

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

Injury No.: 02-006369

Employee: David Kinealy
Employer: Ford Motor Company (Settled)
Insurer: Self-Insured – Ford Motor Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: January 19, 2002
Place and County of Accident: St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 30, 2007. The award and decision of Administrative Law Judge John K. Ottenad, issued May 30, 2007, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 29th day of October 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: David Kinealy

Injury No.: 02-006369

Dependents: N/A
Employer: Ford Motor Company (Settled)
Additional Party: Second Injury Fund
Insurer: Self-Insured—Ford Motor Company (Settled)
Hearing Date: January 29, 2007

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

Checked by: JKO

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: January 19, 2002
5. State location where accident occurred or occupational disease was contracted: St. Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was a pipefitter for Employer who injured his left ankle and thoracolumbar spine when he fell 10 to 12 feet through the ceiling onto the floor while installing a sprinkler system.
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: Left Ankle and
Body as a Whole-Thoracolumbar Spine
14. Nature and extent of any permanent disability: 35% of the Left Ankle and 20% of the Body as a Whole
referable to the Thoracolumbar Spine
15. Compensation paid to-date for temporary disability: \$14,599.24
16. Value necessary medical aid paid to date by employer/insurer? \$47,255.12

Employee: David Kinealy Injury No.: 02-006369

17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: approximately \$1,000.00
19. Weekly compensation rate: \$628.90 for TTD/ \$329.42 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:

43.25 weeks of permanent partial disability from Second Injury Fund \$14,247.42

TOTAL: **\$14,247.42**

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 22.5% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:
Michael C. Goldberg.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	David Kinealy	Injury No.:	02-006369
Dependents:	N/A		Before the
Employer:	Ford Motor Company (Settled)		Division of Workers'
			Compensation
Additional Party:	Second Injury Fund		Department of Labor and Industrial
			Relations of Missouri
			Jefferson City, Missouri
Insurer:	Self-Insured—Ford Motor Company (Settled)	Checked by:	JKO

On January 29, 2007, the employee, David Kinealy, appeared in person and by his attorney, Mr. Michael C. Goldberg, for a hearing for a final award on his claim against the Second Injury Fund. The employer, Ford Motor Company, which is duly self-insured, was not present or represented at the hearing since it had previously settled its 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 facts and rulings of law, are set forth below as follows:

STIPULATIONS:

- 1) On or about January 19, 2002, David Kinealy (Claimant) sustained an accidental injury arising out of and in the course of his employment that resulted in injury to Claimant.
- 2) Claimant was an employee of Ford Motor Company (Employer).
- 3) Venue is proper in the City of St. Louis.
- 4) Employer received proper notice.
- 5) The Claim was filed within the time prescribed by the law.

- 6) At the relevant time, Claimant earned an average weekly wage of approximately \$1,000.00, resulting in applicable rates of compensation of \$628.90 for total disability benefits and \$329.42 for permanent partial disability (PPD) benefits.
- 7) Employer paid temporary total disability (TTD) benefits in the amount of \$14,599.24, representing a period of time from January 19, 2002 to approximately June 28, 2002, or 23 weeks.
- 8) Employer paid medical benefits totaling \$47,255.12.

ISSUES:

- 1) What is the nature and extent of Claimant's permanent partial and/or permanent total disability attributable to this accident?
- 2) 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 02-006369 between Claimant and Employer.
- B—Certified medical treatment records of Dr. James J. Coyle.
- C—Certified medical treatment records of Dr. Robert A. Sciortino.
- D—Certified medical treatment records of PRORehab, P.C.
- E—Certified medical treatment records of DePaul Health Center.
- F—Stipulation for Compromise Settlement for Injury Number 95-102693 between Claimant and Employer.
- G—Certified medical treatment records of Dr. David Caplin.
- H—Certified medical treatment records of St. Luke's Hospital.
- I—Deposition of Dr. Thomas F. Musich, with attachments, dated June 9, 2005.
- J—Deposition of Mr. Gary Weimholt, with attachments, dated July 6, 2006.
- K—Certified medical treatment records of Ford Motor Company-St. Louis.

Second Injury Fund Exhibits:

Nothing submitted at the time of trial.

