.

6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes

7. Did employer receive proper notice? Yes

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

10. 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:
Exposure to bells, sirens, air horns, diesel noise, and pump noise.

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: Both ears

15. Nature and extent of any permanent disability: 5.8% permanent partial disability of both ears

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

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

Employee: Robert Grothaus Injury No.: 00-176865

17. Value necessary medical aid not furnished by employer/insurer? None

19. Employee's average weekly wages: @$1,400.00

19. Weekly compensation rate: $599.96 TTD; $314.26 PPD

20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

10.44 weeks of permanent partial disability from Employer $3,280.87

22. Second Injury Fund liability: No

TOTAL: $3,280.87

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 20% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Timothy O'Mara

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Robert Grothaus		Injury No.: 00-176865
Dependents:	N/A		Before the **Division of Workers' Compensation** Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Employer:	Mehlville Fire Protection District		
Additional Party:	Second Injury Fund		
Insurer:	Missouri Fire & Ambulance District Insurance		Checked by: JHP

Employee asserts a claim under Section 287.067.3 Mo. Rev. Stat. (2000) for hearing loss allegedly due to exposure to harmful noise. A hearing in this proceeding was held on February 22, 2005. The parties submitted proposed awards on April 5, 2005. This claim was heard with Injury No. 00-111075. Employee claimed that he was permanently and totally disabled in both cases. Additional time was required in issuing this award due to the voluminous record and complexities of determining the issue of whether the employee was permanently and totally disabled in either case.

STIPULATIONS

The parties stipulated that on or about September 13, 2000:

1. the employer and employee were operating under and subject to the provisions of the Missouri Workers' Compensation Law;
2. the employer's liability was insured by Missouri Fire & Ambulance District Insurance;
3. the employee's average weekly wage was approximately $1,400.00; and
4. the rate of compensation for temporary total disability and permanent total disability was $599.96 and the rate of compensation for permanent partial disability was $314.26.

The parties further stipulated that:

1. the employer had notice of the alleged hearing loss and a claim for compensation was filed within the time prescribed by law;
2. no compensation has been paid; and
3. employer/insurer have not paid any medical expenses.

ISSUES

The issues to be resolved in this proceeding are:

1. whether claimant sustained an occupational disease of loss of hearing and/or tinnitus due to industrial noise while in the employment of the employer;
2. if claimant sustained a compensable hearing loss and/or tinnitus, the nature and extent of any permanent disability sustained by the employee; and

3. if claimant sustained a compensable hearing loss and/or tinnitus, whether and to what extent employee has sustained any additional permanent partial or permanent total disability for which the Second Injury Fund would be liable as a result of the combination of any preexisting disabilities with the primary injury.

HEARING LOSS/TINNITUS DUE TO INDUSTRIAL NOISE

Robert Grothaus, claimant herein, alleges that he sustained a binaural loss of hearing due to prolonged exposure to harmful noise during his employment with the Melville Fire Protection District from 1972 until September 13, 2000. Mr. Grothaus also claims that he developed tinnitus as a result of prolonged exposure to harmful noise during said employment.

Section 287.067.3 Mo. Rev. Stat. (2000) recognizes a loss of hearing due to industrial noise as an occupational disease. In order to prevail, claimant must prove that he was exposed to harmful noise (i.e. "sound capable of producing occupational deafness") in his employment which caused a loss of hearing in one or both ears.

An employee's claim for compensation due to an occupational disease is to be determined under Section 287.067.1 Mo. Rev. Stat. (2000). It defines occupational disease as:

> an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence. (1993 additions underlined)

Section 287.067.2, which was added in 1993, provides that an occupational disease is compensable "if it is clearly work related and meets the requirements of an injury which is compensable as provided in subsections 2 and 3 of section 287.020. An occupational disease is not compensable merely because work was a triggering or precipitating factor." Subsection 2 of section 287.020 provides that an injury is clearly work related "if work was a substantial factor in the cause of the resulting medical condition or disability."[28]

Subsection 3(1) of section 287.020 provides that an injury must arise out of and in the course of the employment and be incidental to and not independent of the employment relationship and that "ordinary, gradual deterioration or progressive degeneration of the body caused by aging" is not compensable unless it "follows as an incident of employment."

