

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

Injury No.: 00-174761

Employee: Neal Johnson
Employer: Duke Manufacturing Co. (Settled)
Insurer: The Travelers Companies (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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 15, 2008, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge John Howard Percy, issued July 15, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 13th day of March 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Neal Johnson Injury No. 00-174761
Dependents: N/A Before the
Employer: Duke Manufacturing Co. (previously settled) **Division of Workers'**
Department of Labor and Industrial **Compensation**
Additional Party: Second Injury Fund Relations of Missouri
Jefferson City, Missouri
Insurer: The Travelers Companies (previously settled)
Hearing Date: April 10 & 11, 2008 Checked by: JHP

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
- 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
- Date of accident or onset of occupational disease: December 28, 2000
- State location where accident occurred or occupational disease was contracted St. Louis City, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
- 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:
While pulling a piece of metal, claimant caught his foot on a skid and rolled to the right side.
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: Neck and low back
- Nature and extent of any permanent disability: None

- 15. Compensation paid to-date for temporary disability: \$390.90
- 16. Value necessary medical aid paid to date by employer/insurer? \$1,492.82
- 17. Value necessary medical aid not furnished by employer/insurer? None

- Employee's average weekly wages: \$454.90

- 19. Weekly compensation rate: \$303.27 PTD/TTD/PPD
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

22. Second Injury Fund liability: No

Total: None

23. Future requirements awarded: None

Said payments to begin 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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

FINDINGS OF FACT and RULINGS OF LAW:

Claimant:	Neal Johnson	Injury No. 00-174761
Dependents:	N/A	Before the
Employer:	Duke Manufacturing Co. (previously settled)	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	The Travelers Companies (previously settled)	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: JHP

A hearing in this proceeding was held on April 10 and 11, 2008. Both parties submitted proposed awards, the latter of which was received on May 23, 2008.

STIPULATIONS

The parties stipulated that on or about December 28, 2000:

1. the employer and employee were operating under and subject to the provisions of the Missouri Workers' Compensation Law;
2. the employer's liability was insured by The Travelers Companies;

3. the employee's average weekly wage was \$454.90;
4. the rate of compensation for temporary total disability and permanent total disability was \$303.27 and the rate of compensation for permanent partial disability was \$303.27; and
5. the employee sustained an injury by accident arising out of and in the course of employee's employment occurring in St. Louis City, Missouri.

The parties further stipulated that:

1. the employer had notice of the injury and claims for compensation were filed within the time prescribed by law;
2. compensation has been paid in the amount of \$390.90 representing 1-4/7 weeks of benefits; and
3. employer/insurer have paid \$1,429.82 in medical expenses.

ISSUES

The issues to be resolved in this proceeding are:

1. the nature and extent of any permanent disability sustained as a result of the work-related injury of December 28, 2000;
2. the nature and extent of any preexisting disabilities which employee had at the time of the work-related injury of December 28, 2000; and
3. whether and to what extent employee sustained any additional permanent partial disability or permanent total disability for which the Second Injury Fund would be liable as a result of the combination of any preexisting disabilities with the disability from the primary injury.

SECOND INJURY FUND LIABILITY

Having settled his claim against Employer, Employee seeks an award under Section 287.220.1 Mo. Rev. Stat. (2000) for permanent total disability compensation against the Second Injury Fund. Employee claims that he is permanently and totally disabled as a result of the combination of the disability to his neck and low back from the December 28, 2000 accident and the preexisting disabilities to his low back and neck and from diabetes, sleep apnea, hypertension, and cardiac disease. The Second Injury Fund first contends that the December 28, 2000 accident caused only minor temporary aggravations of claimant's preexisting degenerative conditions in his neck and low back and no permanent disability. The Second Injury Fund also contends that claimant was not rendered permanently and totally disabled by the combination of claimant's primary injuries with his preexisting disabilities and that if he was rendered permanently and totally disabled, it was due to the post-primary injury deterioration of his preexisting pathology in his neck and due to diabetes, sleep apnea, hypertension, and cardiac disease.

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

Obviously, where the disability caused solely by the primary injury is total disability, there can be no liability for the Second Injury Fund. For the Second Injury to be liable for permanent total disability compensation, the total disability must result solely from the combination of the preexisting disabilities and the disability caused by the primary disability. If total disability is caused by the primary injury alone, there can no combination. The employee is not entitled to permanent total disability compensation from both the Second Injury Fund and the employer. Hughey v. Chrysler Corp., 34 S.W.3d 845, 847 (Mo. App. 2000); Vaught v. Vaughts, Inc., 938 S.W.2d 931, 939 (Mo. App. 1997);

Roller v. Treasurer of State of Mo., 935 S.W.2d 739 (Mo. App. 1996).

Where the last injury alone causes the employee to become permanently and totally disabled, then the employer is liable for permanent disability compensation under Section 287.200 Mo. Rev. Stat. (2000). See Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 276 (Mo. App. 1996); Feldman v. Sterling Properties, 910 S.W.2d 808, 810 (Mo. App. 1995); Moorehead v. Lismark Distributing Co., 884 S.W.2d 416, 419 (Mo. App. 1994); Kern v. General Installation, 740 S.W.2d 691, 692 (Mo. App. 1987); see also Terrell v. Board of Education, City of St. Louis, 871 S.W.2d 20 (Mo. App. 1993); Reves v. Kindell's Mercantile Co., Inc., 793 S.W.2d 917 (Mo. App. 1990); Roby v. Tarlton Corp., 728 S.W.2d 586, 589 (Mo. App. 1987); Weinbauer v. Gray Eagle Distributors, 661 S.W.2d 652 (Mo. App. 1983); Fogelson v. Banquet Foods Corporation, 526 S.W.2d 886 (Mo. App. 1975); Mashburn v. Chevrolet Kansas City Div., G.M. Corp., 397 S.W.2d 23 (Mo. App. 1965); Garrison v. Campbell "66" Express, 297 S.W.2d 22 (Mo. App. 1956).