Note: *Unless otherwise specifically noted below, any objections in these exhibits are overruled and the testimony fully admitted into evidence.*

FINDINGS OF FACT:

Based on a comprehensive review of the evidence, including Claimant's testimony, the expert medical opinion 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:

- 1) **Claimant** is a 65 year old, currently retired individual, who last worked for Ford Motor Company as a pipefitter in March 2004. Claimant worked for Employer for 40 years, the last 20 of those years as a pipefitter. In that position, he was responsible for all of the moving of pipe systems in the factory. He would normally work with 21 foot pipe which weighed approximately 100 to 110 pounds each. His job required bending, stooping, squatting, and climbing ladders. Most of the time he was on his feet. He admitted on cross-examination that prior to the 2002 injury, he was repairing machinery, hanging pipes, building pumps, and regularly lifting 150-200 pounds.
- 2) Claimant testified that he graduated from CBC High School and took enough courses at UMSL (The University

of Missouri St. Louis) to obtain Sophomore or Junior status. He did not obtain a degree from UMSL. He received training in an apprenticeship program for the work he eventually performed for Employer. He testified he has never done any computer work, any typing, or any office work.

- 3) In addition to his work as a pipefitter for Employer, Claimant also served as an Alderman for the City of St. Louis from 1979 until 1991. Additionally, he was a lobbyist in Jefferson City and Washington for Ford and the Union. He said that during the legislative session, he would be in Jefferson City from Monday afternoon until Thursday afternoon.
- 4) Claimant testified he had two low back surgeries prior to the accident at work on January 19, 2002. Medical treatment records from **St. Luke's Hospital** (Exhibit H) document Claimant's second low back surgery on October 1, 1980 when Dr. Geise performed a bilateral hemilaminectomy at L4-5 with epidural approach of removal of a bulging degenerated midline disc. The admission noted dated September 29, 1980 indicates Claimant initially hurt his low back in the service in the 1960's when he came under fire and fell over the side of a hill. About a week later, he bent over and felt a pull in the back. He underwent a lumbar laminectomy in September 1971 by Dr. Roulhac because of paresthesia in the left leg. The note indicates those complaints were relieved following the first surgery until about 1978 when intermittent low back and leg pain returned, which became worse over time, resulting in the second surgery in 1980. Following the second surgery in 1980, Claimant continued to report complaints. The last note dated May 3, 1982 indicates he has given up all sports activities because of his back, and has been unable to work since April 2, 1982. The note indicates Claimant had problems sitting or standing in one position for long periods of time. His job at the time was working one day a week at the Ford plant and then commuting between St. Louis and Jefferson City as a lobbyist. Dr. Lansche, at the time, was recommending a decompressive laminectomy and spinal fusion to treat the degenerative disc disease at L4-5 and L5-S1. Claimant apparently never had that surgery. There are also no further follow-up low back treatment records between 1982 and his January 19, 2002 injury.
- 5) After these surgeries, but prior to the January 19, 2002 accident, Claimant testified that he returned to work as a pipefitter. He said that he continued to have low back problems, but he would compensate for those problems by lifting with other parts of his body. He also described problems with bending, walking and pain in the low back. He admitted there were no restrictions imposed by a doctor following these surgeries on bending and stooping. Claimant admitted that he was able to coach soccer and baseball before the 2002 injury, and he could also do minor repairs on the platform for his hot tub.
- 6) Claimant also described an injury to his hands and wrists in 1995 prior to the January 19, 2002 injury, which is the subject of this claim. Medical treatment records from **Dr. David Caplin** (Exhibit G) confirm that he performed a bilateral endoscopic carpal tunnel decompression on Claimant on November 24, 1997 to treat Claimant's work-related bilateral carpal tunnel syndrome.
- 7) Employer and Claimant entered into an agreement to resolve their portion of this 1995 claim (Injury No. 95-102693) by **Stipulation for Compromise Settlement** (Exhibit F) on October 5, 1998 for \$14,858.50 or approximately 15% permanent partial disability of each wrist with a 10% multiplicity load factor. Claimant apparently made no claim against, and received no payment from, the Second Injury Fund in connection with this 1995 injury.
- 8) Claimant testified that after the carpal tunnel surgeries he returned to full duty, but he had continued numbness and tingling in the hands. He also testified that he could not bend his hands all the way. He said he did not have as much strength and he could not pick up small things off of the table. He said he could not use the standard wrenches at work. He said he had to use a "cheater bar" to extend the wrench handle and allow for easier turning. He also testified that he was not able to lift as much. He said he was only able to work full duty with the assistance he described, including the "cheater bar". On cross-examination, Claimant then noted that he created the "cheater" after his first back surgery, but he could not even use that after the 2002 injury.
- 9) On cross-examination, Claimant testified that he regularly worked overtime before the 2002 injury. He said 90% of the time he worked seven days a week and holidays too. He said he would sometimes work 12 hours a day. Sometimes the overtime was mandatory and sometimes it was voluntary. He admitted that during the last 10 years prior to 2002, he made over \$100,000 and up to as much as \$132,000, which was double his base salary, because of all the overtime he worked.
- 10) Claimant's injury on January 19, 2002, while working for Employer, occurred when he was installing a sprinkler system, and he fell 10 to 12 feet through a ceiling onto the floor below. Claimant sustained a left foot calcaneus fracture and a T12 crush injury. He testified that he also complained of low back pain, and pain into the leg.
- 11) Claimant received initial medical treatment at **DePaul Health Center** (Exhibit E) from January 19, 2002 until January 25, 2002. X-rays and CTs of the thoracic spine and left calcaneus revealed a compression fracture (comminuted) of the inferior third of the T12 vertebral body and a comminuted compression fracture of the left calcaneus. Because it was a complex fracture of the left calcaneus, it was felt that he would benefit from surgery,

