

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

Injury No.: 03-120199

Employee: Robert Jezich  
Employer: Lighthouse for the Blind (Settled)  
Insurer: Sheltered Workshop Insurance  
c/o Corporate Claims Management, Inc. (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 November 10, 2010, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge John K. Ottenad, issued November 10, 2010, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 17<sup>th</sup> day of August 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING  
\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

# AWARD

Employee: Robert Jezich

Injury No.: 03-120199

Dependents: N/A

Employer: Lighthouse for the Blind (Settled)

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

Additional Party: Second Injury Fund

Insurer: Sheltered Workshop Insurance C/O  
Corporate Claims Management, Inc. (Settled)

Hearing Date: August 3, 2010

Checked by: JKO

## FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: November 19, 2003
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 running machines for labeling and filling cans for Employer, when he fell over a pallet of cans, injuring his low back.
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: Body as a Whole—Lumbar Spine
14. Nature and extent of any permanent disability: 5% of the Body as a Whole—Lumbar Spine
15. Compensation paid to-date for temporary disability: \$14,502.21
16. Value necessary medical aid paid to date by employer/insurer? \$36,140.23

Employee: Robert Jezich

Injury No.: 03-120199

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$450.84
- 19. Weekly compensation rate: \$300.56 for TTD/ \$300.56 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 in this case

22. Second Injury Fund liability:

None		\$0.00
------	--	--------

<b>TOTAL:</b>	<b><u>\$0.00</u></b>
---------------	----------------------

23. Future requirements awarded: None

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

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

**FINDINGS OF FACT and RULINGS OF LAW:**

Employee:	Robert Jezich	Injury No.: 03-120199
Dependents:	N/A	Before the
Employer:	Lighthouse for the Blind (Settled)	<b>Division of Workers' Compensation</b>
Additional Party:	Second Injury Fund	Department of Labor and Industrial Relations of Missouri
Insurer:	Sheltered Workshop Insurance C/O Corporate Claims Management, Inc. (Settled)	Jefferson City, Missouri
		Checked by: JKO

On August 3, 2010, the employee, Robert Jezich, appeared in person and by his attorney, Mr. Nile D. Griffiths, for a hearing for a final award on his claim against the Second Injury Fund. The employer, Lighthouse for the Blind, and its insurer, Sheltered Workshop Insurance C/O Corporate Claims Management, Inc., 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 Levander Smith. 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 November 19, 2003, Robert Jezich (Claimant) has alleged an accidental injury claim.
- 2) Claimant was an employee of Lighthouse for the Blind (Employer).
- 3) Venue is proper in the City of St. Louis.
- 4) Employer received proper notice.
- 5) The Claim was filed within the time prescribed by the law.
- 6) At the relevant time, Claimant earned an average weekly wage of \$450.84, resulting in applicable rates of compensation of \$300.56 for total disability benefits and \$300.56 for permanent partial disability (PPD) benefits.
- 7) Employer paid temporary total disability (TTD) benefits in the amount of \$14,502.21, representing a period of 48 2/7 weeks.
- 8) Employer paid medical benefits totaling \$36,140.23.

**ISSUES:**

- 1) Did Claimant sustain an accidental injury?
- 2) Did the accidental injury arise out of and in the course of employment?
- 3) Are Claimant's injuries and continuing complaints, as well as any resultant disability, medically causally connected to his alleged accident at work on or about November 19, 2003?
- 4) What is the nature and extent of Claimant's permanent partial and/or permanent total disability attributable to this alleged injury?
- 5) What is the liability of the Second Injury Fund?

**EXHIBITS:**

The following exhibits were admitted into evidence:

***Employee Exhibits:***

- A. Stipulation for Compromise Settlement for Injury Number 03-120199 (Date of Injury of November 19, 2003) between Claimant and Employer
- B. Assorted medical treatment records for the November 19, 2003 injury
- C. Deposition of Dr. Mark Lichtenfeld, with attachments, dated June 26, 2009
- D. Deposition of Dr. Jay Liss, with attachments, dated July 17, 2009
- E. Deposition of Mr. James England, Jr., with attachments, dated July 29, 2009
- F. Certified medical treatment records of Dr. Somkietr Rojanasathit
- G. Certified medical treatment records of Dr. Frank Calandrino
- H. Medical treatment records of Dr. Garry Vickar

***Second Injury Fund Exhibits:***

- I. Medical report dated December 2, 2009 and curriculum vitae of Dr. Russell Cantrell

***Notes:*** 1) Unless otherwise specifically noted below, any objections contained in these Exhibits are overruled and the testimony fully admitted into evidence.

2) Some of the records submitted at hearing contain handwritten remarks or other marks on the Exhibits. All of these marks were on these records at the time they were admitted into evidence and no other marks have been added since their admission on August 3, 2010.

**FINDINGS OF FACT:**

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

- 1) **Claimant** is a 55-year-old, currently unemployed individual, who last worked for Lighthouse for the Blind (Employer) running labeling and filling machines for aerosol cans, until he was fired for having a bad attitude in November 2003. Claimant testified that his current source of income is Social Security Disability benefits of \$1,006.00 per month.
- 2) Claimant graduated from high school in 1973, but he testified that his grades were average or below average. He testified that he was regularly bullied by a classmate throughout his school career and he was often more worried about what was going on with him, than he was about school itself. He tried to attend college for a semester, but the schooling did not work for him. Claimant has had no other formal education or training.
- 3) Claimant testified that he turned to alcohol and over-drinking, partly because of his problems at school and partly because his sister was always an "angel" and he was never very good. He testified that he received beatings from his father at a young age for not listening, and so as he got older, turned to drinking. However, Claimant testified that he has stopped drinking and has been sober for approximately nine years now.
- 4) Claimant testified that in addition to his prior low back problems, which will be discussed in more detail below, he had prior problems with his heart. He testified that he had a stent surgically implanted for heart problems sometime prior to 2001. He admitted that prior to November 19, 2003, he was having symptoms of shortness of breath and chest pain that caused him difficulties at work. He said that he was receiving breathing treatments before the accident to deal with his shortness of breath. When he would suffer from chest pains or shortness of breath at work, he would have to sit down, take a break and try to relax. Claimant admitted that prior to November 19, 2003, he was insulin-dependent for diabetes. He was taking a pill in the morning and insulin at night to try to control his diabetes. He said that he notices problems with the diabetes in that if he eats anything in the morning with any amount of sugar in it, then he has to lie down because he gets immediately tired, and he has also passed out in his backyard from his sugar being too high. He also admitted that he has problems with his eyes, in that sometimes he can see fine, and other times things are fuzzy. Claimant testified that he also received treatment and medications for bipolar disorder prior to the work injury in 2003. Despite taking the medications, Claimant testified that he gets very frustrated and aggravated very easily. He believed the medications help, but do not control it totally.