Subsection 3(2) of section 287.020 provides that an injury arises out of and in the course of the employment "only if (a) It is reasonably apparent, upon consideration of all the circumstances, that the employment is a substantial factor in causing the injury; and (b) It can be seen to have followed as a natural incident of the work; and (c) It can be fairly traced to the employment as a proximate cause; and (d) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life[.]"

Much of new subsection 3(2) of section 287.020 was contained in the prior definition of an occupational disease set forth in Section 287.067. Section 287.020.3(2)(b), (c), and (d) were part of the former occupational disease statute. Section 287.020.3(2)(a) is a revision of the prior requirement of a direct causal connection between the conditions under which the work was performed and the occupational disease. Direct causal connection is now defined as "a substantial factor in causing the injury." The Supreme Court held in Kasl v. Bristol Care, Inc., 984 S.W.2d 501 (Mo. 1999) that the foregoing language overruled the holdings in Wynn v. Navajo Freight Lines, Inc., 654 S.W.2d 87 (Mo. 1983), Bone v. Daniel Hamm Drayage Company, 449 S.W.2d 169 (Mo. 1970), and many other cases which had allowed an injury to be compensable so long as it was "triggered or precipitated" by work. A substantial factor does not have to be the primary or most significant causative factor. Bloss v. Plastic Enterprises, 32 S.W.3d 666, 671 (Mo. App. 2000); Cahall v. Cahall, 963 S.W.2d 368, 372 (Mo. App. 1998). The additional language in section 287.020.3(1) concerning deterioration or degeneration of the body due to aging probably does not overturn any prior court decisions.

Since the 1993 amendments pertaining to occupational diseases have largely readopted the prior statute, caselaw interpreting the prior statute is of some significance.

Claimant must also establish, generally through expert testimony, the probability that the claimed occupational disease was caused by conditions in the work place. Dawson at 716; Selby v. Trans World Airlines, Inc., 831 S.W.2d 221, 223 (Mo. App. 1992); Brundige v. Boehringer, 812 S.W.2d 200, 202 (Mo. App. 1991). Claimant must prove that work was "a substantial factor" in causing "the resulting medical condition or disability." Section 287.020.2. Moreover, "an occupational

disease is not compensable merely because work was a triggering or precipitating factor." Section 287.067.2 Mo. Rev. Stat. (2000). The Supreme Court held in Kasl v. Bristol Care, Inc., 984 S.W.2d 501 (Mo. 1999) that the foregoing language overruled the holdings in Wynn v. Navajo Freight Lines, Inc., 654 S.W.2d 87 (Mo. 1983), Bone v. Daniel Hamm Drayage Company, 449 S.W.2d 169 (Mo. 1970), and many other cases which had allowed an injury to be compensable so long as it was "triggered or precipitated" by work. On the other hand, injuries which are triggered or precipitated by workmay nevertheless be compensable if the work is found to be the "substantial factor" in causing the injury. Kasl, supra.

A single medical opinion will support a finding of compensability even where the causes of the disease are indeterminate. Dawson at 716; Sellers v. Trans World Airlines Inc., 776 S.W.2d 502, 504 (Mo. App. 1989); Sheehan at 797. The opinion may be based on a doctor's written report alone. Prater v. Thorngate, Ltd., 761 S.W.2d 226, 230 (Mo. App. 1988)."A medical expert's opinion must be supported by facts and reasons proven by competent evidence that will give the opinion sufficient probative force to be substantial evidence." Silman v. Montgomery & Associates, 891 S.W.2d 173, 176 (Mo. App. 1995); Pippin v. St. Joe Minerals Corp., 799 S.W.2d 898, 903 (Mo. App. 1990). Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. Hawkins v. Emerson Electric Co., 676 S.W.2d 872, 877 (Mo. App. 1984). 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. George v. Shop 'N Save Warehouse Foods, 855 S.W.2d 460 (Mo. App. 1993); 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, 163 (Mo. App. 1986). An administrative law judge may not constitute himself or herself as an expert witness and substitute his or her personal opinion of medical causation of a complicated medical question for the uncontradicted testimony of a qualified medical expert. Wright v. Sports Associated, Inc., 887 S.W.2d 596 (Mo. 1994); Bruflat v. Mister Guy, Inc., 933 S.W.2d 829, 835 (Mo. App. 1996); Eubanks v. Poindexter Mechanical, 901 S.W.2d 246, 249-50 (Mo. App. 1995). However, even uncontradicted medical evidence may be disbelieved. Massey v. Missouri Butcher & Cafe Supply, 890 S.W.2d 761, 763 (Mo. App. 1995); Jones v. Jefferson City School Dist., 801 S.W.2d 486, 490 (Mo. App. 1990).