but the doctors wanted to let the swelling go down first. He was discharged to follow up with orthopedics for both the T12 and calcaneus fractures.

- 12) Claimant treated with **Dr. Robert A. Sciortino** (Exhibit C) who performed an open reduction and internal fixation of the comminuted left calcaneus fracture on February 8, 2002. Claimant followed up with Dr. Sciortino after surgery and also attended a course of physical therapy. He appeared to make steady progress following the surgery. Dr. Sciortino placed him at maximum medical improvement on September 3, 2002 and released him to go back to work with permanent restrictions of no prolonged standing or walking and the need to avoid ladders and uneven surfaces. Dr. Sciortino rated Claimant as having 20% permanent partial disability of the left lower extremity at the level of the left foot as a result of this left calcaneus fracture and subsequent surgery.
- 13) Claimant also treated with **Dr. James J. Coyle** (Exhibit B) for the T12 compression fracture. Dr. Coyle first examined Claimant on February 26, 2002. That note contains a consistent history of the fall on January 19, 2002. It also contains a history of the two prior low back surgeries with the notation that, "He did well following these and was essentially asymptomatic from the standpoint of his back prior to the most recent accident." The physical examination revealed point tenderness to palpation at T12 and mild paraspinal tenderness in the lower spine as well. He had good motor strength and no appreciable sensory deficits in the lower extremities. X-rays revealed 30% anterior loss of height at T12 and also decreased disc space height at L4-5 and L5-S1, where there appeared to be prior surgeries. Dr. Coyle commented that it was not unusual for a thoracolumbar compression fracture to cause associated low lumbar pain. He recommended continued use of the Jewitt brace for the back. In subsequent follow-up appointments with Dr. Coyle, Claimant progressed to a course of physical therapy, and by June 10, 2002, because of persistent low back pain with no pain at the T12 compression fracture site, Dr. Coyle recommended a lumbar MRI. The lumbar MRI was taken on July 15, 2002. It revealed mild stenosis at L3-4 and L4-5, post-op changes on the right at L5-S1, and an old compression deformity of T12. On July 15, 2002, Dr. Coyle released Claimant at maximum medical improvement for the T12 fracture and noted he would likely have some residual low back pain. He released Claimant with a permanent restriction of no lifting over 20 pounds.
- 14) Medical records from **PRORehab, P.C.** (Exhibit D) document physical therapy appointments Claimant had for the left ankle and back from April 22, 2002 through July 5, 2002. Claimant appeared to make progress in therapy with increased range of motion and decreasing complaints, although he did continue to report some left foot and low back complaints even at the end of his therapy. The note dated July 5, 2002 indicates, "He continues to report discomfort in his back if he is up for longer than 5 hours."
- 15) Employer paid medical benefits totaling \$47,255.12 and also paid temporary total disability (TTD) benefits in the amount of \$14,599.24, representing a period of time from January 19, 2002 to approximately June 28, 2002, or 23 weeks.
- 16) Claimant settled this **January 19, 2002 injury (Injury No. 02-006369) with Employer by Stipulation for Compromise Settlement** on July 18, 2006. (Exhibit A) The Stipulation reflects a settlement of \$44,224.63 based on approximate disability of 35% of the left ankle and 20% of the body as a whole referable to the thoracic spine.
- 17) Claimant testified that he went back to a job at Employer in approximately June 2002 when he was released to light duty work by Drs. Sciortino, Coyle and Thomas (the plant doctor). He said he did not return to work as a pipefitter. He returned to a sedentary position where he sat behind a desk, and if they had something for him to do, then they would tell him. They paid him full time wages, but he said he was only there about 4 hours per day. He said he was getting treatment during some of this time period for his back and his foot. He testified he could not go to work everyday and he would miss some time because his back would hurt or his foot would be numb. He said he did this sedentary job until March 31, 2004.
- 18) During the time that he was back working the sedentary job after his 2002 injury, he did have periodic visits to the **Ford Motor Company-St. Louis Plant Medical Department**. (Exhibit K) The notes indicate he received some physical therapy and medications for his foot and back complaints. Two of the notes from February 5, 2003 and February 6, 2003 also give some indication of Claimant's activities while at the plant during this time. On February 5, 2003, the note indicates his "back starts acting up after up on feet x5 hrs." The note from February 6, 2003 indicates, "Pt usually lasts about 4-5 hrs on his feet." The notes also confirm he had a limp, difficulty sitting and an antalgic gait.
- 19) Claimant testified that he voluntarily retired as of March 31, 2004, because he could not continue to make the drive from his home to the Ford plant every day as a result of his complaints. He said he decided to end the light duty when his son had to come one day and pick him up on the side of the highway. He admitted on cross-examination that he retired specifically because of the injury he sustained on January 19, 2002. Claimant testified that his current income comes from Social Security retirement of about \$1,600.00 per month and a pension from St. Louis for his service as an Alderman of about \$200 per month.
- 20) In terms of continuing complaints with the left foot from this injury, Claimant described problems with balance, walking and navigating steps. He described a sharp pain in the ankle, burning, numbness and some lost range of

