

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

Injury No.: 04-008324

Employee: James Harris

Employer: Advanced Auto Parts (Settled)

Insurer: Fidelity & Guaranty Insurance Company
c/o Sedgwick Claims Management Services (Settled)

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

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated August 9, 2010. The award and decision of Administrative Law Judge John K. Ottenad, issued August 9, 2010, 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 9th day of February 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: James Harris

Injury No.: 04-008324

Dependents: N/A

Employer: Advance Auto Parts (Settled)

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

Additional Party: Second Injury Fund

Insurer: Fidelity & Guaranty Insurance Company C/O
Sedgwick Claims Management Services (Settled)

Hearing Date: April 28, 2010

Checked by: JKO

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: February 6, 2004
5. State location where accident occurred or occupational disease was contracted: St. Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant worked as an auto parts delivery driver for Employer, when he slipped and fell on ice while making a delivery, injuring his right ankle.
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 Lower Leg and Ankle
14. Nature and extent of any permanent disability: 65% of the Right Leg at the 160 week level
15. Compensation paid to-date for temporary disability: \$38,932.07
16. Value necessary medical aid paid to date by employer/insurer? \$195,748.39

Employee: James Harris

Injury No.: 04-008324

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Sufficient to result in the following applicable rates of compensation
- 19. Weekly compensation rate: \$191.56 for TTD/ \$191.56 for PPD
- 20. Method wages computation: By agreement (stipulation) of the parties

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Employer previously settled its risk of liability

- 22. Second Injury Fund liability:

\$191.56 per week for Claimant's lifetime starting 03/10/10, subject to review and modification by law

TOTAL: CONTINUING WEEKLY BENEFITS BEGINNING 03/10/10 AS DESCRIBED

- 23. Future requirements awarded: As awarded

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

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	James Harris	Injury No.: 04-008324
Dependents:	N/A	Before the
Employer:	Advance Auto Parts (Settled)	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
		Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
Insurer:	Fidelity & Guaranty Insurance Company C/O Sedgwick Claims Management Services (Settled)	Checked by: JKO

On April 28, 2010, the employee, James Harris, appeared in person and by his attorney, Mr. Thomas M. Kendrick, for a hearing for a final award on his claim against the Second Injury Fund. The employer, Advance Auto Parts, and its insurer, Fidelity & Guaranty Insurance Company C/O Sedgwick Claims Management Services, were not present or represented at the hearing since they had previously settled their risk of liability in this case. The Second Injury Fund was represented at the hearing by Assistant Attorney General Karin Schute. At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of fact and rulings of law, are set forth below as follows:

STIPULATIONS:

- 1) On or about February 6, 2004, James Harris (Claimant) sustained an accidental injury arising out of and in the course of his employment that resulted in injury to Claimant.
- 2) Claimant was an employee of Advance Auto Parts (Employer).
- 3) Venue is proper in the City of St. Louis.
- 4) Employer received proper notice.
- 5) The Claim was filed within the time prescribed by the law.
- 6) At the relevant time, Claimant earned an average weekly wage sufficient to result in applicable rates of compensation of \$191.56 for total disability benefits and \$191.56 for permanent partial disability (PPD) benefits.
- 7) Employer paid temporary total disability (TTD) benefits in the amount of \$38,932.07, or a total of 203 2/7 weeks.

- 8) Employer paid medical benefits totaling \$195,748.39.
- 9) Claimant reached maximum medical improvement on March 10, 2008.

ISSUES:

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

EXHIBITS:

The following exhibits were admitted into evidence:

Employee Exhibits:

- A. Deposition of Dr. David Volarich, with attachments, dated February 1, 2010
- B. Deposition of Mr. James England, with attachments, dated March 29, 2010
- C. Certified records of the Division of Workers' Compensation for
Injury Number 04-008324
- D. Certified medical treatment records of St. John's Mercy Medical Center
- E. Certified medical treatment records of St. Louis University Health Sciences
Center—Des Peres Medical Arts
- F. Certified medical treatment records of St. Louis University Health Sciences
Center—Doctors' Office Building
- G. Certified medical treatment records of St. Louis University Hospital
- H. Certified medical treatment records of St. Louis University Health Sciences
Center—Doctors' Office Building
- I. Certified medical treatment records of Patterson Medical (Dr. Mel Lucas)
- J. Certified medical treatment records of Arthritis Consultants, Inc.
(Dr. Andrew Baldassare)
- K. Certified medical treatment records of Christian Hospital
- L. Certified medical treatment records of Northland MidAmerica Orthopedics
- M. Certified medical treatment records of SSM DePaul Health Center
- N. Certified medical treatment records of Christian Hospital
- O. Certified medical treatment records of St. Louis Orthopedic, Inc.
- P. Certified medical treatment records of Christian Hospital

Second Injury Fund Exhibits:

Nothing offered or admitted at the time of trial

Notes: 1) Any stray marks or handwritten comments contained on any of the exhibits were present on those exhibits at the time they were admitted into evidence, and no other marks have been made since their admission into evidence on April 28, 2010.