Claimant's Testimony

Claimant testified that he began working for the Mehlville Fire Protection District in 1972 as a private on the back step and slowly worked his way up to lead man and permanent driver. He last worked as an engineer for the Employer. His duties included responding to EMS calls, responding to motor vehicle accidents, operating the jaws of life,
class=Section10>
performing CPR, washing the fire trucks, logging mileage of the trucks, and supervising other firemen. Claimant testified that he was regularly exposed to dual air horns and sirens as a firefighter. He testified that he did not wear hearing protection. He had no other employment during this period.

Claimant also testified that in 1972 he suffered third degree burns around his head and ears. Following this accident he first began to notice difficulties with hearing. He stated that his hearing has gotten worse over the years. He currently has difficulties hearing telephone conversations.

Mr. Grothaus stated that he wore hearing aids for several years during the 1990s. He said that they helped for awhile.

Claimant also testified to experiencing ringing in the ears. He said the ringing sounds like birds chirping. He thought that he first noticed this condition in 1992.

Medical Opinions

Dr. John W. McKinney, an otolaryngologist, examined claimant on March 1, 2002. Employee described his work and the types of noise to which he was exposed at the Mehlville Fire Protection District. Dr. McKinney also asked claimant about his leisure activities. Employee told him that he did not use farm equipment, chain saws, ARVs, or firearms, motorcycles, air craft, power boats, or race cars. Claimant also described the 1992 fire incident when he suffered third degree burns to his ears and had "fluid" in his ears. (Claimant's Exhibit F)

On physical examination employee's tympanic membranes were intact, in a neutral position, without evidence of perforation, scar tissue, retraction pockets, middle ear fluid, tympanosclerosis, or cholestestoma. (Claimant's Exhibit F)

Audiometric evaluation showed speech reception threshold was 30 dB and 25 dB for the right and left ears respectively and in agreement with pure tone averages. Speech discrimination at 60 dB was 90% and 94% for the right and left ears respectively. (Claimant's Exhibit F)

Pure tone air studies were completed on three separate days. The average hearing level was calculated at 38.3 dB and 36.6 db for the right and left ears respectively. After subtracting a correction factor for nonoccupational hearing loss based on age in years greater than forty, the average hearing level was calculated at 31.3 dB for the right ear and 29.6 dB for the left ear. Dr. McKinney concluded that the percentage of hearing loss is calculated at 7.9% for the right ear and 5.4% for the left ear. The binaural loss is 5.8%. Dr. McKinney opined that the claimant's hearing loss was "likely secondary to industrial noise exposure, particularly in the early years of his employment when hearing protection devices were not generally worn by firefighters." (Claimant's Exhibit F)

Dr. McKinney also noted claimant complained of occasional ringing in both ears or tinnitus present for greater than five years. Dr. McKinney commented that tinnitus "occurs commonly in adult populations, in individuals exposed to and not exposed to industrial noise. The exact cause of the condition is not known...." He did not express an opinion that claimant's tinnitus was caused by noise exposure at the Mehlville Fire Protection District. (Claimant's Exhibit F)

Findings

Based on the credible testimony of employee I find that he was regularly exposed to dual air horns and sirens as a firefighter for the Mehlville Fire Protection District from 1972 through 2000. During most of that period he did not wear hearing protection. I further find that he did not have any significant noise exposures outside of his employment.

Based my foregoing findings and on the credible opinion of Dr. McKinney I find that Mr. Grothaus's exposure to harmful industrial noise during his employment at the Mehlville Fire Protection District was a substantial factor in causing bilateral hearing loss.[29]

As the cause of tinnitus is a complicated medical question, it is necessary for the employee to have an expert who states that the employment was a substantial factor in causing this condition. As Dr. McKinney's opinion concerning the cause of employee's tinnitus was equivocal, I find that claimant failed to meet his burden of proof with respect to tinnitus.