- 5) Claimant testified that his work history shows he has had many different jobs that normally ended with his being fired. He said that he felt everyone had a problem with him, and when he felt that way, he would “get that bipolar coming out of me and I just want to argue...” He admitted that he has problems getting along with people and he especially does not like it when authority figures get demanding with him. He admitted also that his bipolar disorder was affected (worsened) by his parents’ passing in 2001. He said that his mother used to do everything for him, and since she died he feels lost and that he cannot handle all of this himself. His medications had to be increased and he missed three to four weeks of work following her death. I observed Claimant break down in tears when discussing his mother’s death and the effect it had on him.
- 6) In terms of other pre-existing injuries, Claimant testified that he had problems with his right hand. He said that he fell and crushed the ulnar nerve, and went through two surgeries, but he refused to have a third. He noted that his two fingers are crooked because of the injury and surgeries and he does not have the grip or hand coordination that he once had.
- 7) Medical treatment records from **Dr. Somkietr Rojanasathit** (Exhibit F) document treatment Claimant had with that physician beginning on February 19, 2003 and continuing after his work injury, until February 7, 2005. Throughout those records, there are office notes and laboratory tests showing that Claimant’s diabetes was out of control at various points, both before and after the work injury that is the subject of this case. Additionally, those same notes and test reports show that his triglycerides were often extremely high. For instance, on February 19, 2003, the doctor reported that Claimant had uncontrolled diabetes because test results showed his glucose at 159 and his triglycerides at 216. Later on April 19, 2004, after the work injury of November 19, 2003, Claimant’s glucose level was 146 and his triglycerides level was even higher than before at 564. Then, on December 6, 2004, his test results again seemed to worsen with a glucose level at 325 and a triglycerides level at 794.
- 8) Additionally, in these records from **Dr. Somkietr Rojanasathit** (Exhibit F) was an X-ray report from **Christian Hospital** (Exhibit F) for lumbar spine X-rays taken on May 30, 2003, which showed relatively marked degenerative changes in the lumbar spine with the most severe degenerative disc disease at the L5-S1 interspace. Then, there was the report from **The Imaging Center** (Exhibit F) dated June 13, 2003 for a lumbar spine MRI. The MRI revealed diffuse disc bulging and facet hypertrophy producing central and lateral stenosis most marked at L2-3, L3-4 and L4-5, as well as a focal disc herniation centrally at L5-S1, with extension of the disc material more prominently on the left side at this level.
- 9) Claimant was employed by Employer from April 2003 until November 2003 running machines for labeling and filling aerosol cans. He explained that his job entailed setting up the machines and then pushing a button to start the run. Claimant testified that he thought he was being hired as a supervisor for Employer, but then they brought in someone else to be the supervisor and he was left to just running the machines. He noted that he “buted heads a lot” with Employer over this dispute concerning whether

he was supposed to be a supervisor or not. Claimant admitted that he was repeatedly disciplined by Employer for attitude problems and for not being able to get along with others, particularly his bosses. He was working full-time for Employer, eight hours per day, leading up to the time of his November 19, 2003 fall. Claimant testified that he earned approximately \$450.00 per week while working for Employer.

- 10) Claimant testified that on November 19, 2003, he was working for Employer in his usual job, when he fell over a pallet of cans onto his back. He testified that he reported the injury right away and they took him to the hospital, where he had an MRI taken of his low back. He began a course of treatment for his low back that included injections from Dr. Graham and eventually surgery on his low back performed by Dr. Wagner.
- 11) Claimant testified on direct examination that after his injury at work on November 19, 2003, he “had a lot of lower pain in my back. It was going down my right leg and my left leg.” He admitted that he had had problems with his low back for many years leading up to the time of his November 19, 2003 injury, and that he had had an MRI taken of his low back four or five months prior to his injury because of “pain in my back and everything.” He even admitted at trial that he had pain into his legs before the work injury, but it got more severe after the work injury. He testified that before his work injury, his low back caused problems at work with bending over and doing things, but after his injury and the surgery, which he believed made his condition worse, he now has problems performing any physical activities, including sitting, standing or even moving around. He said that he does not drive anymore, and he had a friend bring him to court for this hearing. He admitted that he was even having trouble before his work injury with the light lifting and bending required in his job for Employer. He admitted that he missed work prior to November 19, 2003 because of low back problems.
- 12) Medical treatment records from **Christian Hospital Northeast/Northwest** (Exhibit B) document Claimant’s initial treatment following this injury on November 19, 2003. He was initially seen in the emergency room and then admitted to the hospital for treatment from November 19, 2003 through November 21, 2003. The records contain a consistent history of falling backwards over some cans onto a pallet at work and injuring his low back. He also struck his mid-back and head and was complaining of headache-type pain. The notes indicate a history of diabetes mellitus under good control, arteriosclerotic heart disease status post coronary artery stent placement, manic depressive illness and chronic obstructive pulmonary disease. In these records, Claimant specifically denies any radiation of pain, numbness, tingling or muscle weakness into the buttocks or lower extremities. An MRI of the lumbar spine taken on November 20, 2003, showed evidence of congenital short pedicle spinal stenosis throughout the lumbar spine, with broad-based, diffuse disc bulging at multiple levels, including L1-2, L2-3, L3-4, L4-5 and L5-S1, and a central disc prominence (potential central disc herniation) at L5-S1. Claimant was discharged on pain medications, given a follow-up appointment with the doctor and kept off work until December 1, 2003.

