

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

Injury No.: 04-129324

Employee: James Karras
Employer: Supervalu, Inc. (Settled)
Insurer: Old Republic Insurance Co.
c/o Risk Enterprise Management, Ltd. (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 February 4, 2009, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge John K. Ottenad, issued February 4, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 20th day of May 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: James Karras

Injury No.: 04-129324

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

Dependents: N/A

Employer: Supervalu, Inc. (Settled)

Additional Party: Second Injury Fund

Insurer: Old Republic Insurance Co.
C/O Risk Enterprise Management, Ltd. (Settled)

Hearing Date: October 17, 2008

Checked by: JKO

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: November 18, 2004
 - 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
 - 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 was a forklift operator for

Employer, who injured his low back and body as a whole when he bent over to pick up a 50-pound case of napkins that had fallen.

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

- Nature and extent of any permanent disability: 10% of the Body as a Whole referable to the Lumbar Spine

15. Compensation paid to-date for temporary disability: \$2,836.99

16. Value necessary medical aid paid to date by employer/insurer? \$2,932.61

Employee: James Karras

Injury No.: 04-129324

17. Value necessary medical aid not furnished by employer/insurer? N/A

- Employee's average weekly wages: Approximately \$1,013.85

19. Weekly compensation rate: \$675.90 for TTD/ \$354.05 for PPD

20. Method wages computation: By agreement (stipulation) of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable:

Employer/Insurer previously settled their risk of liability in this case

22. Second Injury Fund liability: \$0.00

Total: **\$0.00**

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: C. Dennis Barbour.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	James Karras	Injury No.:	04-129324
Dependents:	N/A	Before the	
Employer:	Supervalu, Inc. (Settled)	Division of Workers'	
		Compensation	
Additional Party:	Second Injury Fund	Department of Labor and Industrial	
		Relations of Missouri	
		Jefferson City, Missouri	
Insurer:	Old Republic Insurance Co. C/O Risk Enterprise Management, Ltd. (Settled)	Checked by:	JKO

On October 17, 2008, the employee, James Karras, appeared in person and by his attorney, Mr. C. Dennis Barbour, for a hearing for a final award on his claim against the Second Injury Fund. The employer, Supervalu, Inc., and its insurer, Old Republic Insurance Co. C/O Risk Enterprise Management, Ltd., were not present or represented at the hearing since they had previously settled their risk of liability in this claim. 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:

- On or about November 18, 2004, James Karras (Claimant) sustained an accidental injury arising out of and in the course of his employment that resulted in injury to Claimant.

- Claimant was an employee of Supervalu, Inc. (Employer).

- Venue is proper in the City of St. Louis.

- Employer received proper notice.

- The Claim was filed within the time prescribed by the law.

- At the relevant time, Claimant earned an average weekly wage of \$1,013.85, resulting in applicable rates of compensation of \$675.90 for total disability benefits and \$354.05 for permanent partial disability (PPD) benefits.

- Employer paid temporary total disability (TTD) benefits in the amount of \$2,836.99.
- Employer paid medical benefits totaling \$2,932.61.

ISSUES:

- What is the nature and extent of Claimant's permanent partial and/or permanent total disability attributable to this accident?
- 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 94-097210 between Claimant and Employer
- B Medical treatment records of Missouri Orthopaedic Sports & Trauma Clinic and Premier Care Orthopedics
- C Medical treatment records of Dr. R. Evan Crandall
- D Stipulation for Compromise Settlement for Injury Number 96-407411 between Claimant and Employer
- E Medical treatment records of Parkway Orthopaedic Group, Inc.
- F Stipulation for Compromise Settlement for Injury Number 98-141158 between Claimant and Employer
- G Medical treatment records from the Supervalu medical dispensary
- H Medical treatment records from Christian Hospital dated December 20, 1998
- I Certified medical treatment records of Orthopedic and Sports Medicine
- J MRIs and X-rays of the low back from Metro Imaging
- K Stipulation for Compromise Settlement for Injury Number 01-164857 between Claimant and Employer
- L Stipulation for Compromise Settlement for Injury Number 02-122791 between Claimant and Employer
- M Medical report of Orthopedic Specialists
- N Stipulation for Compromise Settlement for Injury Number 01-091730 between Claimant and Employer
- O Medical treatment records of Dr. Kia Swan-Moore
- P Medical treatment records of Dr. William Feinstein
- Q X-ray reports of the right wrist and hand from The Imaging Center
- R Stipulation for Compromise Settlement for Injury Number 04-059841 between

	Claimant and Employer
S	Medical treatment records from the Supervalu medical dispensary
T	Claim for Compensation filed in Injury Number 04-129324
U	Stipulation for Compromise Settlement for Injury Number 04-129324 between Claimant and Employer
V	Medical treatment records from the Supervalu medical dispensary
W	Medical treatment records and reports from Orthopedic & Sports Medicine, Inc.
X	Report from the Nerve Conduction Study performed by Dr. Russell Cantrell on March 16, 2005
Y	MRI report for the low back from Metro Imaging dated January 11, 2005
AA	Medical treatment records of Frontier Chiropractic
BB	Medical report from Metropolitan Neurology, Ltd. (Dr. Pan) dated May 24, 2005
CC	Certified medical treatment records from St. Louis Labor Health Institute
DD	Medical treatment records of Dr. William Sill
EE	Deposition of Ms. Sherry Browning, with attachments, dated September 4, 2008
FF	Deposition of Dr. Raymond Cohen, with attachments, dated December 18, 2006
GG	Employer's certified yearly attendance records for Claimant from 2001 to 2005

Second Injury Fund Exhibits:

- I. ***Not admitted into evidence***
- II. Page 20 of the deposition of James Karras dated December 6, 2006
- III. Page 41 of the deposition of James Karras dated December 6, 2006

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 October 17, 2008.*

FINDINGS OF FACT:

Based on a comprehensive review of the evidence, including Claimant's testimony, the expert medical opinions and deposition, the vocational opinion and deposition, the stipulations for compromise settlement, and the medical records, as well as my personal observations of Claimant at hearing, I find:

- **Claimant** is a 59-year-old, currently unemployed individual, who last worked for Supervalu, Inc. (Employer) as a forklift operator until he took early retirement on October 29, 2005. Claimant worked for Employer for approximately 31 years, from 1974 until 2005. Although he formally retired on October 29, 2005, his **attendance records** (Exhibit GG) show that he actually physically worked for Employer very few days in 2005 leading up to the time of his retirement. In his position as a forklift operator, he was responsible for driving a forklift and moving pallets and cases of products around the warehouse, and occasionally cleaning up cases of products that spilled during their transfer. His job required extensive standing and walking, use of his arms, bending, stooping, carrying, and operating equipment. He testified that as a forklift operator he earned an hourly rate of \$21.53 per hour.
- Claimant testified that his current income comes from Social Security disability of about \$1,800.00 per month and a Teamsters pension of about \$2,229.00 per month, as well as a Cigna benefit of approximately \$37.80 per

month.

- Claimant testified that he attended University City High School through the eleventh grade but did not complete high school or graduate, because his parents moved to the Parkway School District, and they did not have a co-op (work/study) program that would have allowed him to continue to work and attend school. He never obtained a GED and he has had no other formal education.
- In his years working for Employer, Claimant sustained numerous injuries to multiple body parts which have been the subject of medical treatment, surgeries, and Workers' Compensation settlements. (Exhibits A-S) These pre-existing injuries have resulted in Stipulations for Compromise Settlement totaling 12.5% of the right shoulder (impingement syndrome), 25% of the right elbow (twice-operated radial head fracture and excision of the radial head), 9.5% of the left foot at the 110 week level (metatarsalgia), 8% of the body as a whole referable to the low back (low back pain and right L5 radiculopathy), 18% of the right hand/wrist (right fifth metacarpal fracture and hand/wrist pain), 1% of the left shoulder (adhesive capsulitis), and 18.75% of the left small toe (contusion with probable fracture).
- Claimant testified extensively about the effect these injuries had on his ability to continue to work and regarding the problems he had with these body parts as he continued his job as a forklift operator for Employer.
- Of all of these injuries, the one that has the most bearing on the primary low back case that is the subject of this Claim, is the 1998 low back injury which Claimant ultimately settled for 8% of the body as a whole referable to the low back (Exhibit F). In connection with this injury, Claimant had two MRI scans performed at **Metro Imaging** (Exhibit J). The second of those two scans from January 12, 2000 showed degenerative disc changes present throughout the lumbar spine with desiccation of the discs from L1 through L5. There was disc space narrowing at L2-3 and L3-4, and "some bulging of the annulus fibrosis noted at L1-L2 and L5-S1." (Exhibit J) Claimant received treatment and an EMG/NCS from **Dr. Russell Cantrell** (Exhibit I). The EMG/NCS dated January 27, 1999 were suggestive of a resolving right L5 radiculopathy. Claimant complained at that time of right buttock pain and numbness down the right leg and into the right foot. There was no evidence of a compression pathology in the low back to explain the right leg numbness, but Dr. Cantrell suggested it may be secondary to lumbar radiculitis. Claimant testified that following this low back injury, he continued to have intermittent low back pain and he turned down some overtime because his legs would get fatigued from all the standing.
- Claimant's injury on November 18, 2004, while working for Employer, occurred when he was bent over to pick up a 50-pound case of napkins that had fallen and he felt a sharp pain in his low back.
- According to the Supervalu medical dispensary records (Exhibit V), Claimant first reported the accident on December 13, 2004. He described a consistent history of picking up the case of napkins and feeling what seemed like a muscle pull in the low back. Since the accident date, Claimant reported that he has been limping and the pain has gone down the right leg and into the right foot. He was diagnosed with sciatica. By January 6, 2005, Claimant was reporting pain into his forth toes bilaterally, and then by January 20, 2005, he reported pain into his lateral feet and occasionally across the top of the left foot, but he noted that his sciatica (down the right leg) was "quieter." An MRI was taken at **Metro Imaging** (Exhibit Y) on January 11, 2005 which showed