On the other hand, where permanent and total disability results only from the combination of the disability from the primary injury with preexisting disabilities and with unrelated post-primary injury progression of preexisting disabilities, the Second Injury Fund is not liable for permanent and total disability. The Second Injury Fund is not liable for any post-accident worsening of an employee's preexisting disabilities which are not caused or aggravated by the last work-related injury or for any conditions which arise after the last work-related injury. Lammert v. Vess Beverages, Inc., 968 S.W.2d 720, 725 (Mo. App. 1998); Garcia v. St. Louis County, *supra*; Frazier v. Treasurer of Missouri, 869 S.W.2d 152 (Mo. App. 1994); Lawrence v. Joplin R-VIII School Dist., 834 S.W.2d 789 (Mo. App. 1992); see also Wilhite v. Hurd, 411 S.W.2d 72 (Mo. 1967).

The first determination to be made is the extent of the compensation liability of the employer for the last injury, considered alone. Hughey v. Chrysler Corp., 34 S.W.3d 845, 847 (Mo. App. 2000); Vaught v. Vaughts, Inc., 938 S.W.2d 931, 939 (Mo. App. 1997); Roller v. Treasurer of State of Mo., 935 S.W.2d 739, (Mo. App. 1996). After that has been determined, then the extent of preexisting disabilities is to be determined. Lastly, the fact finder is determine whether the preexisting disabilities combine with disabilities from the primary injury to create permanent total disability. Where the combination of those disabilities causes permanent total disability, the Second Injury Fund is liable for permanent total disability, but only after the employer has paid the compensation due for the disability resulting from the primary injury. Cartwright v. Wells Fargo Armored Serv., 921 S.W.2d 165, 167 (Mo. App. 1996); Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995); Brown v. Treasurer of Missouri, 795 S.W.2d 479, 482 (Mo. App. 1990); Anderson v. Emerson Elec. Co., 698 S.W.2d 574, 576-77 (Mo. App. 1985).

Disability from Primary Injury

The employer's liability for permanent partial disability compensation is determined under Section 287.190 Mo. Rev. Stat. (2000). Stewart v. Johnson, 398 S.W.2d 850 (Mo. 1966). The employee must prove the nature and extent of any disability by a reasonable degree of certainty. Downing v. Willamette Industries, Inc., 895 S.W.2d 650, 655 (Mo. App. 1995); Griggs v. A. B. Chance Company, 503 S.W.2d 697, 703 (Mo. App. 1974). Such proof is made only by competent and substantial evidence. It may not rest on speculation. Idem. Expert testimony may be required where there are complicated medical issues. Goleman v. MCI Transporters, 844 S.W.2d 463, 466 (Mo. App. 1993); Griggs at 704; Downs v. A.C.F. Industries, Incorporated, 460 S.W.2d 293, 295-96 (Mo. App. 1970). However, where the facts are within the understanding of lay persons, the employee's testimony or that of other lay witnesses may constitute substantial and competent evidence. This is especially true where such testimony is supported by some medical evidence. Pruteanu v. Electro Core Inc., 847 S.W.2d 203 (Mo. App. 1993); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 367 (Mo. App. 1992); Ford v. Bi-State Development Agency, 677 S.W.2d 899, 904 (Mo. App. 1984); Fogelson v. Banquet Foods Corporation, 526 S.W.2d 886, 892 (Mo. App. 1975).

Findings on Primary Injury

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

Prior Medical Treatment of Cervical Spine

Mr. Johnson was examined for neck pain by Dr. Gregory J. Bailey in 1992. By 1997 Employee was experiencing pain radiating to the shoulder blade and into his hand. Dr. Bailey ordered an MRI of the cervical spine which was performed on August 26, 1997. According to the radiologist, the MRI showed disk degeneration at C4-C5 and C5-C6, broad based posterior hypertrophic spurring with an intervertebral disc bulge at the C4-5 level which lateralized to the right and narrowed the right neural intervertebral foramen and caused spinal stenosis, and broad based posterior hypertrophic spurring at the C5-C6 level which lateralized to the right and narrowed the right neural intervertebral foramen and caused spinal stenosis. It also showed hypertrophic spurring at the C6-C7 interspace. According to Dr. Bailey, the MRI revealed symmetrical spondylosis of C4-5 and C5-6. As conservative treatment failed to improve his symptoms, Claimant underwent a micro-anterior cervical discectomy and decompression with allograft fusion of C4-5 and C5-6 on September 25, 1997. Dr. Bailey indicated that Claimant had herniated disks at C4-5 and C5-6 and he removed both disks during the surgery. (Claimant's Exhibits H and I)

Claimant gradually recovered over several months and returned to a normal level of function. During 1999-2000 Employee experienced pain with lifting his arms and with bending his neck forward. The pain radiated from his neck into both arms. He also experienced some weakness of his intrinsic hand function on both sides. (Claimant's Exhibit D)

On August 18, 2000 Employee returned to Dr. Deborah Fowler-Dixon, his primary care physician, who had previously treated his hypertension and type 2 diabetes, for stabbing pains in the feet at night and numbness and tingling in both hands. On examination she found mild tenderness over the base of the cervical spine; his grip and muscle strength were normal. She diagnosed him with diabetic neuropathy of the legs and paresthesias of the hands. She ordered an MRI of the cervical spine and prescribed Lorcet Plus for pain. (Claimant's Exhibit G)