motion. He said if he is going to be up on it for a long time, then he uses a brace. He said he cannot stand too long because of pain.

- 21) With regard to the T12 fracture, Claimant testified that he experiences a dull pain in the upper back. He said he cannot bend or straighten up, and he cannot lift his 16 pound grandchild. Similarly, with the low back, he said if he bends over, it takes him awhile to straighten up, and he gets a sharper pain when he is getting up. He also described back spasms after sitting too long and said he got a recliner so that he could lay down when he wanted to relieve his complaints. He said after sitting for awhile, he needs to stand up and stretch or else lay down. He said he cannot walk as fast as before, and he gets a grinding and pounding on the low back while walking. He testified he has obtained a handicapped license because of these complaints.
- 22) Claimant testified that he cannot do anything at home anymore. He said he has handles on a stand by the bed to help him get up. He stretches out on a treadmill and also uses his hot tub to feel better. He said he is up every 3-4 hours walking around. He described problems sleeping at night and said he takes Trazedone, Darvocet, and Sonata for those complaints. Claimant said he is facing depression since the 2002 injury for which he is taking medications. He testified it also limits his concentration.
- 23) The deposition of **Dr. Thomas F. Musich** was taken by Claimant on June 9, 2005 to make his opinions in this case admissible at trial. (Exhibit I) Dr. Musich is a family care practitioner. He examined Claimant on one occasion, August 6, 2004, at the request of Claimant's attorney. He acknowledged on cross-examination that he does approximately 10 independent medical examinations per week and the vast majority, if not all, are at the request of the claimant's attorneys.
- 24) His report contained a consistent history of the injury at work on January 19, 2002, as well as the medical treatment Claimant received following that injury. He recorded that Claimant had a 12th grade education, training as a pipefitter, and work history as a pipefitter for 41 years with Ford Motor Company. Dr. Musich wrote in his report and testified, "Prior to his work injury in January 2002, Mr. Kinealy worked on a full time basis as a pipefitter at Ford Motor Company without any significant restrictions." While noting that Claimant did have some *occasional* low back aching from the mid 1980's until 2002 brought on by prolonged positioning or heavy repetitive lifting, he also noted Claimant worked during that period of time without need for additional spinal evaluation and treatment. He noted, "Mr. Kinealy never required any restrictions or accommodations referable to his low back or his left heel prior to January 2002." Then later in Dr. Musich's report, in the section dealing specifically with the pre-existing injuries, Dr. Musich records that during this same period before 2002, Claimant noted *frequent* intermittent low back pain. He also recorded the complaints Claimant reported as a result of his pre-existing carpal tunnel surgeries.
- 25) Physical examination of the mid back revealed pain to deep palpation and visual kyphosis at the T12 level. There was 25% reduced range of motion because of pain at T12 radiating down to the L5 level. The straight leg raising test was negative bilaterally. There were normal reflexes and no paresthesia in the lower extremities. The left ankle examination revealed swelling, pain and lost range of motion. Dr. Musich noted that Claimant was limping. Physical examination of the wrists revealed positive Tinel and Phalen's signs.
- 26) Dr. Musich opined that the January 19, 2002 injury was a substantial factor in the development of the comminuted calcaneus fracture, along with the T12 fracture and subsequent mechanical low back pain. He rated Claimant as having 35% permanent partial disability of the body as a whole referable to the thoracolumbar spine, and 65% permanent partial disability of the left heel as a result of that 2002 injury. He recommended that Claimant follow the same restrictions placed on him by the treating physicians. He did not impose any additional restrictions of his own following this examination.
- 27) For Claimant's pre-existing conditions, Dr. Musich rated 30% permanent partial disability of the body as whole referable to the lumbar spine and 35% permanent partial disability of each wrist. He opined that the combination of the past and present disabilities is significantly greater than the simple sum. He also opined that Claimant is "totally and permanently disabled due to a combination of his present and past disabilities, his advanced work age, chronic pain, permanent restrictions and lack of transferable skills and work history." Dr. Musich acknowledged on cross-examination that he is not a vocational expert or specialist. He further acknowledged that he would take under advisement what a vocational expert had to say about getting Claimant back into the open labor market, but he would not defer to that vocational expert on the question of employability.
- 28) The deposition of **Mr. Gary Weimholt** was taken by Claimant on July 6, 2006 to make his opinions in this case admissible at trial. (Exhibit J) Mr. Weimholt is a vocational rehabilitation counselor, who saw Claimant at the request of his attorney on September 13, 2004. Based on his testing, Mr. Weimholt believed Claimant was functioning at a high school level of reading and 7th grade level for arithmetic. Academically, he believed the arithmetic score was lower than most employers would want for an entry level position. Mr. Weimholt noted the restrictions placed on Claimant by Dr. Coyle and Dr. Sciortino following the 2002 injury. Because of these restrictions, he opined that Claimant would be unable to do his past work or other similar work. When Claimant reported his work history to Mr. Weimholt, he apparently only told him about being a pipefitter. There was only a