- 13) Claimant was next examined by the doctors at **Concentra Medical Centers** (Exhibit B) at the request of Employer on November 26, 2003. Claimant again provided a consistent history of injuring his low back when a can rolled off a pallet under his feet and he fell backwards over the pallet. He reported back pain but no radicular symptoms. He was diagnosed with a lumbar strain, spinal stenosis and a possible central disc herniation at L5-S1. Although Employer raised some issues with regard to whether this was a work-related event or not, when Dr. Catanzaro saw Claimant on December 3, 2003, he apparently believed that it was a compensable work injury, because he referred Claimant to an orthopedic surgeon for consultation on the MRI findings, and continued his same medications and modified activity restrictions.
- 14) As a result of the referral from Concentra, Claimant came under the care of **Dr. John Wagner** (Exhibit B) for his low back injury on December 16, 2003. Claimant again provided a consistent history of the injury at work, and also mentioned a prior history of low back problems from working with concrete when he was 20 years old, but he denied any other pre-existing low back problems leading up to this accident at work. He did not report to Dr. Wagner that he had X-rays and an MRI of the low back taken only approximately six months prior to this examination, and prior to his work injury. He complained of back pain to Dr. Wagner, but no radicular symptoms in his legs. Dr. Wagner noted that the MRI showed a herniated disc at L5-S1 on the right, as well as marked degenerative disc disease throughout the lumbar spine. Dr. Wagner found that Claimant had severe osteoarthritis at a very young age, and also had some residual complaints from his fall at work. He recommended physical therapy, medication, light duty work and re-evaluation in four weeks. The notes indicate the physical therapy aggravated Claimant's low back complaints.
- 15) Dr. Wagner recommended epidural steroid injections for Claimant's continuing back complaints, which were administered by **Dr. John Graham** (Exhibit B), and seemed to provide some relief of his pain. Dr. Graham's report dated February 4, 2004 is the first indication I can find in the medical treatment records where Claimant complained of any pain in his legs, following his accident at work. Continued physical therapy also seemed to be providing improvement in his functioning and decreasing his complaints. However, in early April 2004, Claimant was performing vigorous exercises with both lower extremities, when he noticed a gradual increase in right lower extremity pain from the lateral thigh to the lateral calf that resulted in an emergency room visit to Christian Hospital on April 17, 2004. By April 22, 2004, Dr. Wagner found that Claimant had a limp on the right side with obvious discomfort on weight bearing. He ordered an EMG/nerve conduction study that was performed by **Dr. Ravi Yadava** (Exhibit B) on April 27, 2004. It showed findings compatible with a right-sided lumbar radiculitis affecting the L5 and S1 myotomes. When Claimant returned to see Dr. Wagner on April 29, 2004, Dr. Wagner indicated a new MRI showed no change in the herniated disc found on the prior MRI, but the EMG showed nerve root involvement that corresponded to the L5-S1 disc herniation. He discussed surgical treatment options with Claimant, but noted the increased risks associated with his diabetes and weight. Dr. Wagner indicated that unless something dramatic occurred, with Claimant's back problems and the herniated disc, he did not think there was much of a chance of Claimant returning to a lifting occupation. By May 6, 2004,

Dr. Wagner notes that he again discussed surgery with Claimant, and surgery for excision of the herniated disc was to be scheduled at Claimant's convenience.

- 16) Dr. John Wagner took Claimant to surgery at **Missouri Baptist Medical Center** (Exhibit B) on June 1, 2004 and performed an excision of the herniated disc at L5-S1 on the right.
- 17) As Claimant continued to follow up with Dr. Wagner after his surgery, he initially reported some improvement in his back symptoms, but he still reported some back pain and posterior knee pain. Dr. Wagner thought the residual symptoms were due to the degenerative disc disease since he found no continued radicular signs. Claimant was sent for physical therapy, but in Dr. Wagner's notes, he comments that Claimant does not seem to be progressing in therapy at all. He encourages Claimant to get out of the house, be active, walk and go to therapy, but he questions, based on the lack of progress, if Claimant is actually performing any of the home exercises he is supposed to be doing. Claimant had a Functional Capacity Evaluation performed at **PRORehab** (Exhibit B) on December 7, 2004. The report indicates that Claimant was employable on a full-time basis in the heavy work demand level. It also noted that he failed 6 out of 11 of the validity criteria, raising questions about possible symptom magnification and not giving maximal effort in the test.
- 18) When Claimant saw Dr. Wagner on December 14, 2004, Dr. Wagner reviewed the results of the Functional Capacity Evaluation with him. He opined that because of the degenerative joint disease that pre-existed Claimant's injury, he thought it would be more appropriate to place Claimant at the medium demand duty level with a lifting restriction of 35 pounds on a regular basis and 50 pounds occasionally. Dr. Wagner discharged Claimant from care at that point. He opined that Claimant had 17.5% permanent partial disability of the lumbar spine, of which 7.5% was due to his pre-existing degenerative disease and 10% was due to his herniated disc.
- 19) On May 19, 2006, **Dr. John Wagner** (Exhibit B) wrote another letter to Employer's attorney after he reviewed some additional pre-existing medical records, showing an emergency room visit for back pain five months before his injury and an MRI of the lumbar spine from June 12, 2003 that also showed a focal disc herniation centrally at L5-S1. Claimant had apparently not reported these prior problems and the prior MRI to Dr. Wagner. Based on this new information, Dr. Wagner concluded that the disc protrusion at L5-S1 existed prior to the November 19, 2003 accident. He opined that the radiologists who read the individual MRI's were basically expressing the same finding that he saw during his physical examination. He opined that the injury of November 19, 2003 resulted in a significant sprain to the back, with pre-existing degenerative disease, stenosis and a central disc at L5-S1. With this new information, he also amended his rating of disability. He still opined that Claimant had 17.5% permanent partial disability of the lumbar spine overall, but he further opined that 12.5% was pre-existing (related to the degenerative disease and herniated disc) and 5% was related to the significant sprain of the back related to the November 19, 2003 injury.

- 20) Medical treatment records from **Dr. Garry Vickar** (Exhibit H) span the period of time of March 19, 2003 through April 2004. Although these appear to be psychiatric treatment records, since I believe there is a reference to a diagnosis of major depression on March 19, 2003, they are extremely difficult to decipher and it is not at all clear to me what exactly the doctor was recording in the majority of these notes.
- 21) Claimant and Employer entered into an agreement to resolve their portion of the November 19, 2003 claim (Injury No. 03-120199) by **Stipulation for Compromise Settlement** (Exhibit A) for \$21,039.20 or 17.5% permanent partial disability of the body as a whole referable to the lumbar spine. According to the Stipulation, Employer paid medical benefits totaling \$36,140.23 and temporary total disability benefits of \$14,502.21, for a period of 48 2/7 weeks. The Second Injury Fund portion of the case was left open on the Stipulation for Compromise Settlement. The Stipulation was approved by Administrative Law Judge John Percy on July 10, 2006.
- 22) The medical treatment records from **Dr. Frank Calandrino** (Exhibit G) span the period of time of November 14, 2002 through July 30, 2009. These records confirm that going back to November 14, 2002, Claimant was diagnosed with mild-to-moderate emphysema, and then in 2004 he was diagnosed with moderate COPD. He received numerous breathing tests, treatments and medications for his breathing condition throughout this period of time.
- 23) The deposition of **Dr. Mark Lichtenfeld** (Exhibit C) was taken by Claimant on June 26, 2009 to make his opinions in this case admissible at trial. Dr. Lichtenfeld is a board certified family physician and medical examiner. He examined Claimant on one occasion, September 14, 2006, at the request of Claimant's attorney, and he authored one report dated September 26, 2006. He took a history from Claimant, reviewed medical treatment records and performed a physical examination of Claimant. Dr. Lichtenfeld's report contains not only the history provided by Claimant, the results of the physical examination and a review of the medical treatment records, but also approximately a page-long diatribe on his views of functional capacity evaluations, the reasons he does not believe they are accurate or useful, and especially disparaging remarks about Mr. David Abkemeier, who performed the functional capacity evaluation in this case. Dr. Lichtenfeld opined that as a direct result of the injury on November 19, 2003, Claimant had the following diagnoses: Cervical spine strain, resolved; concussion; chronic lumbosacral spine strain; incitation, exacerbation and acceleration of pre-existing degenerative changes; left nerve root impingement at L5; status post inferior laminectomy at L5 and superior laminectomy at S1; status post L5-S1 discectomy; right L5 and S1 radiculopathy; and left L4 and L5 radiculopathy. He opined that while Claimant had similar findings on the MRI scan in June 2003, Claimant was asymptomatic with respect to nerve root encroachment and the herniated disc before November 2003, so that is why he believes these diagnoses are the direct result of the workplace injury in November 2003. He opined that the work injury was responsible for causing the radicular complaints from the herniated disc that, in turn, necessitated the low back surgery. Although his report contained no specific opinion on an amount of permanent partial disability referable to the November 2003 injury, in his deposition, Dr. Lichtenfeld