2) Some of the exhibits were admitted with objections contained in the record. Unless otherwise specifically noted below, the objections are overruled and the testimony fully admitted into evidence.

FINDINGS OF FACT:

Based on a comprehensive review of the substantial and competent evidence, including Claimant's testimony, the expert medical and vocational opinions and depositions, the medical records, and the Stipulation for Compromise Settlement, as well as based on my personal observations of Claimant at hearing, I find:

- 1) **Claimant** is a 71-year-old, currently unemployed individual, who last worked for Advance Auto Parts (Employer) in 2004 as an auto parts delivery driver.
- 2) Claimant testified that his highest level of education was twelfth grade. He has worked in the auto industry for most of his career. He worked as an auto mechanic from 1965 to 1977. He worked at JCPenny, Venture and K-Mart in the automotive departments as the Service Manager. Then he worked in automotive service writing at Western Auto, Parts America and Advance Auto.
- 3) In terms of pre-existing injuries and disabilities, Claimant testified that he suffered a back injury in 1970 when he was working as an auto mechanic. He had collapsed to the floor after getting up in the morning and had to be taken by ambulance to the hospital. He had low back surgery performed by Dr. Dash at Incarnate Word Hospital. He was out of work for approximately five months. He returned to work with no permanent restrictions from the doctor, but he changed the way that he worked. He would use his legs more for lifting instead of bending over and lifting.
- 4) In 1973, Claimant was putting a large tire and wheel on a truck, when he felt pain and burning in his right shoulder. He had right shoulder surgery performed by Dr. Powell and he missed approximately five and a half months of work. As a result of his injury, Claimant testified that he was slower at work and he had no strength in the right arm. He basically had to do everything left-handed, with only slight help from the right arm. He was unable to use the right arm for any overhead lifting.
- 5) Claimant testified that in the early 1990s, he treated with Dr. Baldassare for rheumatoid arthritis. Claimant testified that he was having pain in the left knee as well as swelling. He, then, came under the care of Dr. Mel Lucas in 1996, who referred him to Dr. Strickland for his knees in 1996. Claimant testified that he had left knee and right knee arthroscopic procedures in 1996, after which he missed a total of six months of work. Claimant testified that after the knee surgeries, he was unable

to squat like before, and he would have to have something to pull himself up on if he did squat down. It also slowed down his ability to do the job as fast as he once did.

- 6) Claimant testified that the rheumatoid arthritis affected his knees, hands and left hip. He said that he had to modify everything that he did, because the condition was very painful. He participated in clinical trials and blind drug trial studies for the rheumatoid arthritis. He said that he took Darvocet and Vicodin. He also received cortisone shots in the left hip. Claimant testified that his hands would swell and he would have to soak them in the morning before he was able to use them. Likewise, his left knee swelled up a couple times, resulting in the doctor having to drain it.
- 7) Medical records from **Arthritis Consultants, Inc.** and **Dr. Andrew Baldassare** (Exhibit J), document that according to a letter dated April 23, 1990, Claimant was being treated for rheumatoid arthritis. He was taking Imuran with fairly good relief until the past several weeks when he noticed increasing synovitis in his hands. His Imuran dosage was increased to combat the symptoms. Later correspondence in that exhibit noted that Claimant continued to treat with Dr. Baldassare for his rheumatoid arthritis through 1997, but the office had destroyed the records documenting that treatment.
- 8) Medical treatment records from **St. Louis Orthopedic, Inc.** (Exhibit O) document the treatment Claimant received from **Dr. James Strickland** for his knees in 1996 and 1997. When Dr. Strickland first examined Claimant on August 6, 1996, Claimant complained of pain, tenderness and intermittent locking and catching in the left knee which had been getting gradually worse over the prior two to three years. Dr. Strickland took Claimant to surgery on August 15, 2006 for a diagnostic arthroscopy, partial medial meniscectomy and chondroplasty with removal of loose chondral bodies to treat his torn medial meniscus, grade III and grade IV chondromalacia and loose chondral bodies. In follow-up appointments after surgery, Claimant still complained of pain, catching and locking in the left knee, but reported that it had improved. His right knee was also bothering him, according to the records, so on October 29, 1996, Dr. Strickland took Claimant back to surgery for his right knee. He performed a diagnostic arthroscopy, partial medial meniscectomy and chondroplasty to treat his torn medial meniscus, grade III and grade IV chondromalacia and loose chondral bodies. The last note from Dr. Strickland dated January 22, 1997 indicates that Claimant was doing better after surgery, but he still had intermittent aching and swelling after being on his legs most of the day. Dr. Strickland noted that Claimant would eventually need total knee replacements because of the significant chondromalacia. He further noted that Claimant continued to have significant problems associated with his rheumatoid arthritis.
- 9) Medical treatment records from **SSM DePaul Health Center** (Exhibit M) document an admission to the pain center on September 29, 1998 for a several year history of headaches. His headaches had apparently been increasing in intensity and frequency. The record notes a past history of L4-5 laminectomy and discectomy in 1971 and a previous shoulder surgery in 1973. He was given some medication to try and a

referral to a neurologist was mentioned. The other admission documented in this record was on October 12, 1998 for removal of an enlarging right ear lesion.