brief reference to his lobbying activities in connection with a discussion in the report of the 1980 back surgery, and there was absolutely no mention of his work as an Alderman for the City of St. Louis for 12 years. Mr. Weimholt wrote that Claimant's previous work was as a pipefitter and "he has had few if any other vocational experiences." He found Claimant had a lack of transferable job skills that he would be able to use in lighter duty jobs. He testified that Claimant told him that, "he would not have retired were it not for the injury of January 19, 2002 and problems resulting from that injury." Taking all these factors into account, Mr. Weimholt opined that Claimant is totally disabled from employment, as a result of the combination of the conditions affecting Claimant's thoracic spine, low back, hands and left lower extremity.

- 29) When asked about the job to which Claimant returned at Employer for almost two years after his 2002 injury, Mr. Weimholt responded that he believed the job was "made up" for Claimant and it was not the same as a job in the competitive open labor market. Despite that, Mr. Weimholt acknowledged that he was present at work for the full eight-hour work day and that he did not require any assistance while working in that sedentary position.
- 30) On cross-examination, Mr. Weimholt acknowledged that there were no doctor-imposed restrictions on sitting for any length of time. He also agreed that Claimant had no work restrictions as a pipefitter prior to the 2002 injury. He testified that he did not note any inability that Claimant had to complete his work duties while employed by Employer. He did not note that Claimant required any assistance either. Mr. Weimholt testified that Claimant also enjoyed outdoor work and repairs, such as painting the house, prior to the 2002 injury.

RULINGS OF LAW:

Based on a comprehensive review of the substantial and competent evidence, and based upon the applicable laws of the State of Missouri, I find: As a result of the January 19, 2002 accident, which arose out of and in the course of his employment, Claimant sustained a compensable left ankle (left calcaneus fracture) and thoracic spine (T12 fracture) injury, with subsequent related mechanical low back pain. As a result of the injury to his left ankle and thoracolumbar spine, adequately described in the records and reports of Dr. Sciortino, Dr. Coyle, and Dr. Musich, Claimant continued to have pain, limited motion and weakness in his left ankle and thoracolumbar spine.

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

Under **Mo. Rev. Stat. § 287.020.7 (2000)**, "total disability" is defined as "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 the nature and extent of 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 not permanently and totally disabled under the statute against Employer as a result of the last injury alone.

Of all of the medical records and expert opinions I reviewed, I only found two that provided an opinion that Claimant was permanently and totally disabled, Dr. Musich and Mr. Weimholt. However, neither 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 referable to the left ankle (calcaneus) and body as a whole referable to the thoracolumbar spine, related to the January 19, 2002 injury.