testified that Claimant had 37.5% permanent partial disability of the body as a whole referable to the November 19, 2003 injury. Although his report, again, contained no rating of disability for the pre-existing low back condition, he also rated Claimant as having 25% permanent partial disability of the body as a whole referable to the low back regarding his pre-existing degenerative changes and the herniated disc at L5-S1. However, later in the deposition, Dr. Lichtenfeld testified that Claimant had 20% permanent partial disability of the low back, pre-existing the November 2003 injury. Since there was no rating in that respect contained in the report, it is impossible to tell which one of these was the error.

24) Dr. Lichtenfeld continued in his report and testimony to also diagnose and rate Claimant's alleged pre-existing conditions and disabilities. Dr. Lichtenfeld diagnosed and rated the following pre-existing conditions, all of which he believed were hindrances or obstacles to Claimant obtaining employment or re-employment:

- 15% of the body as a whole for tinnitus (ringing in the ears);
- An unquantified percentage for hearing loss;
- An unquantified percentage for bipolar affective disorder;
- 20% of the body as a whole for peptic ulcer disease and a hiatal hernia;
- 60% of the right fourth MCP joint;
- 50% of the right fifth MCP joint;
- A 15% loading factor for the combination of the MCP joint disabilities;
- 20% of the right wrist for contracture of the fourth and fifth fingers;
- 27.5% of the right elbow for right cubital tunnel syndrome;
- 35% of the right elbow for a right elbow fracture;
- 30% of the body as a whole for hypertension (35% in his testimony);
- 35% of the body as a whole for COPD;
- 40% of the body as a whole for diabetes; and
- 32.5% of the body as a whole for coronary artery disease.

Dr. Lichtenfeld opined that these disabilities combine with each other and the disability from the November 19, 2003 injury to generate an overall disability greater than the simple sum of the disabilities when added together. He finally opined that when considering Claimant's educational background and vocational history, as well as the primary and pre-existing disabilities, Claimant is totally and permanently disabled and unable to compete in the open labor market. He admitted, though, that he was not a vocational expert and would defer to a vocational expert if one could find a job for Claimant within the restrictions he imposed on Claimant.

25) The deposition of **Dr. Jay Liss** (Exhibit D) was taken by Claimant on July 17, 2009 to make his opinions in this case admissible at trial. Dr. Liss is board certified in psychiatry and neurology. He examined Claimant on one occasion, November 15, 2007, at the request of Claimant's attorney, and issued his report with that same date. He provided no treatment to Claimant in this case. Dr. Liss testified that the psychiatric evaluation he conducted of Claimant consisted of a history evaluation, review of available medical records, providing the patient with self-reporting questionnaires, and a mental status examination. Dr. Liss diagnosed Claimant with bipolar disorder and chemical dependency to alcohol. Taking into account Claimant's work history and chronology, as well as the extent of his illness, Dr. Liss opined that

Claimant would have at least 40% permanent partial disability of the body as a whole. He further opined that this disability pre-existed the November 2003 injury, since Claimant had been diagnosed and treated for this condition prior to that injury. He admitted that he had no medical treatment records to review regarding any prior treatment. Therefore, he had to rely on what the patient and his wife told him, as well as gleaned information from his other medical records. He testified that he agreed with Dr. Lichtenfeld's diagnosis of bipolar affective disorder, as well as his opinions on the combination of the disabilities and Claimant's being unemployable in the open labor market. Dr. Liss testified that Claimant had a GAF of less than 50, which means the psychiatric illness is severe.

26) On cross-examination, Dr. Liss was specifically questioned about some of the parts of his report dated November 15, 2007. In that report, Dr. Liss notes that the "purpose of this psychiatric evaluation is to document psychiatric illness prior to the accident for the Second Injury Fund." Dr. Liss admitted that the only medical record he reviewed that mentioned a psychiatric disease prior to the accident was Dr. Mark Lichtenfeld's report of September 26, 2006, prepared as a part of the workmen's compensation claim. Dr. Liss admitted that in formulating his opinions and conclusions in this case, he relied on what Claimant told him and the reference in Dr. Lichtenfeld's report. However, in his report (and confirmed in his testimony), Dr. Liss admitted that Claimant was not a reliable source of information, nor really was his wife, and Claimant even disagreed with Dr. Vickar's diagnosis of him. However, he believed Claimant had a list of complaints compatible with the diagnosis. Dr. Liss concluded his report by writing, "Mr. Jezich has a psychiatric diagnosis which was diagnosed and treated prior to his accident of 2003. He worked in mainly labor jobs. So it is very difficult to document the extent of disability of the person as a whole. Judging the affects of bi-polar illness on any patient it can be rated that he has a permanent/partial disability of 40% caused by the bi-polar illness." Dr. Liss explained this conclusion and rating by testifying that although Claimant had a poor work history, considering his potential, background, opportunities and socioeconomic environment, he could have or should have done better. He further testified that the 40% rating he assigned could at least be a base rating for any patient with a bipolar diagnosis.

27) The deposition of **Mr. James England** (Exhibit E) was taken by Claimant on July 29, 2009 to make his opinions in this case admissible at trial. Mr. England is a board certified vocational rehabilitation counselor. He met with and evaluated Claimant on one occasion, May 19, 2008, at the request of Claimant's attorney, and he authored one report with that same date. As a part of his evaluation, he interviewed Claimant, reviewed medical records and reports, and performed vocational testing. Relying on Claimant's history and the reports of Drs. Lichtenfeld and Liss, as well as the medical treatment records, Mr. England concluded that the combination of Claimant's various problems would negate his ability to compete for or sustain work activity in the open labor market. He testified that the combination of the physical problems alone would limit Claimant to less than a full range of sedentary employment, but then once the psychological problems were added in, the overall combination would render Claimant permanently and totally disabled.