- 10) Eventually, Claimant was referred to **Dr. Fallon Maylack** by Dr. Mel Lucas for additional treatment for the left knee. The medical treatment records of **Northland MidAmerica Orthopedics** (Exhibit L) show that when Claimant was first examined on September 29, 1999, he complained of worsening problems with the left knee. Dr. Maylack diagnosed left knee pain with no evidence of meniscal tear and possible advanced medial compartmental degenerative joint disease. Dr. Maylack took Claimant to surgery on January 3, 2000 at **Christian Hospital** (Exhibit K). He performed an arthroscopy of the left knee followed by a left total knee replacement, unicompartmental type with medial facet patelloplasty. Follow-up notes showed improvement in knee function, but he was taken back to surgery two times (February 16, 2000 and April 10, 2000) at **Christian Hospital** (Exhibit N) for removal of stitch incision and drainage to treat a stitch infection and retained stitches that were bothering Claimant. In follow-up examinations with Dr. Maylack, Claimant reported good motion and very little pain in the left knee. By June 14, 2000, Claimant was given a hinged knee brace for support when returning to work. On August 16, 2000, Claimant demonstrated good motion, stability and function of the knee. However, by February 14, 2001, Claimant reported that his retirement plans had gone awry and he was back working with complaints of some stiffness and slight swelling in the left knee. Claimant still had good motion, function and stability, but Dr. Maylack recommended use of a hinged knee brace.
- 11) For the five to six years prior to 2000, Claimant worked as a counterperson in sales for Employer. He greeted customers, sold parts, looked up parts on the computer and obtained parts from the shelves. He was basically standing eight hours per day. Claimant testified that the standing hurt both knees, both hips and his low back. As a result of the prior right shoulder surgery, he could not use his right arm overhead, so he would have to get help or climb a stepladder to get the parts. Claimant retired in 2000, at 62-years-old, because his "body had given out" and he couldn't work standing all that time like he used to be able to do. He was having problems bending and stooping. He could not get up and down like he once could. He testified that he would need something to pull himself up with or he could not get down. He was unable to do anything overhead and he could not lift because of right arm issues.
- 12) Approximately 30 days after retiring from Employer, he received a letter stating that his wife's insurance was about to expire. Consequently, he went back to Employer and began working as a driver three days a week to get his insurance back. He worked for Employer 3 days per week for 10 hours per day, or approximately 30 hours per week. Claimant testified that he worked Monday, Wednesday and Friday so that he would have the days in between to rest. He testified that the deliveries were within seven miles at most, so he did not have any prolonged sitting. He could not sit for prolonged periods of time because of the prior low back surgery. Claimant testified that as a driver he was in and out of the store driving a Ford Ranger pickup delivering parts. He said that it was easier on his body because he was sitting and driving and had breaks in between his work. Additionally, he was able to sit down in

the store. He delivered parts such as brakes, batteries, front-end parts, oil and mufflers. He loaded his own truck unless the parts were heavy. He would get help with anything heavy or with overhead lifting. Claimant would also get help at the repair facilities where he delivered the parts with the unloading if the items were heavy.