PERMANENT DISABILITY

Under Section 287.197.8 Mo. Rev. Stat. (2000) an employer is liable for "the entire occupational deafness to which his employment has contributed...." Previous deafness can be established by "a hearing test or other competent evidence". Generally the employee must prove the nature and extent of any disability by a reasonable degree of certainty. Griggs v. A. B. Chance Company, 503 S.W.2d 697, 704 (Mo. App. 1974); Downing v. Willamette Industries, Inc., 895 S.W.2d 650, 655 (Mo. App. 1995). Such proof is made only by competent and substantial evidence. It may not rest on speculation. Id. at 703. Expert testimony may be required where there are complicated medical issues. Goleman v. MCI Transporters, 844 S.W.2d 463, 466 (Mo. App. 1993); Griggs at 704; Downs v. A.C.F. Industries, Incorporated, 460 S.W.2d 293, 295-96 (Mo. App. 1970). However, where the facts are within the understanding of lay persons, the employee's testimony or that of other lay witnesses may constitute substantial and competent evidence. This is especially true where such testimony is supported by some medical evidence. Pruteanu v. Electro Core Inc., 847 S.W.2d 203 (Mo. App. 1993); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 367 (Mo. App. 1992); Ford v. Bi-State Development Agency, 677 S.W.2d 899, 904 (Mo. App. 1984); Fogelsong v. Banquet Foods Corporation, 526 S.W.2d 886, 892 (Mo. App. 1975).

Hearing loss is measured in accordance with Section 287.197 Mo. Rev. Stat. (2000) and 8 C.S.R. § 50-5.060.

Findings

Dr. McKinney tested Mr. Grothaus's hearing on March 1, 4, and 6, 2002 as required by law and measured his thresholds of hearing at the prescribed 3 frequencies. He applied the correction factor applicable for employee's age for hearing loss from nonoccupational causes. He determined that Mr. Grothaus's binaural hearing loss is 5.8%. (Claimant's Exhibit F) Employer does not contest the accuracy of Dr. McKinney's conclusion concerning the extent of the binaural hearing loss. Accordingly, I find that claimant has a binaural hearing loss of 5.8%.

As Dr. McKinney was fully informed of the 1972 injury to claimant's ears and chose not to assign any disability due that accident, I find that claimant sustained no disability from the 1972 fire. As there was no other evidence of nonoccupational exposure to harmful noise, I find that all of the binaural hearing loss of 5.8% was caused by exposure to harmful noise during claimant's employment with the Mehlville Fire Protection District.

Where hearing loss is compensable as an occupational disease, the amount of compensation for partial occupational deafness is determined under Section 287.197.3 rather than under Section 287.190.1. That section provides that for binaural

hearing loss, compensation is to be paid for the percentage of binaural hearing loss applicable to 180 weeks. Based on binaural hearing loss of 5.8%, claimant is awarded 10.44 weeks of compensation at the stipulated rate of $314.26 per week.

SECOND INJURY FUND LIABILITY
ALLEGED PERMANENT TOTAL DISABILITY

The employee claims that he is permanently and totally disabled as a result of the combination of the September 13, 2000 hearing loss with employee's alleged preexisting disabilities in his neck, right and left knees, and due to obesity. There was no evidence that employee was rendered permanently and totally disabled as a result of the injuries caused by his hearing loss considered alone and without regard to his alleged preexisting disabilities.

Section 287.220.1 Mo. Rev. Stat. (2000) provides that where a previous partial disability or disabilities, whether from a compensable injury or otherwise, and the last injury combine to result in total and permanent disability, the employer at the time of the last injury is liable only for the disability which results from the last injury considered by itselfand the Second Injury Fund shall pay the remainder of the compensation that would be due for permanent total disability under Section 287.200; Grant v. Neal, 381 S.W.2d 838, 840 (Mo. 1964); Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 366 (Mo. App. 1992); Brown v. Treasurer of Missouri, 795 S.W.2d 479, 482 (Mo. App. 1990). The employee must prove that a prior permanent partial disability, whether from a compensable injury or not, combined with the subsequent compensable injury to result in total and permanent disability.

Findings

As there was no evidence that claimant’s hearing loss combined with his preexisting disabilities to both knees, neck and due to obesity to render him permanently and totally disabled, the claim against the Second Injury Fund is denied.

ATTORNEY'S FEES

This award is subject to a lien in the amount of 20% of the additional payments hereunder in favor of the employee's attorney, Timothy O’Mara, for necessary legal services rendered to the employee.