lumbar disc desiccation at all levels, and disc space narrowing at L1-2, L2-3 and L3-4. There was also mild bulging of the annulus fibrosis at those same levels, and a left-sided focal disc protrusion at L5-S1 which encroaches upon the left lateral recess and left neural foramen. In comparing this MRI to the MRI from 2000, Dr. Koch wrote that the degenerative disc changes at L1-2, L2-3 and L3-4 were similar to the prior study, but the disc protrusion at L5-S1 was a new finding. **Dr. Dirkers** (Exhibit V) wrote in his January 20, 2005 report that Claimant had right-sided sciatica but there were no acute changes on the MRI consistent with the sciatica. He also noted that Claimant had some vague mild symptoms into both feet that were symmetrical. He recommended further evaluation with Dr. Cantrell since Claimant had previously treated with him for his back complaints in 1999.

- Claimant began a course of treatment with **Dr. Russell Cantrell** (Exhibit W) on March 8, 2005. Claimant provided Dr. Cantrell with a history of his prior right leg radiculopathy from his prior injury which Claimant described as “tolerable” leading up to his most recent 2004 injury. He also indicated that he developed similar symptoms in the left leg about a year and a half prior to his examination without any particular injury, which like the right leg complaints, were tolerable. He reported a gradual increase in his lower extremity complaints over the past several months which were interrupting his sleep. He also reported the injury at work on November 18, 2004. He reported continuing intermittent paresthesias in his feet prior to the back injury on November 18, 2004. Claimant indicated that he was unaware of any known medical conditions such as hypertension or diabetes. When Dr. Cantrell compared the MRIs from 2000 and 2005, he found there was also a disc protrusion at L5-S1 on the 2000 MRI, but it was slightly larger in the 2005 MRI. On physical examination, Dr. Cantrell found stocking-glove sensory loss in both lower extremities to the mid tibia. Based on his clinical examination and his review of the MRIs, he was unable to provide a definite explanation for the sensory symptoms in the lower extremities as it relates to the lumbar spine. He characterized the difference in the MRIs as “minor,” and besides Claimant initially reported right leg complaints with a left-sided bulge. Additionally, Claimant admitted that he had complaints down both legs prior to the alleged injury anyway. Dr. Cantrell recommended electrodiagnostic studies to further evaluate the situation.
- Dr. Cantrell performed an **EMG/NCS** on March 16, 2005 (Exhibit X) which revealed electrodiagnostic findings consistent with generalized peripheral polyneuropathy. There was no evidence of a lumbosacral radiculopathy or plexopathy. Claimant admitted on that date to Dr. Cantrell that he was taking medication for diabetes and it was not under the best control. Dr. Cantrell explained that the symptoms Claimant was describing in his feet and legs and the findings on the EMG/NCS were consistent with generalized peripheral polyneuropathy, most likely related to his diabetes. Dr. Cantrell further noted that Claimant has an element of mechanical lumbar back pain, but no evidence to suggest a lumbosacral radiculopathy on examination or in the electrodiagnostic testing. In his final report dated June 7, 2005, Dr. Cantrell opined that Claimant had 5% permanent partial disability of the body as a whole referable to the lumbar spine based on the diagnosis of a lumbar strain from his work injury. He reiterated that he did not believe Claimant had any lumbar radiculopathy, and the findings on the MRI confirmed pre-existing degenerative disc disease in the lumbar spine.
- Employer paid medical benefits totaling \$2,932.61 and also paid temporary total disability (TTD) benefits in the amount of \$2,836.99.
- Claimant settled this **November 18, 2004 injury (Injury No. 04-129324) with Employer by Stipulation for Compromise Settlement** on February 1, 2006. (Exhibit U) The Stipulation reflects a settlement of \$17,702.50 based on approximate disability of 12.5% of the body as a whole referable to the low back. The Second Injury Fund Claim was left open on the stipulation.

- Since disability related to Claimant's diabetes and diabetic neuropathy is at issue in this case, Claimant placed extensive medical treatment records from his family physician into evidence. Medical treatment records from the **St. Louis Labor Health Institute** (Exhibit CC) document treatment Claimant received there from June 10, 1977 through December 15, 2003. The most relevant records from this provider begin on June 4, 1999, when Claimant requested routine lab work because of his family history of diabetes. On June 21, 1999, he was found to have a blood sugar reading of 313, and as of August 20, 1999, the records discussed placing Claimant on a diabetic diet. In January of 2001 there were additional discussions regarding a diabetic diet, but by May 4, 2001 and August 10, 2001, Claimant apparently indicated that he "feels well." Throughout 2001, the only pain mentioned in the records, is shoulder pain for which Claimant was taking pain medications. The note from November 13, 2001 again indicated that Claimant feels well and reported that his diabetes was getting better controlled. *From the time Claimant was diagnosed with diabetes in June 1999 through his last visit there on December 15, 2003, I found no reference to any pain or problems with his feet or legs related to his diabetes.*
- Claimant then began a course of treatment with a new family physician, **Dr. William Sill** (Exhibit DD), who treated Claimant from January 15, 2003 through September 2, 2005. On January 15, 2003, the note indicates that Claimant's diabetes is out of control, and again on December 2, 2003, Claimant was found to have high blood sugars. *The first reference to any pain or problems with his feet or legs in these records is documented on March 21, 2005.* On that date, Claimant reported that his feet have been hurting, and the bottoms of his feet are numb, including the two toes on the end. He reported that all of his toes ache. Claimant reported that for the last nine to eleven months, his feet have been acting up. He further reported that his feet bother him at night when he is trying to sleep. Throughout the rest of the notes from 2005, there are numerous references to bilateral foot pain and tingling, as well as problems standing. When Dr. Sill provided Claimant with an off-work slip for June 7, 2005 through July 18, 2005, he wrote as the reason for the time off work, "severe pain in feet-neuropathy."
- Dr. Sill referred Claimant for an examination with a neurologist, **Dr. Min Pan** (Exhibit BB) on May 24, 2005. Dr. Pan took a history from Claimant of lifting a case at work in October 2004 and developing right-sided low back pain, and then a month later experiencing shooting pain down the right leg. Claimant reported the symptoms were getting progressively worse. He reported having trouble sleeping because of the pain and having burning and tingling in both feet. Dr. Pan diagnosed diabetic polyneuropathy, most likely secondary to Claimant's diabetes. He also noted that Claimant had "possible superimposed lumbar radiculopathy" even though he had negative EMG tests for radiculopathy.
- Dr. Sill (Exhibit DD) then provided a number of completed and signed forms beginning on June 7, 2005 for various disability benefit claims Claimant was pursuing since he was not working. On an FMLA form dated June 7, 2005, Dr. Sill wrote that Claimant was a known diabetic patient with diabetic neuropathy of the feet who "will not be able to continue work due to pain in feet." He further noted that Claimant has sciatica from an October 2004 injury that is painful, and he has radiculopathy as well, "but neuropathic pain in feet is overwhelmingly worse since 18 OC..." [Dr. Sill apparently was off by one month on the date of the accident.] Dr. Sill wrote that the "chronic condition is the neuropathy of the feet—I believe that this will soon become incapacitating for him." He continued, "As standing becomes more painful for him, he perhaps could do sedentary work, sitting—no standing." As of June 7, 2005, Dr. Sill characterized Claimant's condition as "worsening," and although he stated that Claimant had both neuropathy and radiculopathy, he wrote, "The neuropathy is the more severe problem that is disabling."
- By July 14, 2005, when Dr. Sill (Exhibit DD) completed a Supplemental Report of Claim Disability Benefits, he

only listed the severe diabetic neuropathy and severe burning, tingling and numbness in both feet as the reason for the continued disability, but said nothing of the radiculopathy that had been previously mentioned. On a similar form on August 11, 2005, Dr. Sill once again only mentions the severe pain in Claimant's feet from his diabetic neuropathy as the reason he cannot work. The difference this time is that Dr. Sill indicated that Claimant would now "never" be able to resume work on account of the diabetic neuropathy.

- Finally, Dr. Sill (Exhibit DD) completed a medical examination form for Long Term Disability benefits from Cigna, which Claimant apparently received since he testified at hearing that he was receiving monthly payments from Cigna. The form is dated October 18, 2005, but Dr. Sill completed and signed it on October 30, 2005. Dr. Sill wrote that Claimant will never work because of the severe diabetic neuropathy and the pain in both of his feet. There was absolutely no mention of the low back or of radiculopathy as a reason for his inability to work. On the Physical Ability Assessment part of the report, there is a notation that, "Mr. Karras is not able to do any of the above due to his inability to stand or walk for more than a few minutes due to severe foot pain—both feet." Dr. Sill further opined, "He perhaps could do only sedentary type work (sitting). He has no problems with upper extremity usage or environmental conditions—But would not be able to use any foot controls."
- Claimant was sent by his attorney for an examination with **Dr. Raymond Cohen** (Exhibit FF). According to Dr. Cohen's report dated August 21, 2006, Claimant told Dr. Cohen that he was diagnosed with diabetes in 2001 and his foot pain and problems started then and have gotten progressively worse over time. Claimant indicated that the diagnosis was made with a nerve conduction study and then laboratory data. He initially reported that he had to retire because of low back pain, but then added that it was low back pain and the effects of the diabetic neuropathy. Later, Claimant told Dr. Cohen that Dr. Sill told him to stop working because he was not safe on machinery with his lack of sleep due to his foot pain. Dr. Cohen wrote that Claimant "was clear to state" that "a significant amount of those [foot and leg] symptoms [from the diabetes] were before 11-18-04 and that they have progressively become worse since 2001 up to the present." In reviewing the medical records, Dr. Cohen found that the 1999 EMG results showed a resolving acute L5 radiculopathy, but no evidence of peripheral neuropathy. He further confirmed that the 2005 EMG results showed generalized peripheral neuropathy. Dr. Cohen rated Claimant as having 12.5% permanent partial disability of the body as a whole referable to the lumbar spine for the left disc protrusion at L5-S1 from the November 18, 2004 injury. He then rated pre-existing permanent partial disabilities of 30% of each leg (160 level) for the neuropathy, 20% of the left foot (150 level) for the crush injury, 20% of the body as a whole for the diabetes, 15% of the right hand, 30% of the body as a whole referable to the lumbar spine, 30% of the left shoulder, 25% of the right shoulder, 45% of the right elbow, and 20% of the body as a whole for tinnitus. He opined that the combination of these disabilities creates greater disability than the simple sum, and that the combination makes Claimant permanently totally disabled.
- The deposition of **Dr. Raymond Cohen** was taken by Claimant on December 18, 2006 to make his opinions in this case admissible at trial (Exhibit FF). Dr. Cohen is a board certified osteopathic neurologist. He examined Claimant on one occasion, August 21, 2006, at the request of Claimant's attorney, and he provided no medical treatment to Claimant. Dr. Cohen testified consistent with his opinions contained in his report and described above.
- Dr. Cohen admitted that Claimant's neuropathy was consistent with his diagnosis of diabetes. He further admitted that he found no evidence of radicular findings on Claimant's low back examination. Although he believed the marked reduction of the peroneal nerves on the EMG testing of March 16, 2005 suggested that the condition was longstanding, Dr. Cohen also readily admitted that Claimant's diabetic symptoms, and specifically the diabetic polyneuropathy, became progressively worse from 2004-2006. Dr. Cohen clearly explained how

diabetes affects a patient's ability to heal from injuries, but other than an indication that pain could temporarily increase blood sugar levels, it was unclear how, if at all, the disc protrusion could have been responsible for the worsening of the diabetes. In fact, Dr. Cohen ultimately concluded that the worsening of the neuropathy was unrelated to the other injuries Claimant had.

- Finally, and most importantly, Dr. Cohen testified that Claimant would be unable to work based on the diabetic neuropathy and the prior injuries, even without including the disc protrusion.
- The deposition of **Ms. Sherry Browning** (Exhibit EE) was taken by Claimant on September 4, 2008 to make her opinions in this case admissible at trial. Ms. Browning is a certified vocational rehabilitation counselor, who saw Claimant at the request of his attorney on March 27, 2007. Ms. Browning produced an extensive report that summarized in great detail all of the medical records and her vocational analysis of Claimant. Ms. Browning testified consistent with the opinions contained in her report. She essentially concluded that Claimant was unemployable in the open labor market due to the combination of his injuries and disabilities.
- In reviewing Ms. Browning's report, in conjunction with the other medical records and reports in evidence, I find that Claimant apparently reported three different times when his foot pain and problems from the diabetic neuropathy began. He told Dr. Cohen that the foot problems began in 2001 and have been progressive since that time. He told Dr. Sill that they started nine to eleven months prior to March 21, 2005 (May or June 2004). Finally, he told Ms. Browning that the foot problems began in 1999 and have become worse since 2004. When she followed up with Claimant again in July 2007, he apparently again told her that the foot numbness was getting worse.
- However, as a review of the medical records in evidence reveals, there are absolutely no medical treatment records prior to November 18, 2004 that document any generalized foot pain complaints that could be attributed to diabetic neuropathy. In fact, Claimant received treatment for a left foot small toe injury in May 2004, and those treatment records contain no complaints of generalized foot pain or problems. Further, Claimant told Dr. Cohen that the neuropathy was diagnosed with an EMG test, but that test was not done until 2005, after the 2004 back injury.
- Ms. Browning was asked about her opinion on the combination of disabilities causing the permanent total disability, and she indicated she was apparently not aware of Dr. Cohen's deposition testimony that the diabetes and the pre-existing disabilities would total Claimant even without the low back disc bulge, even though she had Dr. Cohen's deposition to review. Although she is not a medical doctor and does not hold herself out as an expert in that regard, she testified that she was able to separate out the worsening of the low back and diabetic condition, and did not consider those aspects when rendering her opinion on employability. She was apparently able to divide out those conditions and separate the subsequent deteriorations, even though no medical doctor provided any evidence or testimony in that regard. Her testimony to that effect was even harder to believe, given that the vast majority of the records she had to review, and that she summarized, on the diabetic condition came after the November 18, 2004 injury.
- In terms of his current ability to function on a daily basis, Claimant testified that lifting and carrying affect his back, arms, shoulders and wrists. Driving is a problem because he cannot sit in one position for too long as a

result of his back. His arms, shoulders and wrists give him problems with doing yard work such as raking leaves or digging. Claimant testified that in his current condition he could not go back to doing any of the jobs he had performed in the past. He said he does not feel he can work because of his lack of sleep, lack of patience, and he does not want to be around other people. Claimant testified he is in the habit of needing a nap now, so any potential work would need to accommodate his need to lie down periodically.

RULINGS OF LAW:

Based on a comprehensive review of the above-stated evidence, and based upon the applicable laws of the State of Missouri, I find: As a result of the November 18, 2004 accident, which arose out of and in the course of his employment, Claimant sustained a compensable injury to his lumbar spine. As a result of the injury to his low back, adequately described in the records and reports of Dr. Dirkers, Dr. Cantrell, Metro Imaging and Dr. Cohen, Claimant continued to have pain, and a slightly larger left-sided disc protrusion at L5-S1 than he had on prior MRI studies.

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

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

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.

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.

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. ***Fogelson 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 is not against Employer as a result of the last injury alone. Employer only has liability in this case for permanent partial disability related to the low back injury from November 18, 2004.

In reviewing the medical records and reports in evidence, I found that Dr. Sill, Dr. Cohen and Ms. Browning all provided opinions that Claimant was unable to continue working and, thus, essentially permanently and totally disabled. Although, as will be explored more below, I may disagree with the reasoning and the factors some of the experts have used to reach this conclusion, I do not disagree with their ultimate conclusion that Claimant is unable to compete in the open labor market and that he is unable to return to any employment. However, 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.

I find that Claimant has successfully met his burden of proof that Employer is responsible for the payment of permanent partial disability at the level of the body as a whole referable to the lumbar spine related to the November 18, 2004 injury.

With regard to the low back injury from the 2004 accident, Dr. Cohen rated Claimant as having 12.5% permanent partial disability of the body as a whole referable to the lumbar spine. This rating accounted for his diagnosis of a left-sided disc protrusion at L5-S1. However, it is important to note that he was unable to appreciate any evidence of radicular findings on his low back examination of Claimant. Dr. Cantrell rated Claimant as having 5% permanent partial disability of the body as a whole referable to the lumbar spine based on the diagnosis of a lumbar strain from his work injury. He reiterated that he did not believe Claimant had any lumbar radiculopathy, and the findings on the MRI confirmed pre-existing degenerative disc disease in the lumbar spine. Dr. Cantrell, in comparing the new and old MRIs also found that the beginnings of the L5-S1 disc bulge were there in the 2000 MRI, but it was slightly larger in 2005 than it had been before. Claimant complained of pain, intermittent problems down both legs, and decreased function following this 2004 injury.

The issue of nature and extent of permanent partial disability is further complicated in this case by the pre-existing settlement Claimant had for permanent partial disability to the body as a whole referable to the low back in connection with his prior low back injury and right leg radiculopathy from 1998. **Mo. Rev. Stat. § 287.190.6 (2000)** also provides in pertinent part that,

when payment therefor has been made in accordance with a settlement approved either by an administrative law judge or by the labor and industrial relations commission,...the percentage of disability shall be conclusively presumed to continue undiminished whenever a subsequent injury to the same member or same part of the body also results in permanent partial disability for which compensation under this chapter may be due...

Case law in this area has stood for the proposition that since pre-existing permanent partial disability to the same part

of the body is conclusively presumed to continue undiminished, it is appropriate for the total amount of permanent partial disability to be reduced by the prior amount, leaving the balance to be paid by the Employer in the instant case. *Helm v. SCF, Inc.*, 761 S.W.2d 199 (Mo.App. 1988).

Claimant previously settled his 1998 low back case involving a right leg radiculopathy for 8% permanent partial disability of the body as a whole referable to the low back. That settlement in Injury Number 98-141158 was approved by Legal Advisor Lori Neidel on March 3, 2001. Dr. Cantrell, in 2000, had rated Claimant as having 3% permanent partial disability attributable to this 1998 injury. Dr. Cohen more recently opined that because of that prior low back injury and the degenerative changes found in Claimant's spine, he had a pre-existing permanent partial disability of 30% of the body as a whole referable to the lumbar spine before the November 18, 2004 injury at work. Therefore, under Mo. Rev. Stat. § 287.190.6 (2000), I find that the prior 8% of the body as whole referable to the lumbar spine settlement is conclusively presumed to continue undiminished in this subsequent injury to his low back.

On the basis of all of these findings, as well as based on Claimant's testimony and the medical evidence, I find that Claimant has a total of 18% permanent partial disability of the body as a whole referable to the low back. I further find that Claimant previously settled Injury Number 98-141158 for 8% of the body as a whole referable to the low back. I find that a legal advisor properly approved that settlement on March 3, 2001. Therefore, that prior percentage of disability continues undiminished. Subtracting then the pre-existing disability from the total amount of disability found, leaves Employer responsible for the payment of 10% permanent partial disability of the body as a whole referable to the low back attributable to the November 18, 2004 injury. This finding of 10% permanent partial disability for the 2004 injury accounts for the slightly more pronounced disc bulge at L5-S1, and also takes into account the fact that radiculopathy in the lower extremities could not be established either by the EMG/NCS performed by Dr. Cantrell or the physical examination performed by Dr. Cohen.

Having now established the nature and extent of the permanent partial disability attributable to the primary injury against Employer, it is now appropriate to determine whether or not Claimant has successfully met his burden of proving Second Injury Fund liability for permanent total or permanent partial disability.

I find that the central issue in this case, as far as Second Injury Fund liability is concerned, revolves around the onset of the diabetic neuropathy and the extent to which the diabetic neuropathy affects Claimant's ability to compete in the open labor market and be employable.

As far as the onset of the diabetic neuropathy is concerned, there are contradictory statements from Claimant in the medical records and in evidence regarding when he really began to feel the effects of the polyneuropathy in his lower extremities. I find that Claimant apparently reported three different times when his foot pain and problems from the diabetic neuropathy began. He told Dr. Cohen that the foot problems began in 2001 and have been progressive since that time. He told Dr. Sill that they started nine to eleven months prior to March 21, 2005 (May or June 2004). Finally, he told Ms. Browning that the foot problems began in 1999 and have become worse since 2004. However, as a review of the medical records in evidence reveals, there are absolutely no medical treatment records prior to November 18, 2004 that document any generalized foot pain complaints that could be attributed to diabetic neuropathy. In fact, Claimant received treatment for a left foot small toe injury in May 2004, and those treatment records contain no complaints of generalized foot pain or problems. Further, Claimant told Dr. Cohen that the neuropathy was diagnosed with an EMG test, but that test was not done until 2005, after the 2004 back injury.

The absence of any medical treatment records prior to the November 18, 2004 injury referring to lower extremity complaints or neuropathy, combined with Claimant's varied accounts to various physicians and experts regarding the onset of those complaints, leads me to conclude that Claimant has failed to prove that the diabetic polyneuropathy was actually a pre-existing disabling condition, or that it was a hindrance or obstacle to his employment prior to November 18, 2004.

Whether or not the diabetic polyneuropathy was actually a pre-existing hindrance or obstacle to employment, I further find that there is significant, competent and substantial evidence in the record to show that the diabetic neuropathy progressively worsened after the 2004 injury, independent of the effects of that low back injury. Dr. Sill

specifically notes that the diabetic neuropathy progressively worsened since the 2004 accident. His reports to various disability insurance plans changed from a temporary inability to work for a number of weeks to Claimant's inability to ever go back to work because of the neuropathy. Both Dr. Cohen and Ms. Browning's reports and testimony also clearly indicate that Claimant's neuropathy was progressively worsening over time and had progressively worsened since the 2004 accident at work.

The Second Injury Fund is not responsible for the subsequent worsening (progression) of a pre-existing condition when that subsequent worsening or deterioration is unrelated to the primary compensable injury against Employer. *Garcia v. St. Louis County*, 916 S.W.2d 263 (Mo.App.E.D. 1995) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003).

Based on all of this evidence and the balance of the medical treatment records in evidence for this period of time, I find that the significant worsening of the diabetic neuropathy after the November 18, 2004 injury represents a subsequent deterioration of a pre-existing condition unrelated to the primary low back injury. Although Dr. Cohen attempts to explain how the increased pain from the back may have caused a temporary spike in blood sugar levels affecting his neuropathy, he clearly testified later that the worsening of the neuropathy was unrelated to the other injuries Claimant had.

All of the experts who have testified on Claimant's permanent total disability included the diabetic neuropathy and the severe pain and numbness in his feet as one of the reasons Claimant was unable to continue to be employed. While Ms. Browning testified that she was dividing out the pre-existing disability from the subsequent deterioration of that condition in rendering her opinion in this case, she allegedly did so without the benefit of a medical doctor providing any guidance in that regard. To that extent, since she is not a medical doctor herself, her opinions on that issue are not credible, as they reach beyond her area of expertise and suggest that she is somehow capable of commenting on causation, when, in fact, she has neither the expertise, training or accurate factual base upon which to do that. Further, all of the medical she relied upon for the diabetic neuropathy condition was subsequent to the 2004 injury, and she was not given a consistent history from Claimant on the onset of his foot complaints. For these many reasons, while I agree with her ultimate conclusion that Claimant is permanently and totally disabled, I find that her rationale and her conclusion that a combination of his last injury and the pre-existing injuries, including the neuropathy, caused the permanent total disability, is not competent, credible or reliable.

Therefore, to the extent that this subsequent deterioration of his pre-existing diabetes is an included disability in any determination that Claimant is permanently and totally disabled, I find that Claimant's claim for benefits against the Second Injury Fund must fail, because the Fund is not responsible for a subsequent deterioration of a pre-existing disability unrelated to the primary injury.

Although the finding that Claimant failed to prove his diabetic neuropathy was a pre-existing hindrance or obstacle, and the finding that the worsening of the diabetic neuropathy represented a subsequent deterioration unrelated to the primary injury, would by themselves be two independent reasons why this claim for permanent total disability against the Second Injury Fund could be denied, there is yet a third reason why I find Claimant is not entitled to the permanent total disability benefits that he seeks. I find, based on the competent, credible and reliable evidence in Dr. William Sill's medical records that the diabetic neuropathy, in and of itself, resulted in enough disability to render Claimant permanently and totally disabled independent of the low back injury at work on November 18, 2004. Therefore, if there was no combination of disabilities needed to reach permanent total disability, and it was instead based solely on the disability from just the diabetic neuropathy condition, Second Injury Fund exposure is not invoked and they have no liability for benefits in this case.

While it is true that Dr. Sill initially listed both the radiculopathy from the back and the diabetic neuropathy as disabling conditions on the FMLA form dated June 7, 2005, even on that form he was clear that the diabetic neuropathy was the condition that would soon incapacitate him. By the time of his filings dated July 14, 2005 and August 11, 2005, the radiculopathy is not even mentioned anymore, only the diabetic neuropathy as the condition that was keeping Claimant from being able to work. Finally, on the form dated October 18, 2005 and signed by Dr. Sill on October 30, 2005, he lists ONLY the diabetic neuropathy as the condition that will never allow Claimant to go back to work because of the severe pain in his feet and his inability to stand or walk for any period of time. I find Dr. Sill's

opinion on the cause of Claimant's inability to work more credible and persuasive than Dr. Cohen's opinion in that regard, because Dr. Sill was Claimant's personal treating doctor who was not a paid expert for one side or the other in these proceedings, but rather was just looking at the symptoms as presented to him and making a determination on what caused Claimant to be unable to continue to function in the workplace.

Even though I find Dr. Sill's opinions on this matter more competent and credible than those of Dr. Cohen, even Dr. Cohen modified his opinion somewhat in his deposition testimony from what he had originally written in his report. Dr. Cohen ultimately testified that he believed Claimant would have been unable to work based on the combination of the diabetic neuropathy and the prior injuries, even without factoring in the primary low back injury from November 18, 2004. So even though it is for a slightly different reason, even Claimant's expert, Dr. Cohen, supports the finding that Claimant's permanent total disability was not based on a combination of the primary low back injury and the pre-existing disabilities, thus, supporting a denial of Second Injury Fund benefits based on the lack of a proper combination of disabilities to reach the permanent total disability.

Therefore, based upon Claimant's failure to prove his diabetic neuropathy was a pre-existing hindrance or obstacle, based upon my finding that the worsening of the diabetic neuropathy represented a subsequent deterioration unrelated to the primary injury, and based upon Claimant's failure to prove that the combination of the pre-existing and primary disabilities rendered Claimant permanently and totally disabled (as opposed to just the diabetic neuropathy or a combination of just the neuropathy and the other pre-existing disabilities excluding the primary injury), 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.

The last issue then is whether Claimant is entitled to some amount of permanent partial disability from the Second Injury Fund based on the combination of his primary (November 18, 2004) injury and any pre-existing permanent partial disabilities. Having thoroughly considered all of the competent and credible evidence in the record, I find that Claimant is not entitled to a permanent partial disability award against the Second Injury Fund either, since the disability from the primary injury (November 18, 2004) does not meet the applicable threshold contained in the statute necessary for an award of permanent partial disability benefits.

As noted above, in order to award permanent partial disability benefits from the Second Injury Fund, the pre-existing disability and the subsequent compensable (primary) 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. In this case, I have found that Employer had responsibility for 10% permanent partial disability of the body as a whole referable to the low back related to the November 18, 2004 primary injury. Since that 10% permanent partial disability of the body as a whole referable to the low back is less than the threshold amount of 12.5% of the body as a whole, I find that Claimant does not qualify for Second Injury Fund permanent partial disability benefits.

For all of the above-stated reasons, Claimant's Claim for permanent total and permanent partial disability benefits against the Second Injury Fund is denied.

CONCLUSION:

Claimant had a compensable injury to his lumbar spine, resulting in a strain of the low back with slight worsening of an associated disc protrusion at L5-S1, on November 18, 2004. Claimant is permanently and totally disabled under the statute, but that permanent total disability is not against Employer as a result of the last injury alone. Employer is responsible for the payment of 10% permanent partial disability of the body as a whole referable to the low back attributable to the November 18, 2004 injury. Based upon Claimant's failure to prove his diabetic neuropathy was a pre-existing hindrance or obstacle, based upon my finding that the worsening of the diabetic neuropathy represented a subsequent deterioration unrelated to the primary injury, and based upon Claimant's failure to prove that the combination of the pre-existing and primary disabilities rendered Claimant permanently and totally

disabled (as opposed to just the diabetic neuropathy or a combination of just the neuropathy and the other pre-existing disabilities excluding the primary injury), Claimant failed to meet his burden of proof that he is permanently and totally disabled under the statute against the Second Injury Fund. Finally, Claimant does not qualify for Second Injury Fund permanent partial disability benefits, since the primary (November 18, 2004) injury, does not meet the appropriate statutory threshold. 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:

Peter Lyskowski
Acting Director
Division of Workers' Compensation