- 28) On cross-examination, Mr. England agreed that Claimant's psychological problems and his GAF score of less than 50 from Dr. Liss, would prevent Claimant from handling sedentary-to-light types of employment, and, then, it would prevent him from handling medium-to-heavy types of employment as well. Therefore, Mr. England agreed on cross-examination, that with a GAF score of less than 50, Claimant's psychological problems alone would prevent him from being able to handle the whole spectrum of employment, from sedentary-to-heavy work. On redirect examination, Mr. England explained that since Claimant was functioning with the mental problems up until the point of the primary injury, he believed Claimant's mental functioning and emotional difficulties worsened after the primary injury and associated with it. He believed that was what Dr. Liss was suggesting in his report regarding causation.
- 29) At the request of the Attorney General's Office on behalf of the Second Injury Fund, **Dr. Russell Cantrell** (Exhibit SIF I) performed a records review and issued his report dated December 2, 2009. Dr. Cantrell is board certified in physical medicine and rehabilitation. Dr. Cantrell did not perform a physical examination of Claimant. He reviewed medical records including the pre-existing low back MRI from June 12, 2003 and the records for the treatment Claimant received following the November 19, 2003 injury at work. Dr. Cantrell focused on the similarities in the findings on the multiple MRIs and the fact that the medical records following the November 19, 2003 fall did not report an acute radiculopathy immediately after the fall, to support his ultimate opinion that Claimant's lumbar symptoms and need for surgery was related to the progression of his degenerative disc and joint disease, and not the fall at work on November 19, 2003. Upon comparing the various diagnostic imaging studies, he specifically found that there was no significant change between the MRIs from June 2003 and November 2003. He suggests that Claimant may have sustained a low back strain or contusion as a result of the fall. Dr. Cantrell notes that symptoms from degenerative osteoarthritis wax and wane in severity. He opines that the objective medical findings in the months following the alleged injury in November 2003 do not support the development of an acute radiculopathy. Other than opining that the complaints and need for surgery were not related to the November 2003 fall, Dr. Cantrell does not provide any further opinions on Claimant's permanent partial disability or ability to work.
- 30) Claimant described his daily routine at the current time. He said that he gets up in the morning and his friend will have coffee made for him. He sits on the couch and watches television. Then his friend will make something for them to eat. Depending on his blood sugar and what time it is, he will go back to bed, and then not get back up until three or four o'clock in the afternoon. He will get up, eat, go outside for a half an hour or so, sit around, come in and then go back to bed.
- 31) During the trial, I observed that Claimant was shifting around in the witness chair constantly. Within minutes of beginning, he was already standing up. I also observed that at times during his testimony, if he was challenged with questions, he became

loud and agitated, even admitting that his “bipolar is coming out” because he did not know where the questioning was leading.

- 32) On cross-examination, Claimant was completely inconsistent and contradictory with regard to when the pain and complaints started going down his legs. Although he earlier admitted that he had leg complaints before the November 19, 2003 accident, on cross-examination he testified that he had no complaints in the legs prior to November 19, 2003. Claimant, then, variously testified that the leg complaints started in December 2003, then not until immediately after the surgery by Dr. Wagner, then prior to the February 4, 2004 injection by Dr. Graham.
- 33) On cross-examination, Claimant was taken through his employment history and it seemed as though he regularly lost his job because of attitude problems and conflicts with co-workers or supervisors. Claimant admitted that even if he did not have any physical problems, and just had his attitude and bipolar disorder, he did not believe he would be able to work currently based on the affect of the bipolar disorder and his attitude problems alone. Claimant again admitted on redirect examination that considering just the bipolar disorder, he did not think he would be able to work at all. In response to questioning from his attorney, he admitted that his bipolar again worsened after December 2009 when his wife died, just as it worsened after his mother died.

### **RULINGS OF LAW:**

Based on a comprehensive review of the above-stated evidence, including Claimant’s testimony, the expert medical and vocational opinions and depositions, the medical records, and the Stipulation for Compromise Settlement between Claimant and Employer, as well as based on my personal observations of Claimant at hearing, and based upon the applicable laws of the State of Missouri, I find:

Given that these three issues are so inter-related in this Claim, I will address these three issues together.

***Issue 1: Did Claimant sustain an accidental injury?***

***Issue 2: Did the accidental injury arise out of and in the course of employment?***

***Issue 3: Are Claimant’s injuries and continuing complaints, as well as any resultant disability, medically causally connected to his alleged accident at work on or about November 19, 2003?***

Since this is a Second Injury Fund only case, it is important to note that under **Mo. Rev. Stat. § 287.220.1 (2000)**, in order to qualify for Second Injury Fund benefits, Claimant must prove the presence of pre-existing permanent partial disability, along with a “subsequent ***compensable injury*** resulting in additional permanent partial disability... [emphasis added].” In

other words, if the primary injury against Employer is not a *compensable* injury, then the Second Injury Fund claim fails.

Claimant bears the burden of proof on all essential elements of his Workers' Compensation case. *Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute*, 793 S.W.2d 195 (Mo. App. E.D. 1990) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). The fact finder is charged with passing on the credibility of all witnesses and may disbelieve testimony absent contradictory evidence. *Id.* at 199.

Claimant alleges that he sustained an accidental injury involving his low back and body as a whole that was medically causally related to his employment for Employer. Under **Mo. Rev. Stat. §287.020.2 (2000)**, the word "accident" is defined to mean, "an unexpected or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." "Arising out of employment" means that a causal connection exists between the employee's duties and the injury for purposes of workers' compensation. *Cruzan v. City of Paris*, 922 S.W.2d 473 (Mo. App. E.D. 1996) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). An injury is compensable only if it is clearly work related, and an injury is clearly work related only if work was a substantial factor in the cause of the injury and the resulting medical condition. However, an injury is not compensable if work was merely a triggering or precipitating factor. **Mo. Rev. Stat. §287.020.2 (2000)** Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. *Kelley v. Banta & Stude Construction Co., Inc.*, 1 S.W.3d 43 (Mo. App. E.D. 1999)

Having thoroughly reviewed all of the evidence regarding Claimant's low back injury, I find that Claimant has met his burden of proving the presence of an accident that arose out of and in the course of his employment. I find very little dispute in the records and testimony in evidence that Claimant actually fell over some cans and a pallet while performing his normal job duties for Employer at work on November 19, 2003, landing on his low back and striking his head. The medical treatment records and reports are replete with this consistent history of the accident at work on November 19, 2003.

Despite finding that Claimant did, in fact, sustain an accident in the course and scope of his employment for Employer on November 19, 2003, the real issue here revolves around what, if any, parts of Claimant's low back pathology and symptoms are medically causally related to this accident, as opposed to the natural and gradual progression of his significant pre-existing low back degenerative disease. Claimant alleges that his symptomatic herniated disc at L5-S1, his radicular complaints down his lower extremities, his need for surgery and his ongoing significant low back complaints are medically causally related to the accident on November 19, 2003. On the other hand, Employer asserts that the accident resulted in nothing more than a low back strain/sprain and that all of these other low back problems are related to his degenerative low back disease and not his accident on November 19, 2003.

In order to sustain his burden of proof on the medical causation issue, it is necessary for Claimant to provide credible testimony on his own behalf regarding the onset of the complaints and problems, as well as to provide competent, credible and reliable medical evidence establishing that the pathology, symptoms and complaints are related to the November 19, 2003

accident. Having thoroughly reviewed Claimant's testimony and the medical evidence in the record, I find that Claimant failed to meet his burden of proving that the herniated disc, his radicular complaints down his lower extremities, the need for his low back surgery and his ongoing significant low back complaints are medically causally related to the accident on November 19, 2003.

First, I find Claimant failed to meet his burden of proof by failing to provide credible testimony on his own behalf regarding the onset of the complaints and problems from his low back. Since I find very little dispute in the record that the herniated disc at L5-S1 was actually present prior to the November 19, 2003 accident, the crux of this case comes down to when Claimant began to experience the complaints and problems that gave rise to the need for the low back surgery performed by Dr. Wagner. At trial, Claimant's testimony was completely inconsistent and contradictory with regard to when the pain and complaints started going down his legs. Although he earlier admitted that he had leg complaints before the November 19, 2003 accident, on cross-examination he testified that he had no complaints in the legs prior to November 19, 2003. Claimant, then, variously testified that the leg complaints started in December 2003, then not until immediately after the surgery by Dr. Wagner, then prior to the February 4, 2004 injection by Dr. Graham. Claimant offered no consistent history of when the radicular complaints from the herniated disc actually started, except it is clear that they did not begin immediately after the accident on November 19, 2003.

I am further troubled by Claimant's lack of credibility and candor when considering his consistent failure to mention that he had low back problems and complaints that gave rise to X-rays and an MRI of the low back only months prior to this accident at work. There is no mention of the prior low back X-rays and MRI when he seeks treatment immediately after the November 19, 2003 accident at Christian Hospital Northeast/Northwest or Concentra Medical Centers. And if this omission of information is not bad enough, when Claimant begins his course of treatment with Dr. John Wagner, not only does he fail to mention the prior X-rays and MRI, but he gives a flatly false and contradictory history of his low back problems and complaints. According to Dr. Wagner's records, Claimant mentioned a prior history of low back problems from working with concrete when he was 20 years old, but he denied any other pre-existing low back problems leading up to this accident at work. This history Claimant provided to Dr. Wagner is quite simply not true. Based on this inaccurate and incomplete history, Dr. Wagner causally related the herniated disc and Claimant's complaints to the accident on November 19, 2003 and provided low back surgery. It was not until almost two years later, in 2006, that Dr. Wagner learned of the X-rays and MRI showing the prior herniated disc, the same disc he had been led to believe by Claimant first arose out of the November 19, 2003 injury. I cannot overlook Claimant's flatly false and incredibly omitted history, when those items go right to the very heart of the medical causation issue in this case.

For these reasons, I find Claimant did not provide competent and credible testimony on his own behalf to support his medical causation theory, and, thus, has failed to meet his burden of proof in that regard. Since Claimant's medical expert, Dr. Lichtenfeld, relied on Claimant's errant and incredible history in reaching his medical causation opinion in this case, I further find that Claimant has failed to submit competent, credible and reliable medical causation testimony from a physician into the record of evidence as well.

The only medical expert in the record who ultimately supported Claimant's theory of the case, that the radicular complaints in the lower extremities, the need for low back surgery, and the continued problems and complaints Claimant had with his low back, was medically causally related to the November 19, 2003 injury, was Dr. Mark Lichtenfeld, a family physician. Although Dr. John Wagner, the orthopedic spine surgeon, initially supported this proposition as well, after he had the full and complete history of the prior X-rays and MRI only months before this accident at work, he changed his opinion and found that only a low back strain was related to the November 19, 2003 injury and everything else in the low back was related to Claimant's degenerative low back disease. Additionally, Dr. Russell Cantrell, who is board certified in physical medicine and rehabilitation, offered opinions in his report following his review of the medical records that were substantially similar to the final opinions of Dr. Wagner.

After comparing the relative training and experience of these physicians, as well as the history that formed the basis of their opinions, I find the medical opinions of Drs. Wagner and Cantrell on medical causation more competent, credible and reliable than the opinion of Dr. Lichtenfeld in that regard.

Claimant reported a history to Dr. Lichtenfeld that he had back pain prior to the November 2003 accident, in June 2003, but the back pain remitted spontaneously and he had no radicular complaints down his legs until after the November 2003 injury. However, this history conflicts with at least some of Claimant's trial testimony wherein he admitted he had radicular complaints before the November 19, 2003 injury, but they were significantly worsened by that fall. To the extent that Dr. Lichtenfeld relied on the contradictory, inconsistent and non-credible testimony of Claimant in forming his medical causation opinion in this case, I similarly find that his medical causation opinion is not reliable, consistent or credible. I further find that as a family physician, Dr. Lichtenfeld is not as qualified as the treating orthopedic surgeon, Dr. Wagner, or a board certified physical medicine and rehabilitation specialist, Dr. Cantrell, to render the medical causation opinion in this case.

For all these reasons, I find that the medical causation opinions of Drs. Wagner and Cantrell are more competent, credible and reliable than that of Dr. Lichtenfeld in this case. Accordingly, I find that as a result of the November 19, 2003 accident in the course and scope of his employment for Employer, that Claimant sustained only a low back strain/sprain. I also find that the herniated disc at L5-S1, the other degenerative changes and degenerative disc disease in his low back, the radicular complaints down his lower extremities, his need for the low back surgery performed by Dr. Wagner, and his continued problems and complaints in the low back and legs are related to the overall natural progression of the degenerative conditions in his low back and not to the injury at work on November 19, 2003.

***Issue 4: What is the nature and extent of Claimant's permanent partial and/or permanent total disability attributable to this alleged injury?***

***Issue 5: What is the liability of the Second Injury Fund?***

Given that these two issues are so inter-related in this Claim, and, further, given Claimant's allegation that he is permanently and totally disabled, I will address these two issues together.

As noted above, Claimant again bears the burden of proof on all essential elements of his Workers' Compensation case. *Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute*, 793 S.W.2d 195 (Mo. App. E.D. 1990) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). The fact finder is charged with passing on the credibility of all witnesses and may disbelieve testimony absent contradictory evidence. *Id.* at 199.

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 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. *Fogelsong v. Banquet Foods Corp.*, 526 S.W.2d 886, 892 (Mo. App. 1975) (citations omitted).

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) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003).

In cases such as this one where the Second Injury Fund is involved, we must also look to **Mo. Rev. Stat. § 287.220 (2000)** for the appropriate apportionment of benefits under the statute. In order to recover from the Fund, Claimant must prove a pre-existing permanent partial disability, that existed at the time of the primary injury, and which was of such seriousness as to constitute a hindrance or obstacle to employment or reemployment should employee become unemployed. *Messex v. Sachs Electric Co.*, 989 S.W.2d 206 (Mo. App. E.D. 1999) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). Then to have a valid Fund claim, that pre-existing permanent partial disability must combine with the primary disability in one of two ways. First, the disabilities combine to create permanent total disability, or second, the disabilities combine to create a greater overall disability than the simple sum of the disabilities when added together.

In the second (permanent partial disability) combination scenario, pursuant to **Mo. Rev. Stat. § 287.220.1 (2000)**, the disabilities must also meet certain thresholds before liability against the Second Injury Fund is invoked. The pre-existing disability and the subsequent compensable injury each must result in a minimum of 12.5% permanent partial disability of the body as a whole or 15% permanent partial disability of a major extremity. These thresholds are not applicable in permanent total disability cases.

It is first necessary to determine whether Claimant is permanently and totally disabled, and then the nature and extent of the permanent partial and/or permanent total disability against Employer. Based on the evidence referenced above, including the medical treatment records, the expert opinions from the doctors and vocational expert, as well as based on my personal observations of Claimant at hearing, I find that Claimant is permanently and totally disabled under the statute, but that permanent total disability would not be against Employer as a result of the last injury alone. If Employer had not previously settled their risk of liability in this case, Employer would only have liability for permanent partial disability related to the low back strain/sprain resulting from the accident on November 19, 2003.

In reviewing the medical records and reports in evidence, I found that Dr. Lichtenfeld and Dr. Liss both provided opinions that Claimant was unable to continue working, and, thus, permanently and totally disabled. Additionally, Claimant's vocational expert, Mr. England, also opined that Claimant was unemployable in the open labor market. None of those experts indicated that the permanent total disability was the result of the last injury alone. Therefore, I find there is no evidence in the record to substantiate a finding of permanent total disability against Employer as a result of the last injury alone.

I find that Claimant has successfully met his burden of proof that Employer is responsible for the payment of permanent partial disability for the body as a whole referable to the low back related to the November 19, 2003 injury.

With regard to the low back strain/sprain injury from the 2003 accident, Dr. John Wagner rated Claimant as having 5% permanent partial disability of the body as a whole referable to the low back. On the other hand, Dr. Mark Lichtenfeld rated Claimant as having 37.5% permanent partial disability of the body as a whole referable to the low back based on his diagnoses that included the radicular symptoms and need for surgery being related to the November 2003 injury. For the same reasons enumerated above and further expounded upon below regarding Dr. Lichtenfeld's lack of a credible, competent and reliable opinion in this case, I find Dr. Lichtenfeld's opinions on diagnosis and his rating of permanent partial disability referable to the November 19, 2003 injury to be completely incredible, incompetent and unreliable.

On the basis of all of these findings, I find that Claimant has 5% permanent partial disability of the body as a whole referable to the lumbar spine attributable to the November 19, 2003 injury.

Having now established the nature and extent of the permanent partial disability attributable to the primary injury against Employer, 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.

After a thorough review of the evidence, I find that the competent and substantial evidence in the record leads me to conclude that Claimant's permanent total disability is not the result of the combination of the primary injury low back disability and the pre-existing disabilities to multiple parts of Claimant's body, and so, therefore, the Second Injury Fund has no

liability in this case for the payment of permanent total disability benefits. Since there are a number of independent bases for this ultimate determination, any one of which would be enough to result in a denial of permanent total disability from the Second Injury Fund, I will set out a few of them below as support for my determination of benefits in this case.

First and foremost, I find that the evidence in the record leads me to conclude that Claimant's permanent total disability and inability to compete in the open labor market is the result of the effects of his psychiatric disability alone (bipolar disorder). Claimant himself admitted that even if he did not have any physical problems, and just had his attitude and bipolar disorder, he did not believe he would be able to work currently based on the affect of the bipolar disorder and his attitude problems alone. Claimant again admitted on redirect examination that considering just the bipolar disorder, he did not think he would be able to work at all. In response to questioning from his attorney, he admitted that his bipolar again worsened after December 2009 when his wife died, just as it worsened after his mother died.

In addition to Claimant's own testimony, Claimant's vocational expert, Mr. James England, testified that Claimant's psychological problems and his GAF score of less than 50 from Dr. Liss, would prevent Claimant from handling sedentary-to-light types of employment, and, then, it would prevent him from handling medium-to-heavy types of employment as well. After all, Dr. Liss testified that a GAF of less than 50 means the psychiatric illness is severe. Therefore, Mr. England agreed on cross-examination, that with a GAF score of less than 50, Claimant's psychological problems alone would prevent him from being able to handle the whole spectrum of employment, from sedentary-to-heavy work. Therefore, Mr. England essentially agreed with Claimant's own assertion that the psychological problems and disability, in and of itself, would be enough to render Claimant permanently and totally disabled.

Since the psychological disability alone would be enough to render Claimant permanently and totally disabled, and since none of the psychological disability has been causally linked to the primary injury from November 19, 2003, Claimant has failed to prove a combination of primary injury and pre-existing disabilities resulted in the permanent total disability, and, thus, has failed to meet his burden of proof for Second Injury Fund liability.

Separate and distinct from the above reasoning, and yet referenced above in Claimant's testimony, is another reason why Claimant has failed to meet his burden of proving Second Injury Fund liability. I find that Claimant's testimony and the medical evidence supports the finding that Claimant's pre-existing disabilities subsequently worsened, unrelated to the primary (November 19, 2003) injury, resulting in his permanent total disability. Claimant himself testified that the effects of his bipolar condition worsened in 2009 when his wife died, and, thus, as a result, his bipolar condition alone leaves him unable to be employable in the open labor market.