- 13) Medical treatment records from **Dr. Mel Lucas at Patterson Medical** (Exhibit I) document treatment Claimant was receiving from his family doctor from early 2001 through the 2004 date of injury and beyond. On December 19, 2001, the records note that Claimant suffered from complaints related to degenerative joint disease and osteoarthritis in both knees. Records from 2002 note bilateral knee pain and an onset of low back pain from lifting a case of oil at work. Throughout 2003 there are reports of advanced degenerative joint disease and osteoarthritis in the right shoulder and left hip. On January 21, 2004, just shortly before the February 6, 2004 date of injury, Claimant reported that his left hip was really bothering him. He was again diagnosed with osteoarthritis in the left hip and right shoulder. Throughout these records leading up to February 6, 2004, Claimant is not only seeing the doctor and being examined for these complaints, but he is also receiving pain medications and anti-inflammatory nonsteroidal medications.
- 14) On February 6, 2004 at approximately 9:00 a.m., Claimant was making a delivery for Employer at a shop in Jennings. It was cold and icy outside. He took the carburetor into the shop and was carrying the old item back in a box, when on the way to the truck, three steps out the door, his left foot hit ice and he heard a crunch as his right foot dug behind him. Claimant testified that he slid on his buttocks for a foot or two. Claimant said that he was taken by ambulance to St. John's Hospital, where he received his first right ankle surgery from Dr. John Tessier.
- 15) Medical treatment records from **Christian Hospital** (Exhibit P) confirm that Christian Ambulance responded to Claimant's accident site on February 6, 2004 and transported him to St. John's Mercy Medical Center. The records contain a consistent history of the accident on that date when Claimant slipped on ice while delivering parts, injuring his right ankle.
- 16) Medical treatment records from **St. John's Mercy Medical Center** (Exhibit D) contain a history that on February 6, 2004, **Dr. John Tessier** performed an open reduction internal fixation with posterior malleolus fixation to treat his trimalleolar fracture from his fall on the ice at work. When Claimant continued to have problems with pain and limited weight bearing, Dr. Tessier found that X-rays demonstrated a collapsed medial malleolus and nonunion. Therefore, on May 7, 2004, Dr. Tessier performed an exploration of the right ankle with hardware removal and a repeat open reduction and internal fixation with synthetic grafting.
- 17) Claimant went back to light duty work for Employer from approximately June 15, 2004 through July 15, 2004. He only performed counter work. He sat on a window ledge and then got up on his crutches to help a customer, when necessary. Claimant testified that he has not worked anywhere since that time.

- 18) As a result of continued pain complaints and a varus deformity of the right ankle, Claimant was referred by Dr. Tessier to **Dr. J. Tracy Watson** at the St. Louis University Department of Orthopaedic Surgery. According to the medical treatment records of **St. Louis University Health Sciences Center—Doctors' Office Building** (Exhibit H), Claimant was first examined by Dr. Watson on September 30, 2004. To treat his continued complaints, nonunion and varus angulation, Dr. Watson took Claimant to surgery at **St. Louis University Hospital** (Exhibit G) on November 29, 2004. He performed a tibial osteotomy, removal of the old hardware and application of an Ilizarov frame to treat the malunion and nonunion of the right distal tibia and medial malleolus following his severe pilon fracture from slipping on the ice. As Claimant continued to follow up with the doctors after the Ilizarov external fixator placement, he continued to complain of pain, but X-rays showed good maintenance of alignment and deformity correction with good growth of callus. Because of his progress, on May 16, 2005, Dr. Watson took Claimant back to surgery to remove the Ilizarov external fixator.
- 19) When Claimant followed up with the doctors at **St. Louis University Department of Orthopaedic Surgery** (Exhibit H) on June 23, 2005, some six weeks after the removal of the Ilizarov fixator, they found that his ankle had fallen back into recurvatum. Claimant was complaining of pain whenever he tried to ambulate on the leg. Because of his poor alignment, the doctors recommended reapplication of the Ilizarov frame. Therefore, on June 29, 2005 at **St. Louis University Hospital** (Exhibit G) Dr. Watson performed an application of a complex Ilizarov off compression deformity external fixator for Claimant's hypertrophic nonunion with acquired distal tibial deformity. The follow-up notes from the doctors revealed progression of the correction of Claimant's recurvatum malalignment with the onset of callus formation across the nonunion site. Claimant was again taken back to surgery on November 28, 2005 for removal of the Ilizarov external fixator with application of a short leg walking cast.
- 20) During this treatment with Dr. Watson, Claimant testified that therapy really did not help his ankle, because it would not move. He intermittently used crutches or a cane to walk, but sometimes was also able to walk without a cane. He testified that lots of times his right ankle would swell and he would have to elevate the leg because of the swelling. He did not sleep well because if he bumped the ankle, he would wake up on account of the pain. Claimant testified that his left hip also worsened during this time. He noted that he had had rheumatoid arthritis in the hip for years (from the mid-1990s), and he was thinking about having the hip surgery done even before the right ankle injury. He said that Dr. Lucas had talked to him about having the hip surgery to alleviate some of his hip complaints prior to the right ankle injury. However, after a couple of years of walking with crutches following the right ankle injury and putting more pressure on the left leg, he eventually decided to get the hip surgery in 2006.
- 21) In the midst of his treatment for the right ankle, because of worsening pain and problems with the left hip, Claimant came under the care of **Dr. Thomas Otto** at the St. Louis University Department of Orthopaedic Surgery for the left hip. The medical

treatment records of the **St. Louis University Health Sciences Center—Des Peres Medical Arts** (Exhibit E) reveal that Claimant first saw Dr. Otto on February 13, 2006 as a referral from Dr. Watson for evaluation of his left hip. Claimant reported that he had been on anti-inflammatories for his arthritis and had been participating in a double-blind study conducted by Merck for osteoarthritis, but his left hip complaints had been increasing in severity. Dr. Otto found significant left hip joint obliteration suggestive of osteoarthritis with collapse of the femoral head. He diagnosed left hip avascular necrosis of idiopathic etiology. He recommended a left hip replacement. Dr. Otto performed the minimally-invasive two-incision image-guided arthroplasty of the left hip at **St. Louis University Hospital** (Exhibit G) on March 15, 2006. Claimant continued to follow up with Dr. Otto for the left hip and by March 5, 2007 reported that his hip was fantastic with no complaints of pain. He was only aware of the hip replacement when making a sudden turning movement to the right side, and otherwise was completely satisfied with the procedure.

- 22) While treating for the left hip, Claimant also continued to see Dr. Watson (Exhibit H) for the right ankle injury. On August 31, 2006, Claimant reported that he continued to have pain, achiness and discomfort in the anteromedial aspect of the ankle joint. The doctors found continued loss of motion, slight antecurvatum deformity, but more significantly, post-traumatic osteoarthritis secondary to the pilon fracture resulting in nearly obliterated anterolateral and posterolateral joint spaces. Osteophytes also continued to form probably further limiting his ankle motion. Dr. Watson recommended a consult with Dr. Karges for consideration of an ankle fusion.
- 23) Claimant was once again taken to surgery at **St. Louis University Hospital** (Exhibit G) by **Dr. David Karges** on January 25, 2007. Dr. Karges performed a right tibiotalar fusion secondary to post-traumatic osteoarthritis. Because the screws inserted as a part of the fusion procedure became symptomatic, Dr. Karges took Claimant back to surgery on August 23, 2007 for removal of the two symptomatic screws from the right medial ankle and for removal of a bony spur from the right medial ankle.
- 24) The last office note from Dr. David Karges at the **St. Louis University Department of Orthopaedic Surgery** (Exhibit H) dated March 10, 2008 revealed that Claimant continued to have persistent paresthesias on the heel and arch of the right foot. He continued to take pain medication. X-rays showed a healed fusion of the tibiotalar joint. Dr. Karges diagnosed Claimant as being status post right tibiotalar fusion. He released Claimant from care on that date so that Claimant could try to get back to some part-time work. Dr. Karges placed restrictions limiting Claimant's standing, walking and lifting activities.
- 25) Medical treatment records from Dr. Otto at the **St. Louis University Health Sciences Center—Doctors' Office Building** (Exhibit F) document that Claimant continued to follow up for his left hip arthroplasty on March 10, 2008 and March 12, 2009 with no reports of pain or problems from the left hip. In fact, on March 12, 2009, Dr. Otto noted that the hip was not limiting any of Claimant's activities at that time. Claimant was found to have excellent hip range of motion and no pain. Three years following his left total hip arthroplasty, Claimant was characterized as "doing very well."

- 26) Claimant saw **Dr. David Volarich** (Exhibit A) for an independent medical examination at his attorney's request on December 5, 2008. Dr. Volarich examined Claimant on that one occasion and provided no medical treatment. He took a complete history from Claimant of the various work injuries and his pre-existing injuries and conditions. Dr. Volarich also reviewed Claimant's medical treatment records, recorded his continuing complaints and performed a physical examination. Claimant reported to Dr. Volarich that as a result of the 2004 right ankle injury he has limited motion and pain. He reported that he limps and has swelling if he walks more than 30 minutes. He also reported pre-existing problems with his right shoulder, low back, rheumatoid arthritis, knees, headaches and left hip. Physical examination revealed weakness in the right shoulder deltoid and rotator cuff; weakness in both quadriceps and hamstrings, as well as the right calf; diminished sensation in the right foot; abnormal reflexes in the lower extremities; decreased range of motion, but no spasm or trigger points in the low back; decreased range of motion and a mildly to moderately positive impingement test in the right shoulder; positive Phalen's and Tinel's signs in the wrists, as well as thenar atrophy; evidence of mild synovitis and slight deformity of the metacarpophalangeal joints consistent with rheumatoid arthritis; a slight lost range of motion in the left hip; crepitus and trace swelling in each knee; mild mistracking of the patella in the left knee; some swelling but no range of motion in the right ankle; and a shorter right leg than left leg.
- 27) As a result of the February 6, 2004 accident, Dr. Volarich diagnosed a severely comminuted and displaced trimalleolar fracture of the right ankle, status post eight surgical repairs culminating in a pan fusion of the right ankle, with continuing right calf, ankle and foot pain and short leg syndrome. He rated Claimant as having 80% permanent partial disability of the right lower extremity rated at the calf for this accident. Dr. Volarich rated pre-existing permanent partial disabilities of 40% of the right knee/thigh for the arthroscopically treated right knee; 65% of the left knee for the arthroscopy and medial compartment knee replacement; 30% of the right shoulder for the biceps tendon rupture and open reconstruction; 10% of the body as a whole referable to the low back for the laminectomy; 20% of the body as a whole for the rheumatoid arthritis; and 65% of the left hip for the advanced arthritis resulting in a total hip replacement. The rating on the hip accounted for severe pain, lost motion and weakness in the left hip girdle prior to February 6, 2004. Dr. Volarich placed a number of restrictions on Claimant's ability to work on account of his various injuries and medical conditions. Dr. Volarich ultimately opined that Claimant is permanently and totally disabled as a result of the combination of the February 6, 2004 work injury and all of the pre-existing medical conditions.
- 28) Claimant and Employer entered into an agreement to resolve the February 6, 2004 claim (Injury No. 04-008324) by **Stipulation for Compromise Settlement** (Exhibit C) for \$20,000.00, or 65% permanent partial disability of the right leg at the 160 week level. The stipulation reflects that Employer paid \$195,748.39 in medical benefits and \$38,932.07 in temporary total disability benefits for a period of 203 2/7 weeks. The Second Injury Fund claim was left open and pending by the terms of this settlement.