With regard to the left ankle (calcaneus), Dr. Sciortino, the treating doctor, rated Claimant as having 20% permanent partial disability of the left lower extremity at the level of the left foot as a result of this left calcaneus fracture and subsequent surgery. Dr. Musich rated Claimant as having 65% permanent partial disability of the left heel. Claimant complained of pain, numbness, decreased motion, and an inability to walk long distances, along with the need to use a brace at times. Additionally, there were references to Claimant limping. Dr. Sciortino did place permanent restrictions regarding the ankle on Claimant of no prolonged standing or walking and the need to avoid ladders and uneven surfaces. On the basis of all of these findings, and Claimant's complaints, I find Claimant has 35% permanent partial disability at the level of the left ankle attributable to the January 19, 2002 injury.

With regard to the thoracolumbar spine (T12 fracture and subsequent related mechanical low back pain), Dr. Musich rated Claimant as having 35% permanent partial disability of the body as a whole referable to the thoracolumbar spine. Dr. Coyle, the treating doctor, did not provide a rating of disability, but he did place a permanent restriction on Claimant of no lifting over 20 pounds. Claimant complained of a dull pain in his upper back, along with an inability to bend and straighten up normally, and pain in the back from sitting or standing for too long a period of time. On the basis of all of these findings, and Claimant's complaints, I find Claimant has 20% permanent partial disability of the body as a whole referable to the thoracolumbar spine attributable to the January 19, 2002 injury.

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.

Of all of the doctors and/or experts who examined and treated Claimant, there are only two that indicate Claimant is permanently and totally disabled, Dr. Musich and Mr. Weimholt. Dr. Musich, Claimant's rating physician, opined that Claimant is "totally and permanently disabled due to a combination of his present and past disabilities, his advanced work age, chronic pain, permanent restrictions and lack of transferable skills and work history." Similarly, Mr. Weimholt, Claimant's vocational expert, opined that Claimant is totally disabled from employment, as a result of the combination of the conditions affecting Claimant's thoracic spine, low back, hands and left lower extremity.

I do not find either of these experts' opinions on the issue of permanent total disability to be competent, credible or persuasive. When Dr. Musich states the basis of his opinion on permanent total disability, he includes "lack of transferable skills and work history" as two of the reasons for finding Claimant permanently and totally disabled. However, Dr. Musich admits that he is not a vocational expert. It is completely unclear to me how he could make any decision based on transferable skills and work history, when he did not do a transferable skills analysis as a part of his examination and he did not have a complete work history. The only job Dr. Musich listed for Claimant was pipefitter. There is no mention of Claimant's past relevant work as a lobbyist in Jefferson City and Washington, or as an Alderman in the City of St. Louis for 12 years. What is within Dr. Musich's realm of expertise as a medical expert, is placing medical restrictions on Claimant's ability to function as a result of his medical conditions. However, Dr. Musich does not place any additional restrictions on Claimant. Instead, he relies on the restrictions already in place from the treating doctors, which do not include any restrictions for Claimant's pre-existing conditions. As a result of the deficient basis of his opinion, combined with his

overreaching beyond his area of expertise, I find Dr. Musich's opinion on permanent total disability is fatally flawed and cannot be used to support any award of permanent total disability benefits in this case.

Similarly, Mr. Weimholt, Claimant's vocational expert, did not have a complete vocational history in order to do an accurate assessment of Claimant's transferable skills, which in turn affected his assessment of whether or not there would be any sedentary jobs in the open labor market available to Claimant. When Claimant reported his work history to Mr. Weimholt, he apparently only told him about being a pipefitter. There was only a brief reference to his lobbying activities in connection with a discussion in the report of the 1980 back surgery, and there was absolutely no mention of his work as an Alderman for the City of St. Louis for 12 years. Mr. Weimholt wrote that Claimant's previous work was as a pipefitter and "he has had few if any other vocational experiences." He found Claimant had a lack of transferable job skills that he would be able to use in lighter duty jobs. While it may be true that Claimant has no transferable skills from his work as a pipefitter, Mr. Weimholt did not mention whether or not there were any such transferable skills from his work as a lobbyist, and he did not know about the Aldermanic position Claimant held for 12 years, so he did not factor that into the equation either. Certainly, the work Claimant did as a lobbyist and an Alderman required a different skill set than the physical nature of his job as a pipefitter. Since Mr. Weimholt did not know about (or did not cover those positions) in his analysis, I find his opinion on permanent total disability is incomplete, nonpersuasive and also fatally flawed. Thus, it cannot be used as a basis for an award of any such benefits in this case.

On the other hand, both of the treating doctors released Claimant back to work, albeit with some restrictions. Dr. Sciortino did place permanent restrictions regarding the ankle on Claimant of no prolonged standing or walking and the need to avoid ladders and uneven surfaces. Dr. Coyle did place a permanent restriction on Claimant of no lifting over 20 pounds. Neither of them opined that Claimant was incapable of returning to any job in the open labor market, and in fact, Claimant did return to a job at Employer for almost two years after this 2002 injury.