An MRI of the cervical spine was performed on August 24, 2000. According to the radiologist it showed the fusion at C4-5 and C5-6, prominent reversal of the normal cervical lordosis with the apex at C4-5 and posterior osteophytes at the C4-5 level, resulting in very severe narrowing of the spinal canal in a ventral dorsal direction with a maximal diameter of approximately 5 mm. On receipt of the MRI report Dr. Fowler-Dixon referred Claimant to Dr. Christopher D. Heffner, a neurosurgeon, in Belleville. On September 14 Claimant told Dr. Fowler-Dixon that he was frustrated over his neck pain and that he continued to have problems sleeping at night. (Claimant's Exhibit G)

Dr. Heffner evaluated Claimant's cervical spine on September 22, 2000. According to Dr. Heffner, the MRI of the cervical spine demonstrated cervical kyphosis with posterior osteophytes and significant posterior angulation at C4-5, resulting in severe narrowing of the spinal canal down to about 5 mm. Dr. Heffner opined that Claimant had "quite significant spinal cord compromise" and progressive symptoms from the collapse of the anterior margins at C4-5 and C5-6 and the osteophytes. Dr. Heffner recommended an anterior corpectomy at C4 and C5 and possibly C6. He indicated that Claimant might also needed an additional posterior fixation with lateral mass plating. He prescribed Vioxx and referred him to Dr. Carl Lauryssen, a neurosurgeon at Washington University School of Medicine, for this procedure. (Claimant's Exhibit D)

Dr. Lauryssen examined Mr. Johnson on October 12, 2000. Claimant told him that his symptoms were becoming worse, that he had 75% neck pain and 25% arm pain. He described his pain as aching, stabbing, and burning and indicated that it was aggravated by lying down and improved by propping his head up. He was not experiencing numbness or tingling. He also described subjective weakness in both hands during the preceding year. Dr. Lauryssen indicated that the August 24, 2000 MRI revealed hyperintense signal abnormality in the spinal cord behind the body of C6 and evidence of the prior surgery. He opined that Claimant had MRI evidence of fairly significant loss of cervical lordosis and narrowing of his cervical spinal canal. He ordered cervical x-rays and a CT myelogram. Dr. Lauryssen felt that it would be in Employee's best interest to proceed with surgical decompression given the fairly significant loss of cervical lordosis and associated cervical canal narrowing. He planned to see Employee after the CT myelogram. There is no evidence that he did. (Claimant's Exhibit E)

A CT myelogram was performed on October 13, 2000. According to the radiologist it revealed the cervical

fusion of C4 and C5 with slight narrowing of the spinal canal at this level and extra bony fusion mass protrusion into the spinal canal at C4-5 and C5-6 with deformity of the thecal sac but no evidence of spinal cord compression or nerve root compression. (Claimant's Exhibit J)

On October 27 and November 3, 2000 Claimant reported increased right shoulder pain at work to Dr. Fowler-Dixon. She noted that he had tried multiple pain medications, including Lorcet, Darvocet, and Ultram with no relief of his neck and shoulder pain. She diagnosed him with severe cervical degenerative joint disease. On November 17, 2000 Dr. Fowler-Dixon began treating Claimant for cellulitis of the right foot following a slip in the bathtub. (Claimant's Exhibit G)

Dr. Lauryssen apparently referred Mr. Johnson to Dr. Anthony H. Guarino at the Washington University Pain Management Center for possible bilateral C7 nerve root injections. Claimant told him on December 1, 2000 that he was experiencing continuous pain, primarily at the base of his neck; his pain radiated on the right to the shoulder and on the left into the lateral aspect of the arm down to the back of the hand. He rated his pain as 7/10. At its best his pain was 6/10 and at its worst his pain was 10/10. Dr. Guarino administered bilateral C7 nerve root injections. Claimant's pain dropped from a 6 to a 4 out of 10. He asked Mr. Johnson to keep a diary of his symptoms. (Claimant's Exhibit L)

Claimant received additional injections from Dr. Guarino on December 15 after which Employee's pain dropped from an 8 to a 5 out of 10. On December 29 Dr. Guarino administered a third set of bilateral C7 nerve root injections after which Employee's pain dropped from a 10 to a 7 out of 10. (Claimant's Exhibit L)

Claimant continued to experience constant pain in his neck and shooting pain in his arms and weakness and lack of mobility in his neck up to December 28, 2000. Prior to December of 2000 Employee was unable to raise his arms without experiencing pain in his neck. Prior to December of 2000 Claimant was experiencing pain and numbness in his neck, shoulders, and arms and weakness and loss of coordination with his hands. He was dropping things out of his hands. (Claimant's Testimony)

Description of December 28, 2000 Accident

Neal Johnson, Claimant herein, began working as a fabricator for Duke Manufacturing Co., Employer herein, in 1998. On December 28, 2000 while pulling a 60 pound piece of metal out of a pneumatic press, Claimant caught his right foot on a skid and rolled to the right side. His right shoulder hit the skid. The metal fell on his lower back. After the incident Claimant experienced increased pain in his neck and in his lower back and down the right leg when he bent over. Claimant reported the incident to John Cox, his supervisor, who told him to sit down for a couple of hours. The next day Employee told his supervisor that he had pain in his back and right leg. His supervisor told him to continue working. (Claimant's Testimony)

Medical Treatment

On December 29 Claimant returned to Dr. Anthony H. Guarino, who had previously administered two sets of bilateral C7 nerve root injections, for the third set of injections. He did not report any neck injury at work to Dr. Guarino. After the injections Employee's pain dropped from a 10 to a 7 out of 10. (Claimant's Exhibit L)

On January 2, 2001 Claimant sought medical treatment from Dr. Deborah Fowler-Dixon, his primary care physician, for edema in both legs. He mentioned that he had fallen on his bottom at work the preceding week and irritated his back. He experienced some leg weakness initially, but it had improved. (Claimant's Exhibit G)

On January 5, 2001 Claimant returned to Dr. Fowler-Dixon for treatment of the edema in his legs. He also reported that he was experiencing back pain since the fall at work and was "feeling very aggravated with problems relating to the neck pain." He was taking multiple medications without any change in his neck pain. He reported problems with sleeping due to neck pain. (Claimant's Exhibit G)

On January 8, 2001 Mr. Johnson was examined at BJC Corporate Health at the request of Employer by a nurse practitioner. Claimant told her that he tripped over a skid and fell to his left hip on December 28, 2000. He

complained of intermittent pain in the left hip down the thigh which sometimes caused the left leg to give out. He reported that he had undergone lumbar disk surgery nine years earlier and that he had not experienced any lumbar/hip pain since his recovery from that surgery. He also reported that he had chronic cervical pain with diffuse degenerative disease and had received multiple steroid injections to that area, the most recent of which was on January 5, 2001. He was taking Lorcet, a pain reliever, at bedtime as needed. (Claimant's Exhibit J)

On examination Employee had positive bilateral lumbar and sacroiliac joint tenderness with the left side greater than the right side and positive left lateral thigh pain with motion. He had full range of motion of the lumbar spine and left hip. There was no indication in the records of any neck complaints. The nurse practitioner recommended that he apply warm compresses to his back and limit his lifting to 10 pounds and limit repetitive bending and twisting of the back and referred him to an orthopedist. There was no indication in the records that Employee was examined by an orthopedist. (Claimant's Exhibit J)

Dr. Fowler-Dixon reexamined Claimant on January 9, 2001. Claimant told Dr. Fowler-Dixon that on December 28, 2000 he slipped and struck his right shoulder on a machine and then fell and struck his left hip struck on a stack of steel. He reported on-going left hip pain. She indicated that he should follow up with orthopedic surgeon through work. She noted that as he had undergone three injections for his neck, he should contact Dr. Carl Laurysen, who had evaluated Claimant on October 12, 2000, or Dr. Gregory Bailey, who had performed a two-level cervical fusion on September 25, 1997, for follow up. She instructed Mr. Johnson to follow limited duty and to not engage in heavy repetitive lifting. (Claimant's Exhibit G)

On January 11, Dr. Fowler-Dixon noted that Employee had no significant change in his low back or neck pain. On February 16 though Claimant was primarily receiving treatment for right foot cellulitis, he told Dr. Fowler-Dixon that he was also having problems sleeping due to neck and arm pain and was experiencing increasing episodes of spasm in his upper arms. On February 23 Dr. Fowler-Dixon advised to see a neurosurgeon for evaluation of weakness in the intrinsic muscles of his left hand. She refilled his Percocet. (Claimant's Exhibit G)

On March 8, 2001 Mr. Johnson sought treatment from Dr. Fowler-Dixon for severe low back pain. He reported that he felt a pull in his back while pushing a cart at work three days earlier. His pain worsened on March 7 when he bent over to pick up a piece of paper at work. Dr. Fowler-Dixon advised him to take Flexeril and Percocet. He received a Stadol injection. On March 13 Claimant reported that he had experienced improvement following the Stadol injection and was on vacation from work. She advised him to continue using Flexeril and Lorcet. On March 19 Dr. Fowler-Dixon felt that Employee should start Neurontin and ordered an MRI of his lumbar spine. She returned Claimant to work for a maximum of five hours per day and gave him a note for his absences on March 8, 9, and 12. (Claimant's Exhibit G)

On March 22, 2001 Claimant underwent an MRI of his lumbar spine. It revealed a moderate to large disc herniation at L5-S1 and disk bulging at L3-4 and L4-5. Dr. Fowler-Dixon recommended that he be evaluated by a neurosurgeon for his neck and low back, especially as the symptoms from his cervical spine appeared to be worsening. (Claimant's Exhibit G)

Dr. Joseph E. Sherril, a neurosurgeon, at STLCare, evaluated Claimant on March 29, 2001. Mr. Johnson told him about the anterior cervical discectomy performed by Dr. Greg Bailey, his initial improvement, and his subsequent worsening. Employee mentioned that he became worse after a fall at work and that he had a consultation with Dr. Carl Laurysen. Dr. Sherril reviewed the cervical MRI films and noted that there was probably very little union at the C4-5 space. He was concerned the C5-6 space was very reminiscent of a more rapidly evolving degenerative condition that diabetic patients with joint arthropathy often undergo. He also reviewed the MRI films of the lumbar spine and noted that there was a very prominent disc in the central region of L5-S1. He added that Claimant was not then experiencing sciatica and only had a little back pain. He urged Mr. Johnson to follow up with Dr. Laurysen. Dr. Sherril told Claimant that he favored the operation proposed by Dr. Laurysen. He added that the foot lesion needed to be resolved prior to any surgery. (Claimant's Exhibit K)

Mr. Johnson returned to Dr. Fowler-Dixon on March 30, 2001, a day after having been evaluated by Dr. Kenneth Smith (sic) at St. Louis University Neurosurgery Department. According to Dr. Fowler-Dixon, Dr. Smith (sic) recommended surgery on Employee's cervical spine as soon as possible. He was also concerned about the lumbar

herniation though Claimant had experienced some improvement in his symptoms. As the ulcer on his right foot had not healed and as his diabetes was not under control, Dr. Fowler-Dixon advised Claimant that he needed to get these conditions under better control prior to surgery. She also advised him that she agreed with Dr. Smith (sic) that he would need to find a new line of work. (Claimant's Exhibit G)

In a letter date April 16, 2001 Dr. Sherril noted that Dr. Laurysen suggested a front and back stages procedure with which he agreed. After reviewing the myelogram films, he found that the C4-5 and C3-4 levels were the worst affected and that the C5-6 and C6-7 levels were the least affected. He indicated that surgery for neck pain alone would not benefit Mr. Johnson as the surgery itself would cause neck pain. He added that if Employee were to become compromised in any way, then an operation would be indicated. The proposed surgery was a C3 through C6 corpectomy and an instrumental spinal fusion followed by a posterior decompression and lateral mass plate fixation from C3 through C7. He noted that Claimant was continuing to try to work, was able to walk, had bowel and bladder function, and was able to use his hands for writing and other fine motions. Claimant was advised to contact him should his condition worsen. (Claimant's Exhibit K)

Mr. Johnson returned to Dr. Fowler-Dixon on April 20, 2001. She indicated that Dr. Kennedy (sic) did not want to perform surgery on his neck. Employee reported pain in his neck as well as difficulty in holding objects. As his glucose was 269 Dr. Fowler-Dixon modified his diabetes medications. She advised continued use of Silvadene for the foot ulcer. She advised him not to return to work and to apply for disability. (Claimant's Exhibit G)

On April 27, May 4 and 14, 2001 Mr. Johnson reported increased pain in his shoulders and upper arms and difficulty sleeping and increased pain in his low back and down the legs. (Claimant's Exhibit G) Dr. Fowler-Dixon ordered MRIs of the lumbar and thoracic spine which were performed on May 29, 2001. According to the radiologist, the thoracic spine MRI showed loss of vertebral body height at T7 through T9. There was no evidence for significant central canal, lateral recess or neural foraminal stenosis. The lumbar spine MRI showed no significant interval change to the large central disc herniation at L5-S1 and stable appearance of the mild annular disc bulges at L4-5 and L3-4. It also showed moderate to severe central canal, right lateral recess and right neural foraminal stenosis and mild left neural foraminal stenosis at the L5-S1 level. (Claimant's Exhibit F)

On June 1, 2001 Employee told Dr. Fowler-Dixon that his low back and neck pain had doubled in intensity during the prior two to three weeks. She reviewed the MRI reports and noted that there were no significant changes. Claimant was given a Stadol injection and advised to restart all of his medications. (Claimant's Exhibit G)

On June 5, 2001 Dr. Fowler-Dixon sent Employee to Anderson Hospital for evaluation of chest pains. On discharge he was told to discontinue Percocet and was prescribed MS-Contin for pain. On June 8 Claimant reported swelling and pain in his feet. Dr. Fowler-Dixon prescribed Lasix. On June 22 he reported difficulty walking due to swelling in his feet. (Claimant's Exhibit G)

Claimant returned to Dr. Sherril on July 2, 2001. Claimant reported erectile tissue dysfunction, which was a new problem. Dr. Sherril noted that as the foot lesion had closed, he wanted to re-assess Claimant's cervical spine. He indicated that he wanted new films of his cervical spine, including an MRI, to be sure about cutting out his deformity at C4 and C5 and then expanding the fusion from C3 to C6 or C7. (Claimant's Exhibit K)

On July 23 Employee returned to Dr. Fowler-Dixon and reported increased back pain after bending over to pick up a box of crackers the prior evening. She administered another Stadol injection, discontinued the MS-Contin, and restarted him on Percocet. On August 13 he received another Stadol injection. (Claimant's Exhibit G)

According to Dr. Fowler-Dixon, Claimant underwent the first surgery on August 17, 2001 and the second surgery near the end of October, 2001. (Claimant's Exhibit G) Dr. Sherril described the first surgery as an anterior decompression from C3 to C6 by removing the bones of C4 and C5. He described the second surgery as a C3 to C6 laminectomy with an instrumental fusion, using bone grafts from both hips. He indicated that the 1997 anterior cervical discectomy by Dr. Bailey resulted in a nonunion and eventual deformity. He also indicated that the nonunion was caused by a multi-level allograft operation after decompression. (Claimant's Exhibit K, rpts dtd 12/17/01 & 3/18/2002)

Dr. Sherril examined Mr. Johnson on November 26, 2001. He noted that Claimant's cervical myelopathy symptoms had gotten quite a bit better. There was only some residual tingling and numbness. Employee was able to use his hands without any impairment. X-rays showed adequate alignment, but very little posterior bone growth. He reexamined Employee on December 17. Employee had some complaints of pain and numbness. Dr. Sherril expected to discharge him from his collar by the end of December. (Claimant's Exhibit K)

Claimant returned to Dr. Fowler-Dixon on January 25, 2002 and reported that he had tripped and fallen in his yard earlier in the week and was experiencing spasm in the neck and low back. On examination Dr. Fowler-Dixon detected spasm of the cervical paraspinal muscles extending from C3 to C6. She diagnosed him with a cervical and lumbar strains and prescribed Zanaflex. (Claimant's Exhibit G)

Dr. Sherril reexamined Mr. Johnson on February 11, 2002. X-rays showed bony union. He noted that Claimant had developed an impingement-like syndrome with loss of range of motion of his right shoulder. He recommended that Employee see one of the shoulder orthopedists at St. Louis University. On March 18 Dr. Sherril noted that Claimant did not have any clicking, popping, snapping or translation of his neck. He did have some "evening glove numbness" of his arms. (Claimant's Exhibit K) Dr. Fowler-Dixon treated Claimant's right shoulder symptoms with Toradol and Celestone injections and Lorcet Plus. On April 12, 2002 she indicated that he was still disabled from work. In May of 2002 she referred Claimant to a Dr. Simmons, an orthopedist in Belleville, for further treatment of his right shoulder. (Claimant's Exhibit G)

On June 27, 2002 Dr. Fowler-Dixon readvised Claimant that with his multiple medical conditions and in particular his severe degenerative disc disease necessitating extensive surgery of the cervical spine, he was unable to work and would be suitable for disability. (Claimant's Exhibit G)

Dr. Sherril reexamined Claimant on August 1, 2002. Employee reported that his neck was shook up in a recent motor vehicle accident and that he had some neck complaints and vague tinglings. X-rays taken of his cervical spine showed no disruption of the hardware and evidence of bony incorporation in both front and back. He was to see him again in a year. There is no record of any such examination. (Claimant's Exhibit K)

Medical Opinions

Dr. Thomas Musich, board certified in family practice, testified by deposition on behalf of Employee on January 3, 2008. He examined Mr. Johnson on May 14, 2007. Dr. Musich reviewed all of the pertinent medical records. (Claimant's Exhibit A, Page 9) He testified that Claimant told him that in late December of 2000, while carrying 80 pound pieces of steel he tripped over a skid, fell and twisted his back adversely affecting his neck, low back, and shoulders. Claimant told Dr. Musich that he underwent neck surgeries in 2002 and 2003 as a result of the work trauma. (Claimant's Exhibit A, Page 10-11)

Dr. Musich testified that Mr. Johnson had significant complaints referable to his neck and low back immediately prior to December of 2000. He noted that Mr. Johnson underwent an anterior cervical discectomies and fusion with a bone graft at the C4-5 and C5-6 levels on September 25, 1997 by Dr. Bailey. (Claimant's Exhibit A, Page 12-13) He also noted that he had undergone a lumbar decompressive procedure by Dr. Bailey in 1992. (Claimant's Exhibit A, Page 13)

Dr. Musich testified that Mr. Johnson told him that he was having significant neck pain in mid to late 2000, that he had been referred to the neurosurgery department at Barnes Hospital, that he was also had numbness and weakness in both upper extremities which was aggravated by lifting and carrying of heavy materials at work. He also testified that Claimant told him that he was experiencing chronic low back pain without any type of significant radiculopathy prior to December of 2000. (Claimant's Exhibit A, Pages 15-16)

Dr. Musich testified that Claimant underwent two cervical decompressions and fusions in 2002 and 2003. (Claimant's Exhibit A, Pages 17-18)

Dr. Musich opined that Mr. Johnson suffered significant trauma on December 28, 2000. He further opined that

the work trauma of December 28, 2000 was a substantial factor in the development of increased cervical pathology that required two surgical interventions. He also opined that Claimant had been treated conservatively for increased low back pain as a result of the work trauma. (Claimant's Exhibit A, Pages 21-22)

Dr. Musich opined that Claimant suffered multi-level cervical spondylosis with multi-level disc herniation that required discectomy, decompression, and fusion in 1997 and that he had ongoing complaints of cervical pain up to and including December of 2000 for which he was being actively treated prior to the work trauma. (Claimant's Exhibit A, Page 22)

Dr. Musich further opined that Claimant suffered lumbar disc herniations in 1991 or 1992 that resulted in chronic pain and diminished mobility and weakness. (Claimant's Exhibit A, Page 22)

Dr. Musich further opined that Claimant had 40% permanent partial disability of the body referable to the cervical spine and 25% permanent partial disability of the body referable to the lumbar spine prior to December of 2000. (Claimant's Exhibit A, Page 23)

On cross examination and re-cross examination Dr. Musich acknowledged that he had not rated Mr. Johnson's primary injuries. He also agreed that Claimant suffered no shoulder pathology from the primary injury. (Claimant's Exhibit A, Pages 31 & 49)

On cross examination Dr. Musich conceded that Neal Johnson had significant complaints in his neck with radicular symptoms before December, 2000, that on September 22, 2000 Dr. Heffner diagnosed Claimant with kyphosis (collapse or rounding of the vertebrae and of the normal alignment of the neck), osteophytes (bone spurs secondary to chronic development), and spinal cord compression. Dr. Musich added that Claimant's symptoms were consistent with cervical spondylosis and radiculopathy due to pinching of the nerve roots from the collapsed vertebrae. He conceded that on September 22, 2000 Dr. Heffner had recommended that Claimant undergo a massive procedure involving a corpectomy at C4, C5 (with complete removal of the C5 vertebral body), and C6, with strut graft, plating and additional posterior fixation with lateral mass plating. (Claimant's Exhibit A, Pages 37-38)

On cross examination Dr. Musich conceded that on October 12, 2000 Dr. Laurysen also recommended surgical decompression because Claimant had significant disk disease and bone loss in the cervical vertebrae. He added that Claimant had very considerable pathology which can be extremely symptomatic. (Claimant's Exhibit A, Pages 39-40)

On re-redirect examination and in response to a very leading question, Dr. Musich testified that he agreed that Claimant sustained at least 23% permanent partial disability of the body referable to the neck from the primary injury as set forth in the settlement with employer/insurer. He had no opinion regarding back. (Claimant's Exhibit A, Pages 49-50)

Additional Findings

I previously found that immediately prior to December 28, 2000 Claimant was experiencing constant pain in his neck and shooting pain in his arms and weakness and lack of mobility in his neck, was unable to raise his arms without experiencing pain in his neck, was experiencing pain and numbness in his neck, shoulders, and arms and weakness and loss of coordination with his hands, and was dropping things out of his hands.

Though Claimant testified on direct examination that his neck pain got worse after December 28, 2000, the only particular that he identified was that anytime he "did things" with his arms he experienced pain in his neck. In comparing this statement with his description of his pre-December 28, 2000 symptoms, I find that it does not identify any new or different symptoms which developed after December 28, 2000 and that it does adequately explain in what manner Claimant's neck pain allegedly worsened after December 28, 2000.

I previously found that Claimant did not mention on December 29, 2000 any neck injury to Dr. Guarino, who had been administering bilateral C7 nerve root injections in her neck. I previously found that on January 2, 2001 he

told Dr. Fowler-Dixon, his personal physician who had been prescribing pain medication for Claimant's neck, about the fall at work, but mentioned only irritating his back. I previously found that on January 5, 2001 he complained to Dr. Fowler-Dixon that the various pain medications which he had been taking had not changed his neck pain. He did not mention any increase in his neck pain. I previously found that on January 8, 2001 when Claimant was examined at BJC Corporate Health at the request of Employer, he described the accident and complained only of left hip pain. Though he reported that he had chronic cervical pain with diffuse degenerate disease and had received multiple steroid injections in his neck, he did not report any increased pain in his neck following the fall. I previously found that when Employee returned to Dr. Fowler-Dixon on January 9, he described the fall at work in more detail, but complained only of left hip pain. She advised him to return to Dr. Laurysen as he had completed his three injections for the neck. I previously found that when Employee returned to Dr. Fowler-Dixon on January 11, he reported no significant change in his low back or neck pain. I previously found that Claimant first reported increased symptoms related to his neck on February 16, 2001 and yet Dr. Fowler-Dixon advised him to see a neurosurgeon; she did not advise him to contact Employer. In late March she again advised him to see a neurosurgeon and her nurse set up an appointment with STLCare of March 29, 2001 when he was evaluated by Dr. Sherril. Employee told Dr. Sherril that his preexisting neck problems became worse after a fall at work. This was the first attribution by Claimant of worse neck problems due to the fall.

As Claimant was not able to articulate in what manner his neck symptoms worsened after the December 28, 2000 accident, as he failed to mention any increased neck symptoms to the physicians he saw for three months after the fall, and as no physician identified any new neck symptoms attributable to the fall, I find that Claimant suffered no acute increase in any cervical symptoms following the work-related accident.

Dr. Musich opined that Mr. Johnson suffered significant trauma on December 28, 2000. He further opined that the work trauma of December 28, 2000 was a substantial factor in the development of increased cervical pathology that required two surgical interventions. (Claimant's Exhibit A, Pages 21-22) Dr. Musich did not identify the cervical pathology which was increased by the accident or explain how the fall increased it. He failed to elicit from Employee a description of any increased symptoms following the December 28, 2000 incident. Dr. Musich merely stated his conclusion without giving any explanation of his basis for reaching it.

On cross examination Dr. Musich conceded that Neal Johnson had significant complaints in his neck with radicular symptoms before December, 2000, that on September 22, 2000 Dr. Heffner diagnosed Claimant with kyphosis (collapse or rounding of the vertebrae and of the normal alignment of the neck), osteophytes (bone spurs secondary to chronic development), and spinal cord compression. Dr. Musich added that Claimant's symptoms were consistent with cervical spondylosis and radiculopathy due to pinching of the nerve roots from the collapsed vertebrae. He conceded that on September 22, 2000 Dr. Heffner had recommended that Claimant undergo a massive procedure involving a corpectomy at C4, C5 (with complete removal of the C5 vertebral body), and C6, with strut graft, plating and additional posterior fixation with lateral mass plating. (Claimant's Exhibit A, Pages 37-38)

On cross examination Dr. Musich conceded that on October 12, 2000 Dr. Laurysen also recommended surgical decompression because Claimant had significant disk disease and bone loss in the cervical vertebrae. He added that Claimant had very considerable pathology which can be extremely symptomatic. (Claimant's Exhibit A, Pages 39-40)

Having described Claimant's preexisting neck pathology, Dr. Musich failed to describe the nature of the "increased cervical pathology" of which he opined work was a substantial causative factor in Claimant's need to undergo two cervical surgeries. Dr. Musich indicated that Claimant's pre-December 28, 2000 radiculopathy was due to the pinching of the nerve roots from the collapsed vertebrae. In his reports of December 17, 2001 and March 18, 2002 Dr. Sherril indicated that the vertebrae had collapsed because of the nonunion of the 1997 fusion which was caused by a multi-level allograft operation. Again, Dr. Musich failed to identify any pathology which had increased as a result of the December 28, 2000 accident.

As Dr. Sherril's two operative reports were not in evidence, there is no complete description of the intraoperative findings or the operative procedures themselves. Dr. Sherril generally described them in his post-surgery office notes. The first surgery was an anterior approach which involved removal of the vertebral bodies at C4 and C5

and insertion of grafts from Claimant's hips and the second surgery was a posterior approach which involved removal of several laminae and insertion of bone grafts and instrumental fusion. Dr. Musich only described the surgeries as cervical decompressions and fusions. He did not mention that C4 and C5 vertebra bodies were removed. These descriptions appear to be very close to the surgical procedures recommended by Drs. Heffner and Laurysen in the fall of 2000. Dr. Musich conceded on cross examination that two competent surgeons had recommended cervical surgery prior to December of 2000.

As Dr. Bailey had removed the C4-5 and C5-6 disks during the August of 1997 surgery, there would not have been any herniations at those levels in 2001. I further find that, as there was no evidence that any disk herniations were removed during the 2001 surgeries, no disc herniations were caused by the December 28, 2000 accident.

Claimant admitted on cross examination that his doctors had told him that his spinal cord was being damaged by the bone spurs and that he needed surgery to avoid paralysis.

"A medical expert's opinion must be supported by facts and reasons proven by competent evidence that will give the opinion sufficient probative force to be substantial evidence." Silman v. Montgomery & Associates, 891 S.W.2d 173, 176 (Mo. App. 1995); Pippin v. St. Joe Minerals Corp., 799 S.W.2d 898, 903 (Mo. App. 1990); see Gilley Raskas Dairy, 903 S.W.2d 656, 657 (Mo. App. 1995).

The determination of the degree of disability sustained by an injured employee is not strictly a medical question. While the nature of the injury and its severity and permanence are medical questions, the impact that the injury has upon the employee's ability to work involves factors which are both medical and nonmedical. Accordingly, the Courts have repeatedly held that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission. Sellers v. Trans World Airlines, Inc., 776 S.W.2d 502, 505 (Mo. App. 1989); Quinlan v. Incarnate Word Hospital, 714 S.W.2d 237, 238 (Mo. App. 1986); Banner Iron Works v. Mordis, 663 S.W.2d 770, 773 (Mo. App. 1983); Barrett v. Bentzinger Brothers, Inc., 595 S.W.2d 441, 443 (Mo. App. 1980); McAdams v. Seven-Up Bottling Works, 429 S.W.2d 284, 289 (Mo. App. 1968). The fact finding body is not bound by or restricted to the specific percentages of disability suggested or stated by the medical experts. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences from such testimony. Fogelsong v. Banquet Foods Corporation, 526 S.W.2d 886, 892 (Mo. App. 1975). The finding of disability may exceed the percentage testified to by the medical experts. Quinlan v. Incarnate Word Hospital, at 238; Barrett v. Bentzinger Brothers, Inc., at 443; McAdams v. Seven-Up Bottling Works, at 289. The uncontradicted testimony of a medical expert concerning the extent of disability may even be disbelieved. Gilley v. Raskas Dairy, 903 S.W.2d 656, 658 (Mo. App. 1995); Jones v. Jefferson City School Dist., 801 S.W.2d 486 (Mo. App. 1990). The fact finding body may reject the uncontradicted opinion of a vocational expert. Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995).

I find that Dr. Musich's opinion, unsupported by facts or reasons, that the December 28, 2000 accident was a substantial factor in causing the need for the two 2001 cervical surgeries performed by Dr. Sherril is not credible.

Based on all of my prior findings, I find that the December 28, 2000 accident caused only minor aggravations of Claimant's extensive preexisting degenerative cervical joint disease and that the two surgeries performed by Dr. Sherril were necessitated by the nonunion of the 1997 fusion and the development of the deformity at C4 and C5, which had developed prior to December of 2000.

On re-redirect examination and in response to a very leading question, Dr. Musich testified that he agreed that Claimant sustained at least 23% permanent partial disability of the body referable to the neck from the primary injury as set forth in the settlement with employer/insurer. He had no opinion regarding back. (Claimant's Exhibit A, Pages 49-50)

As I have previously found that Claimant suffered no acute increase in any cervical symptoms following the work-related accident and as I have found that Dr. Musich's opinion regarding the causal connection of the two 2001 cervical surgeries to the December 28, 2000 accident was not credible, I further find that Dr. Musich's opinion regarding permanent partial disability attributable to the neck from the December 28, 2000 accident is also not

credible.

Accordingly, I find that Claimant sustained no permanent partial disability of the body referable to his neck from the December 28, 2000 accident. As Dr. Musich expressed no opinion regarding the back, I find that Claimant sustained no permanent partial disability of the body referable to his back from the December 28, 2000 accident.

As I have found that Employee sustained no permanent partial disability of the of the body referable to either the neck or the low back as a result of the December 28, 2000 accident, the claim against the Second Injury Fund is denied.

Date: _____

Made by: _____

JOHN HOWARD PERCY

Administrative Law Judge

Division of Workers' Compensation

A true copy: Attest:

Jeffrey W. Buker

Director

Division of Workers' Compensation

The employer's liability for permanent partial disability compensation is determined under Section 287.190. Stewart v. Johnson, 398 S.W.2d 850 (Mo. 1966).

These findings are based on a history which Claimant gave to Dr. Christopher D. Heffner on September 22, 2000.

The report of the radiologist is located at the back of Claimant's Exhibit G.

Employee testified that prior to December 28, 2000 he always had pain in his neck and back for which he was taking Ibuprofen and that anytime he "did things" with his arms he experienced pain in his neck. He also testified that his neck pain got worse after December 28, 2000 and that he was not able to raise his arms without pain.

See Page 8 supra.

There is no medical documentation of any January 5, 2001 injection.

See Page 7 supra.

See Page 8 supra.

The report of the radiologist is located at the back of Claimant's Exhibit G.

The mix-up in the names of the surgeons by Dr. Fowler-Dixon is probably due to her secretary's note indicating that Claimant had been scheduled to see Dr. Kenneth Smith at SLU on 3/29/01. (Claimant's Exhibit G)

The hospital discharge summary is located at the back of Claimant's Exhibit G.

The report of the subsequent cervical MRI was not offered into evidence.

Neither operative report was not offered into evidence. None of the hospital records from these surgeries were offered into evidence.

This document was not offered into evidence.

See findings Page 8 supra.

See findings on Pages 8 through 10 supra.

This document was not offered into evidence.