- 29) Claimant met with **Mr. James England** (Exhibit B) for a vocational rehabilitation evaluation at the request of his attorney on January 12, 2009. Mr. England also reviewed extensive medical treatment records, confirmed his past work history and jobs, and then issued his report dated January 16, 2009. Mr. England found that Claimant had transferrable skills from his time as an auto mechanic that transferred to lighter work such service writing and management, which Claimant later performed. He found that Claimant's vocational testing scores were more than adequate for a variety of alternate occupations. Having taken all this information into consideration, including his age and his physical problems which restrict him to less than what would be needed for even sedentary work, Mr. England opined that Claimant was totally disabled from a vocational standpoint, as a result of the combination of the problems he has with his knees, shoulder, back, right ankle/leg and arthritis affecting various joints.
- 30) The deposition of **Dr. David Volarich** was taken by Claimant on February 1, 2010 to make his opinions in this case admissible at trial (Exhibit A). Dr. Volarich is an osteopathic physician, who is board certified in nuclear medicine, nuclear cardiology, occupational preventative medicine and as an independent medical examiner. He testified consistent with the opinions from his report described above. He confirmed that the pre-existing injuries and conditions rated above were hindrances or obstacles to employment prior to February 6, 2004. He further confirmed that Claimant was permanently and totally disabled as a result of the combination of the right ankle/leg injury and the pre-existing disabilities. On cross-examination, Dr. Volarich agreed that Claimant returned to full duty work with no physician imposed restrictions following his right shoulder, low back and bilateral knee surgeries. However, he acknowledged that Claimant had multiple functional difficulties with activities like squatting, stooping and kneeling on account of these prior conditions, and he was by no means asymptomatic. When challenged on whether the restrictions from the right ankle/leg injury alone would have left Claimant unable to work, Dr. Volarich responded that if Claimant just had the ankle fusion, he believed Claimant would have been able to continue to work in some capacity for Employer, such as a driver, because he would have been able to sit down and move around periodically.
- 31) The deposition of **Mr. James England** was taken by Claimant on March 29, 2010 to make his opinions in this case admissible at trial (Exhibit B). Mr. England is a certified vocational rehabilitation counselor. He testified consistent with the opinions from his report described above. On cross-examination, Mr. England agreed that Dr. Volarich did not place any restriction on Claimant's ability to sit. He further indicated that absent Dr. Volarich's indication that Claimant was unable to sustain a job eight hours a day, five days a week, the rest of his restrictions left Claimant capable of performing light or sedentary work.
- 32) In terms of his current complaints, Claimant testified that he has a constant dull ache (pain) in the right ankle. He said that his right ankle does not move and his right leg is about an inch shorter than his left leg. Claimant noted that at times he has to elevate the right ankle/leg and sometimes he lies down in the afternoon to deal with

his complaints. Claimant continues to take Darvocet for the pain associated with his right ankle and his arthritis. Claimant testified that all of the pain and problems he described associated with his pre-existing injuries and conditions, all continued through the time of his right ankle/leg injury in 2004, and also continued to the date of trial.

- 33) On cross-examination, Claimant admitted that prior to 2001 he worked 40 hours per week, and prior to 2004 he worked 30 hours per week. He agreed that he performed all aspects of his job for Employer, although he performed differently than other employees. He agreed that he had no doctor's restrictions imposed on him prior to 2004, just his own restrictions. He further agreed that Employer never provided accommodations for him.
- 34) At trial, I personally observed Claimant shifting around in the witness chair multiple times during his testimony in an apparent attempt to get more comfortable, because of the length of time he was sitting in one place while testifying.

RULINGS OF LAW:

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

Claimant sustained a compensable injury to his right lower leg and ankle as a result of his slip and fall on ice while delivering parts for Employer in the course and scope of his employment on February 6, 2004. As a result of the February 6, 2004 accident at work, I find Claimant sustained a severely comminuted and displaced trimalleolar fracture of the right ankle, status post eight surgical repairs culminating in a pan fusion of the right ankle, with continuing right calf, ankle and foot pain, sensory changes, lost range of motion and short leg syndrome. The diagnosis of Claimant's right lower leg and ankle condition, the medical causation of it, and the significant treatment he received for the injury, as well as his continuing complaints and problems associated with this injury, are well documented in the medical treatment records and reports of Dr. John Tessier, St. John's Mercy Medical Center, Dr. J. Tracy Watson, Dr. David Karges, St. Louis University Hospital and Dr. David Volarich.

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

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

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

Under **Mo. Rev. Stat. § 287.020.7 (2000)**, “total disability” is defined as the “inability to return to any employment and not merely ... inability to return to the employment in which the employee was engaged at the time of the accident.” The test for permanent total disability is claimant’s ability to compete in the open labor market. The central question is whether any employer in the usual course of business could reasonably be expected to employ claimant in his present physical condition. *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173 (Mo. App. E.D. 1995)

In cases such as this one where the Second Injury Fund is involved and there is an allegation of permanent total disability, we must also look to **Mo. Rev. Stat. § 287.220 (2000)** for the appropriate apportionment of benefits under the statute. The analysis of the case essentially takes on a three-step process:

First, is Claimant permanently and totally disabled?;

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

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

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

Considering the competent and substantial evidence listed above, I find that Claimant is permanently and totally disabled. Claimant credibly described the continuing pain and problems he has with his right lower leg/ankle, bilateral knees, right shoulder, low back, left hip and rheumatoid arthritis that keep him from functioning normally on a daily basis. He is continuing to take medications to deal with his many medical conditions, including the pain and physical complaints. In addition to Claimant’s credible testimony, also in evidence are the reports and testimony of Dr. Volarich, the independent medical examiner, and Mr. England, the vocational rehabilitation counselor, who both agree that Claimant is permanently and totally disabled when considering all of the problems and physical complaints he currently has.

Based on the reports in evidence and the testimony, I find that there are significant restrictions on Claimant’s ability to function in the work place. Dr. Volarich, who provided the most comprehensive report on Claimant’s condition, placed significant functional restrictions on Claimant as a result of his right shoulder and bilateral lower extremity conditions. Dr. Volarich also opined that based on his medical assessment, Claimant was permanently and totally disabled. Dr. Volarich’s opinion, and Claimant’s allegation of permanent total disability, was further bolstered by the competent, credible and reliable testimony of Mr. James England, a vocational rehabilitation counselor, who confirmed that Claimant was not employable in the open labor market given the totality of his condition. The Second Injury Fund offered no contrary medical or vocational opinions to dispute the ultimate findings of Dr. Volarich and Mr. England in this regard.

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

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

Based on my review of the competent and substantial evidence, I do not believe the last injury alone caused Claimant to be permanently and totally disabled. While I certainly agree that the last injury to the right lower leg/ankle was significant and resulted in a substantial amount of medical treatment and some significant functional restrictions and disability, I do not believe that that last injury alone was enough to render Claimant permanently and totally disabled in and of itself. I do not find any credible medical or vocational evidence in the record to suggest that Claimant's permanent total disability is the result of the last injury on February 6, 2004 alone. Instead, the two experts who provided comprehensive reports on Claimant's condition and ability to function in the open labor market, Dr. Volarich and Mr. England, both agreed it was the combination of all of his problems and disabilities, leading up to and including the injury of February 6, 2004, that rendered him permanently and totally disabled, not just the last injury alone.

Claimant has had a long history of injuries and disabilities to various parts of his body for which he has received significant medical treatment going back to the 1970s. These pre-existing injuries and disabilities to the right shoulder, bilateral lower extremities, low back, left hip and body as a whole referable to rheumatoid arthritis caused Claimant to miss time from work, alter the way he performed his jobs, take lighter jobs and take medications for his complaints. I believe Claimant when he testified to the problems he experienced with the right shoulder, bilateral lower extremities, low back, left hip and body as a whole referable to rheumatoid arthritis leading up to February 6, 2004. Dr. Volarich testified that Claimant is permanently and totally disabled as a result of the combination of the February 6, 2004 work injury and all of the pre-existing medical conditions. Mr. England also similarly opined that the combination of the disabilities rendered Claimant unable to compete in the open labor market, and, thus, permanently and totally disabled.

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

Based upon all of these findings, as well as based on Claimant's testimony, the Stipulation for Compromise Settlement between Claimant and Employer in this case, the medical evidence and the unrebutted, credible testimony of Dr. Volarich, I find that Claimant has 65%

permanent partial disability of right leg at the 160 week level, related to the February 6, 2004 injury at work.

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

With regard to the pre-existing injuries and disabilities Claimant has alleged, I find Claimant has provided credible testimony and/or medical evidence to explain the nature of the injuries to his right shoulder, bilateral lower extremities, low back, left hip and body as a whole referable to rheumatoid arthritis. I also found credible testimony to explain the various ways in which these disabilities impacted his ability to work.

In reviewing the medical records and reports submitted into evidence, I did find notes regarding the right shoulder, bilateral lower extremities, low back, left hip and body as a whole referable to rheumatoid arthritis to substantiate the nature and extent of those injuries. It is clear to me from Claimant's testimony and from review of the medical records and vocational evidence that the prior right shoulder, bilateral lower extremities, low back, left hip and body as a whole referable to rheumatoid arthritis conditions were all hindrances or obstacles to employment or re-employment prior to the February 6, 2004 injury. Although he apparently had no formal restrictions placed on him by a doctor leading up to the last injury, it was clear to me from his testimony that he moved to lighter and less strenuous jobs as his career progressed to accommodate the physical problems he had with his right shoulder, bilateral lower extremities, low back, left hip and body as a whole referable to rheumatoid arthritis. Then, of course, there is the credible medical opinion from Dr. Volarich, as well as the vocational opinion of Mr. England, both of whom opine Claimant is permanently and totally disabled as a result of the combination of his primary right lower leg/ankle injury, with his pre-existing disabilities to multiple parts of his body.

I would note that although Claimant had his left hip replacement surgery following the February 6, 2004 injury, Claimant had significant left hip problems pre-existing the February 6, 2004 injury. In that respect, I did not believe the subsequent surgery represented a significant subsequent deterioration of a pre-existing condition, because Claimant had already discussed the need for surgery on the hip with Dr. Lucas prior to the right lower leg/ankle injury and had already been thinking about it when he had suffered the February 6, 2004 accident. Since doctors had already talked to Claimant about the need for the left hip surgery prior to February 6, 2004, then the fact that he had the surgery following the primary injury does not, in my estimation, represent a subsequent deterioration. Further, I find that Dr. Volarich and Mr. England were both clear in only considering the disabilities that pre-existed the February 6, 2004 injury and any disability from the February 6, 2004 injury itself in reaching their opinions on the cause of Claimant's permanent total disability.

Accordingly, based on all of this evidence, I find that Claimant has met his burden of proof to show that he is permanently and totally disabled as a result of the combination of his primary right lower leg/ankle disability with his pre-existing disabilities to the right shoulder, bilateral lower extremities, low back, left hip and body as a whole referable to rheumatoid arthritis. Since the permanent total disability is the result of the combination of his disabilities, the Second Injury Fund has liability for this disability.

Having established the responsibility of the Second Injury Fund for the permanent total disability exposure in this Claim, there is yet one issue regarding the amount and timing of the payments under the statute. The parties stipulated that Claimant reached maximum medical improvement on March 10, 2008. Employer would have had responsibility for temporary total disability benefits up until the date of maximum medical improvement.

Since Claimant reached maximum medical improvement on March 10, 2008, I find that Claimant is permanently and totally disabled as of March 11, 2008.

By the terms of this award, Employer was responsible for 104 weeks of permanent partial disability at a rate of \$191.56. Therefore, from March 11, 2008 until March 9, 2010 (104 weeks), Employer had liability for \$191.56 per week, which Claimant and Employer settled by the terms of the Stipulation for Compromise Settlement that extinguished Employer's liability for this case. Because the PTD and PPD rates are the same, there is no differential due from the Second Injury Fund during this period of time.

Therefore, starting on March 10, 2010, the Second Injury Fund is to pay \$191.56 per week for Claimant's lifetime, subject to review and modification by law.

CONCLUSION:

Claimant sustained a compensable injury arising out of and in the course of his employment for Employer. The severely comminuted and displaced trimalleolar fracture of the right ankle, status post eight surgical repairs culminating in a pan fusion of the right ankle, with continuing right calf, ankle and foot pain, sensory changes, lost range of motion and short leg syndrome is medically causally connected to Claimant's accident while working for Employer on February 6, 2004. Employer was responsible for 104 weeks of compensation (65% of the right leg at the 160 week level) for permanent partial disability attributable to the February 6, 2004 injury. Claimant is permanently and totally disabled as a result of the combination of the primary right lower leg/ankle injury and pre-existing disabilities to the right shoulder, bilateral lower extremities, low back, left hip and body as a whole referable to rheumatoid arthritis. Claimant reached maximum medical improvement as of March 10, 2008. From March 11, 2008 until March 9, 2010 (104 weeks), Employer had liability for \$191.56 per week, which Claimant and Employer settled by the terms of the Stipulation for Compromise Settlement. Compensation from the Second Injury Fund is payable in the amount of \$191.56 per week from March 10, 2010, for the rest of Claimant's life, subject to review and modification by law. Compensation awarded is subject to a lien in the amount of 25% of all payments in favor of Thomas M. Kendrick, for necessary legal services.

Date: _____

Made by: _____

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

A true copy: Attest:

 Naomi Pearson
Division of Workers' Compensation