In support of his claim of permanent total disability, Claimant alleges that he could not go back to his regular job as a pipefitter because of the restrictions placed on him by the treating doctors. Given the restrictions placed on him by those physicians, and given his description of his work as a pipefitter, I find that Claimant would not be able to return to that type of employment in his current physical condition. However the test for permanent total disability is not whether he could return to his former employment, but rather, whether he could return to any employment in the open labor market. Therefore, the mere fact that he could not return to his work as a pipefitter is not dispositive on this issue.

In support of his claim of permanent total disability, Claimant also alleges that the sedentary job he did at Employer for almost two years following his 2002 injury would not be a job found in the open labor market, and so it should not be considered in determining his employability. In support of this position, Claimant offers the testimony of Mr. Weimholt that this job was "made up" for Claimant and it was not the same as a job in the competitive open labor market. While I acknowledge that this position may have represented an accommodated position for Claimant to fit his restrictions, rather than looking at the job duties themselves, I find it more significant that physically Claimant was able to be present and carry out the responsibilities of the position (whatever they were) for almost two years after this 2002 injury. Even Mr. Weimholt acknowledged that Claimant was present at work for the full eight-hour work day and that he did not require any assistance while working in that sedentary position. I find it further significant that Employer did not terminate Claimant for non-performance, but rather Claimant was the one who decided it was time to *voluntarily retire because of the distance of the drive from his home to the Ford plant every day*.

Additionally, there were some discrepancies in the testimony and the records that cause me to question the accuracy of some of the evidence presented at hearing. Claimant prosecutes a claim for permanent total disability against the Second Injury Fund based on the combination of his pre-existing and primary alleged disabilities, but he admitted on cross-examination that he retired specifically because of the injury he sustained on January 19, 2002. He further told Mr. Weimholt that, "he would not have retired were it not for the injury of January 19, 2002 and problems resulting from that injury." These statements are inconsistent with his claim.

Further, regarding his sedentary job at Employer after 2002, Claimant testified that he returned to a sedentary position where he sat behind a desk, and if they had something for him to do, then they would tell him. They paid him full time wages, but he said he was only there about 4 hours per day. Claimant made it seem like he was sitting or reclining most of the day when he was there at work and that he was really only there about 4 hours a day anyway. The medical records from the Ford Plant medical dispensary contain notes on two different occasions that indicate his "back starts acting up after up on feet x5 hrs." and, "Pt usually lasts about 4-5 hrs on his feet." If Claimant is complaining to the plant dispensary about problems after being on his feet for 5 hours, then his position was not just sitting behind a desk or reclining, and he did work more than just 4 hours a day during this time period. Mr. Weimholt also acknowledged that Claimant was present at work for the full eight-hour work day and that he did not require any assistance while working in that sedentary position. This also seems to contradict Claimant's characterization at trial of his sedentary job after 2002.

Finally, there are conflicting descriptions in the medical records and reports concerning Claimant's low back condition after his two surgeries, but before the injury on January 19, 2002. At the hearing, Claimant said that he continued to have low back problems, but he would compensate for those problems by lifting with other parts of his body. He also described problems with bending, walking and pain in the low back. However, in Dr. Coyle's treatment records following the 2002 injury, there was a history of the two prior low back surgeries with the

notation that, "He did well following these and was essentially asymptomatic from the standpoint of his back prior to the most recent accident." Additionally, there was a conflict in Dr. Musich's lone report regarding the extent of Claimant's pre-existing low back problems. When discussing the primary back injury from 2002, the report notes that Claimant did have some *occasional* low back aching from the mid 1980's until 2002 brought on by prolonged positioning or heavy repetitive lifting. However, later in the same report, when the pre-existing back condition is being discussed for rating purposes, the characterization changes to *frequent* intermittent low back pain. While it may not seem like these differences in descriptive words should make a big difference, when trying to assess the nature and extent of a pre-existing condition, as well as trying to assess if that condition was a hindrance or obstacle to employment, whether the condition was asymptomatic, or causing occasional or frequent problems *is* a big difference.

Based upon Claimant's failure to provide a competent, credible and persuasive medical or vocational opinion on permanent total disability, as well as based on Claimant's ability to continue working for an additional two years after the January 2002 injury until he voluntarily retired, and taking into account the discrepancies in the records and testimony described above, 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 (January 19, 2002) 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 has met his burden of proof to show an entitlement to a permanent partial disability award against the Second Injury Fund.