In addition to the subsequent worsening of his bipolar condition, based on the competent, credible and reliable opinions of Dr. Wagner and Dr. Cantrell, it is also clear to me that his pre-existing low back degenerative changes and symptoms subsequently worsened, resulting in the low back surgery and treatment he subsequently received from Dr. Wagner. Dr. Cantrell was especially clear in laying out the facts that Claimant had a delayed onset of radicular lower extremity symptoms after the November 19, 2003 injury, which was consistent with the natural

progression of degenerative spine disease, which worsens over time and resulted in the need for the treatment and surgery Claimant ultimately received. Since I had previously found that the low back surgery and continuing significant complaints in the low back were related to the natural progression of the degenerative condition and not the injury of November 19, 2003, it logically follows, then, that since the surgery and the increased low back complaints after that surgery came after the November 19, 2003 injury, then it must represent an unrelated, subsequent deterioration, which cannot be included in any Second Injury Fund calculation.

Therefore, whether it is the subsequent, unrelated deterioration of the bipolar disorder, or the subsequent, unrelated deterioration of the lumbar spine degenerative disease, it is clear that any finding on Claimant's permanent total disability would include this subsequent, unrelated deterioration, and, thus, would preclude a finding that the Second Injury Fund is responsible for the payment of those benefits.

Finally, even if Claimant were not permanently and totally disabled based solely on his psychological disability, and even if unrelated, subsequent deterioration was not at issue, Claimant would still not qualify for Second injury Fund benefits because he has failed to prove that his permanent total disability is really the result of the combination of his primary injury 5% body as a whole disability and all of his pre-existing disabilities. In short, I find that Claimant has failed to provide competent and substantial evidence in the record that the 5% body as a whole disability plays any role in a finding that he is ultimately permanently and totally disabled.

The principle medical evidence Claimant provided on the issue of whether he was permanently and totally disabled was the report and testimony of Dr. Mark Lichtenfeld. As explained earlier in this award, I have already found that Dr. Lichtenfeld's opinions on the medical causation of the primary low back injury and on the permanent partial disability attributable to that November 19, 2003 injury were not competent, credible or reliable. However, Dr. Lichtenfeld, in his report and testimony, offers a whole host of other opinions, diagnoses and ratings in connection with this case. In general, I do not find Dr. Lichtenfeld's other opinions, diagnoses and ratings any more persuasive, competent, credible or reliable than the initial opinions already mentioned in this award. As such, since I find Dr. Lichtenfeld's report and testimony to be wholly incompetent, incredible and unreliable, I cannot use it as a basis for any of my rulings or findings in this case.

I reached this conclusion regarding Dr. Lichtenfeld's opinions after a thorough review of both his report and deposition testimony. In his report, I was struck by his page-long diatribe regarding his views on functional capacity evaluations and specifically his views on the work of Mr. David Abkemeier, who performed the Functional Capacity Evaluation in this case. Dr. Lichtenfeld's page-long, argumentative rant on this subject, including his unsolicited attempt to impugn Mr. Abkemeier's work and character, in my view, removed Dr. Lichtenfeld from the position of an *independent* medical examiner, and instead moved him into the role of advocate, which is highly inappropriate. This, coupled with his blanket reliance on Claimant, who I have previously found was not credible, and his errant diagnoses, opinions and ratings on the primary injury, have left me to conclude that I cannot rely on any aspect of his report and testimony to form a basis for any findings or conclusions in this case. Without a competent and credible medical opinion on Claimant's primary and pre-existing disabilities and without a competent or

credible opinion on the combination of same, Claimant's claim for benefits from the Second Injury Fund fails for that lack of proof.

However, even if I did not completely disregard Dr. Lichtenfeld's opinions on pre-existing diagnoses and ratings, Claimant still fails to adequately prove it was the combination of disabilities that renders him permanently and totally disabled, and not just the pre-existing disabilities in and of themselves. If Dr. Lichtenfeld is to be believed in this case, then a review of his ratings for the *pre-existing disabilities alone* shows that he believes Claimant had **over 200% permanent partial disability of the body as a whole**, not counting additional pre-existing disability he rated for the right hand and right elbow and other pre-existing disability he diagnosed, but did not rate, for the bipolar disorder and hearing loss. So, even if Dr. Lichtenfeld was credible in these opinions, it is completely incomprehensible to understand how the additional 5% permanent partial disability of the body as a whole for the low back related to the November 19, 2003 injury would have any impact, or would combine in any way, with the over 200% pre-existing body as a whole permanent partial disability Claimant had from all of his other alleged conditions. I find the more logical conclusion, if Dr. Lichtenfeld is to be believed, given these facts, is that the pre-existing disabilities (over 200% of the body as a whole) in and of themselves would render Claimant permanently and totally disabled, without any combination with the primary injury disability.

Therefore, based upon Claimant's failure to prove that the combination of the pre-existing and primary disabilities rendered Claimant permanently and totally disabled, I find that Claimant has failed to meet his burden of proof that he is permanently and totally disabled under the statute against the Second Injury Fund.

Hence, the Second Injury Fund Claim in this case is denied.

**CONCLUSION:**

Claimant met his burden of proving that he was injured by an accident on November 19, 2003, in the course and scope of his employment for Employer, when he fell over some cans and a pallet while performing his normal job duties, landing on his low back and striking his head. Claimant failed to meet his burden of proving that the herniated disc, his radicular complaints down his lower extremities, the need for his low back surgery and his ongoing significant low back complaints are medically causally related to the accident on November 19, 2003. However, as a result of the November 19, 2003 accident, Claimant sustained a low back strain/sprain, for which Employer was responsible for the payment of 5% permanent partial disability of the body as a whole referable to the lumbar spine. Claimant has failed to meet his burden of proving Second Injury Fund liability in this case, because although Claimant is permanently and totally disabled, and although that permanent total disability is not against Employer as a result of the alleged last injury alone, Claimant's permanent total disability is not the result of the combination of the primary injury low back disability and the pre-existing disabilities to multiple parts of Claimant's body. Whether the permanent total disability is the result of the effects of his psychiatric disability alone, or whether it is the result of the subsequent deterioration of the low back or psychiatric condition unrelated to the November 19, 2003 injury, or whether it is the result of the combined effects of the pre-existing disabilities alone without any contribution from the November 19, 2003 injury, in any event, without the permanent total disability resulting from the combination of the primary and pre-existing disabilities, then the Second Injury Fund claim in this case fails. Therefore, the Claim against the Second Injury Fund is denied and no benefits are awarded in this case.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

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

A true copy: Attest:

\_\_\_\_\_  
 Naomi Pearson  
*Division of Workers' Compensation*