Date: _____ Made by: _____

John Howard Percy
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

_____

Patricia “Pat” Secrest
Director
Division of Workers' Compensation

---

[1] As this period is actually 34 weeks and 6 days, the payment period probably ended prior to May 16, 2001.

[2] See Claimant’s Exhibit C, Page 12. Because claimant’s obesity is a significant preexisting condition which impacts various issues in this case, I have noted his weight whenever it was recorded.

[3] See Claimant’s Exhibit A, Page 13.

[4] The operative note was not in evidence.

[5] The operative note was not in evidence.

[6] The operative note was not in evidence.

[7] The operative note was not in evidence.

[8] Section 287.220.1 Mo. Rev. Stat. (2000); Grant v. Neal, 381 S.W.2d 838, 840 (Mo. 1964); Wuebbeling v. West County Drywall, 898 S.W.2d 615, 617-18 (Mo. App. 1995); Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 178 (Mo. App. 1995); Lahue v. Missouri State Treasurer, 820 S.W.2d 561, 563 (Mo. App. 1991).

[9] See Page 10 supra.

[10] See Pages 7 and 12 supra.

[11] As noted on Page 15 supra, the employer's liability for permanent partial disability compensation is determined under Section 287.190. Mo. Rev. Stat. (2000); Stewart v. Johnson, 398 S.W.2d 850 (Mo. 1966).

[12] Given claimant's testimony that he was diving a truck 95% of the time the last few years of his employment and the absence of any specific description of his work activities in Dr. Levy's reports, it is not clear whether Dr. Levy was aware that claimant was not regularly climbing ladders and stairs and whether Dr. Levy too readily agreed to the opposite assumption posited by the Second Injury Fund attorney. See Claimant's Exhibit, A, Page 43)

[13] See findings on Pages 7 to 9 supra.

[14] See findings on Page 9 supra.

[15] See findings on Page 9 supra.

[16] See findings on Pages 21 to 21 supra.

[17] See findings on Page 19 supra.

[18] Section 287.220.1 Mo. Rev. Stat. (2000).

[19] Garcia v. St. Louis County, 916 S.W.2d 263 (Mo. App. 1996); Frazier v. Treasurer of Missouri, 869 S.W.2d 152 (Mo. App. 1994); Lawrence v. Joplin R-VIII School Dist., 834 S.W.2d 789 (Mo. App. 1992); see also Wilhite v. Hurd, 411 S.W.2d 72 (Mo. 1967).

[20] Dr. Bernstein should have used claimant's age of 53 and 4 months as of April 19, 2001, 20 months from "advanced age". It was on that day that he reached maximum medical improvement and could have begun looking for a new job.

[21] When Dr. Levy examined Mr. Grothaus on April 6, 2001, he told Dr. Levy that sitting or standing for over 30 minutes caused great difficulty. He stated that standing while showering caused his right knee to stiffen up and be uncomfortable. (Claimant's Exhibit A, depo ex 2, p. 2) On September 2, 2003 he told Dr. Levy that his right knee pain increased when he walked for even a few minutes and that he could not stand for over 5 to 10 minutes before pressure built up. (Claimant's Exhibit A, depo ex 3, p. 1)

[22] On April 6, 2001 Mr. Grothaus did not describe any locking or giving out of his knee or falls. (Claimant's Exhibit A, depo ex 2, p. 2) On September 2, 2003 Mr. Grothaus told Dr. Levy that his knee had given way 8 times during the preceding 6 weeks His gait was described as slow and waddling. (Claimant's Exhibit A, depo ex 3, pp 1-2)

[23] I found in a companion case, Injury Number 00-176865, that he has only a slight hearing loss.

[24] See finding on Page 11 supra.

[25] See finding on Page 19 supra.

[26] Claimant may well be totally disabled at this time. If he is, his total disability would be due to his massive weight gain after September 13, 2000 and the deterioration of his preexisting osteoarthritis after April 19, 2001. The Second injury Fund is not liable under that circumstance.

[27] Mr. England also testified that claimant's opportunities for employment would be great increased if he lost weight. This is a further indication that claimant's massive weight gain is the primary factor in this case.

[28] Subsection 2 of Section 287.020 repeats the exclusion of injuries where work was merely a triggering or precipitating factor.

[29] I find that Dr. McKinney's words "likely secondary to" are equivalent to "a substantial factor".