While I do have concerns, as enumerated above, regarding the different descriptions of Claimant's prior low back condition following his two surgeries, and while I do question the competency of Dr. Musich's opinion on permanent total disability, based on Dr. Musich's opinions on permanent partial disability and combination, as well as based on the medical treatment records and the credible portions of Claimant's testimony, I find that the pre-existing low back condition and bilateral carpal tunnel syndrome did represent a hindrance or obstacle to employment or reemployment.

Claimant did have two back surgeries including a lumbar laminectomy in 1971 and a bilateral hemilaminectomy at L4-5 with epidural approach of removal of a bulging degenerated midline disc in 1980. While he did return to his full duties as a pipefitter, which is admittedly heavy work, I do believe he had some occasional intermittent problems with the low back leading up to the injury of 2002. I do not find that the problems were extremely significant, because he did not have any restrictions on his work activities, he worked considerable voluntary overtime and he did not receive treatment from a doctor during this time (almost 20 years, 1982-2002) for his back. I believe Claimant though, when he testified that he had to compensate with other parts of his body for lifting and he had to do things a little differently because of his back. On the basis then of all the competent and persuasive evidence described above, I find that Claimant had a pre-existing disability of 15% of the body as a whole referable to the low back leading up to the time of the 2002 injury, and I further find that the pre-existing disability in the low back was a hindrance or obstacle to employment or reemployment.

Regarding the right and left wrists, Claimant had bilateral endoscopic carpal tunnel decompressions on November 24, 1997 to treat his work-related bilateral carpal tunnel syndrome. Claimant settled that claim by Stipulation for Compromise Settlement on October 5, 1998 for \$14,858.50 or approximately 15% permanent partial disability of each wrist with a 10% multiplicity load factor. Again, while he did return to his full duties as a pipefitter, which is admittedly heavy work, I do believe he had some continued problems with his wrists leading up to the injury of 2002. His complaints of decreased strength, less dexterity with small items, and diminished grip are credible given the procedures he had done, and the occupation to which he returned after the surgeries. However, as with the low back condition, I do acknowledge that he returned to full duty, working considerable voluntary overtime, without restrictions, and without further medical treatment for his complaints. On the basis then of all the competent and persuasive evidence described above, I find that Claimant had a pre-existing disability of 15% of the right wrist and 15% of the left wrist leading up to the time of the 2002 injury, and I further find that the pre-existing disability in the wrists was a hindrance or obstacle to employment or reemployment.

As found above, the pre-existing disabilities represented a hindrance or obstacle to employment, and the primary and pre-existing disabilities all met the applicable statutory threshold described above for permanent partial disability cases. Finally, consistent with Dr. Musich's opinion on combination, I find that the pre-existing and primary injury disabilities combine to create disability that is significantly greater than the simple sum. I, therefore, find that Claimant is entitled to receive 43.25 weeks of compensation from the Second Injury Fund.

I calculated the amount of this award from the Second Injury Fund in two different ways, and essentially arrived at similar numbers. First, I added together all of the qualifying disabilities and assessed a loading factor of 15% [35% of the left ankle (54.25 weeks) + 20% of the thoracolumbar spine (80 weeks) + 15% of the low back (60 weeks) + 15% of the right wrist (26.25 weeks) + 15% of the left wrist (26.25 weeks) = 246.75 total weeks of compensation times the 15% loading factor = 37.0125 weeks from the Fund]. Then for the second calculation, consistent with the statute, I assessed Claimant's overall disability, taking into account all of his pre-existing and primary disabilities at 72.5% of the body as a whole (290 weeks). From that I subtracted the number of weeks attributable to the primary and pre-existing disabilities (246.75 weeks), which left a total of 43.25 weeks for which the Second Injury Fund would have responsibility, since that represents the greater combination of the disabilities over and above their simple sum. Although for settlement purposes, the first calculation method is the one most often used by the parties, since the second calculation method is the one consistent with

the statute, I am awarding the 43.25 weeks to Claimant from the Second Injury Fund.

Accordingly, the Second Injury Fund is responsible for the payment of 43.25 weeks of permanent partial disability pursuant to this award.

CONCLUSION:

Claimant had a compensable injury to the left ankle and thoracolumbar spine resulting in a left calcaneus fracture, and T12 fracture with subsequent mechanical related low back pain, on January 19, 2002. Claimant has failed to prove that he is permanently and totally disabled under the statute and so that part of the claim is denied. The Second Injury Fund is to pay 43.25 weeks of permanent partial disability benefits. Compensation awarded is subject to a lien in the amount of 22.5% of all payments in favor of Michael C. Goldberg, for necessary legal services.

Date: _____

Made by: _____

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

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation