

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

Injury No. 09-084011

Employee: John Kolar, Jr.
Employer: First Student, Inc.
Insurer: New Hampshire Insurance Co.
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 § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 8, 2014. The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued July 8, 2014, 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 3rd day of December 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: John Kolar Jr. Injury No.: 09-084011
Dependents: N/A Before the
Employer: First Student Inc. **Division of Workers'**
Compensation
Additional Party: Second Injury Fund Department of Labor and Industrial
Relations of Missouri
Insurer: New Hampshire Ins. Co. c/o Sedgwick CMS Jefferson City, Missouri
Hearing Date: April 2, 2014 Checked by: KOB

FINDINGS OF FACT AND RULINGS OF LAW

2. Are any benefits awarded herein? Yes.
3. 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: October 26, 2009.
5. State location where accident occurred or occupational disease was contracted: St. Louis County, MO.
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: While performing a pre-trip inspection of a school bus, Employee slipped on slick grass and fractured his right lower extremity.
12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Bilateral lower extremities.
14. Nature and extent of any permanent disability: 35% PPD of the right lower extremity at the level of the knee, and 15% PPD of the left knee
15. Compensation paid to-date for temporary disability: \$13,239.72.
16. Value necessary medical aid paid to date by employer/insurer? \$87,122.17.

- 17. Value necessary medical aid not furnished by employer/insurer? Disputed.
- 18. Employee's average weekly wages: \$525.00
- 19. Weekly compensation rates: \$350.00 / \$350.00
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Stipulated underpaid TTD:	\$1,110.28
90 weeks of permanent partial disability from Employer:	\$31,500.00

- 22. Second Injury Fund liability: Yes

36 weeks of permanent partial disability from Second Injury Fund	\$12,600.00
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Total: \$45,210.28

- 23. Future requirements awarded: See Award

Said payments to begin immediately and to 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: Daniel R. Keefe

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	John Kolar Jr.	Injury No.: 09-084011
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	First Student Inc.	Department of Labor and Industrial Relations of Missouri
Additional Party:	Second Injury Fund	Jefferson City, Missouri
Insurer:	New Hampshire Ins. Co. c/o Sedgwick CMS	Checked by: KB

The matter of John Kolar Jr. ("Claimant") proceeded to hearing on April 2, 2014. Attorney Daniel R. Keefe represented Claimant. Attorney Jeffrey Wright represented First Student Inc. ("Employer") and Insurer, New Hampshire Ins. Co. c/o Sedgwick CMS. Assistant Attorney General Adam Sandberg represented the Second Injury Fund.

The parties stipulated that on or about October 26, 2009, Claimant sustained an accidental injury arising out of and in the course and scope of his employment. The parties further stipulated he was an employee of Employer, venue is proper in St. Louis, Missouri, Employer received proper notice, and Claimant filed a timely claim. Claimant earned an average weekly wage of \$525.00, resulting in a rate of \$350.00 for both temporary total disability ("TTD") and permanent partial disability ("PPD") benefits. The parties further stipulated that during the course of treatment, Claimant was underpaid TTD in the amount of \$1,110.28, and the date of maximum medical improvement ("MMI") is November 12, 2010.

The issues to be determined are:

1. Is the work accident the prevailing medical cause of the condition of the left knee;
2. Is Employer liable for future medical care;
3. What is the extent of Claimant's permanent partial and/or total disability; and
4. What is the liability of the Second Injury Fund?

Claimant seeks to recover permanent total disability ("PTD") benefits from the Second Injury Fund.

FINDINGS OF FACT

Claimant is a 46 year old man who left the ninth grade to enter the workforce as a laborer/warehouseman. He worked as a laborer until 2002 or 2003, when he obtained his CDL and became a driver. He drove for several bus companies, but from approximately 2004 to May 2012, he worked solely for Employer. When Claimant started with Employer, he weighed between 375 and 400 pounds. Despite being overweight, Claimant had no problems with stamina, and his weight did not hinder his job. He "was able to do everything and in due fashion." There is conflicting evidence as to Claimant's weight on the day of the accident, but it

appears he weighed close to 500 pounds¹. At hearing, Claimant weighed 520 pounds. During his employment, he passed a basic annual physical every year, and passed the rather demanding physical necessary to retain his DOT certification every other year.

Claimant operated regular school bus routes as well as charter runs for field trips and other special activities. His usual routine for each run would be to conduct a pre-trip bus inspection, drive to pick up and drop off children, conduct a post-trip inspection and clean out the bus. On October 26, 2009, Claimant was conducting an early morning pre-trip inspection when his legs slipped under the bus, his "body went the other way," and he "felt a snap and a whole lot of excruciating pain" in his right leg.

An ambulance transported Claimant to the emergency room at St. Anthony's Medical Center, where he was diagnosed with a broken tibia and fibula of the right leg. On October 27, 2009, Dr. Medler surgically repaired his ankle using "rod and nails." Claimant was in the hospital for approximately 30 days for acute therapy, and then released to Green Park Nursing Home, a rehabilitation facility, because he was non-weight bearing and could not negotiate the stairs in his home. It was while he was receiving this emergency treatment that Claimant was first diagnosed with diabetes².

After more than three months of therapy at Green Park, he could walk and he was released in March 2010 to outpatient therapy and work hardening, where he continued to progress. By November 12, 2010, when he reached MMI, Claimant no longer needed a cane or walker, and could walk the distance required of him to do his job.

During his inpatient therapy at Green Park, in early Spring 2010, Claimant testified he started having left leg pain that he attributed to putting so much weight on his left, non-injured leg. Jason, his therapist at The Work Center, noted Claimant felt his left knee was weak and sore at several visits in April, and his monthly update reports in May, June and July 2010 contained the notation that Claimant comments on occasional pain in his left knee during tasks. In July, Dr. Medler noted, "[h]e is also reporting more pain on the left knee than the right knee and he says that sometimes it feels like it gives out on him." However, Dr. Medler dismissed the left knee symptoms as unrelated to the work injury, and never examined or treated the left knee. When he was able to treat on his own, Claimant obtained cortisone injections to his left knee, although he had significant diabetes-related complications after one injection that required emergency treatment. He currently has a recommendation for a total knee replacement.

In August 2010, Claimant returned to work for Employer performing the same general duties he did before his accident, and driving the same routes. He also passed the physically demanding DOT test in 2010, and all other physicals. However, because he did not take the activity and kindergarten routes after his return to work, he worked fewer hours. He attributed his need to cut his hours to leg pain and compromised endurance. Claimant performed all the duties of a bus driver for Employer throughout the 2010-2011 and 2011-2012 school years.

¹ At deposition in 2014, Claimant testified he was around 490 to 500, as did both doctors. Furthermore, the home assessment conducted February 26, 2010 indicated he weighed approximately 510 lbs. However, hospital records from October 2009 indicate Claimant weighed 420.1 pounds and the discharge summary from Green Park Health Care listed a weight of 430 on March 5, 2010.

² Other than the treatment he received for diabetes at St. Anthony's and Green Park, Claimant did not have medical care for diabetes until August 2012 when he started seeing Dr. Ambercrombie, his PCP. Dr. Abercrombi noted in July 2012 that Claimant had "leftover metformin from 2009 that he never took."

In June 2012, Claimant submitted himself to the annual physical conducted by Employer. He did not pass the test because of his high blood pressure and high blood sugar. He also was diagnosed with neuropathy in August 2012, although he testified he began experiencing the symptoms of foot numbness at the end of the 2011-2012 school year. He now has numbness in his hands and feet. He never took the 2012 DOT physical because he could not pass with his high blood pressure, neuropathy and dependence on insulin, which began in August 2012. He also felt he could not jump off the bus or carry the weight the DOT required.

At the time of the hearing, Claimant complained of deep and aching pain in his right leg, mostly when it is cold and wet. The right leg is painful with weight bearing, and limits his endurance. He has trouble going up stairs, but experiences more pain going down, and usually takes stairs one step at a time. Claimant reports balance issues because of his complaints of left knee pain, in combination with his right leg pain.

With regard to his left knee, he described it as "bone on bone." He said he has locking in the knee and thinks he needs a knee replacement. He said that the more he walks, the more it hurts and swells. He said it is constantly in pain and aches all the time. He said he has arthritis in the knee. He said it also causes balance problems.

He also described problems due to his weight. He said his weight causes endurance problems and he "runs out of energy." He said his endurance now is limited to walking approximately 60 feet and it has gotten worse recently. He estimated he could stand at one time from 90 seconds to two minutes. He self-limits his lifting to 10 pounds.

Claimant described his typical day. He takes 14 different prescription medications, mostly for diabetes, high blood pressure, and cholesterol. Around the house, Claimant limits housework to dishes, vacuuming and laundry, and some light cooking, which he sits down to perform. He uses a special tool to help him get dressed and put on his socks. He generally spends the day watching TV and reading, although he gets out once or twice per week to go to doctors, the bank or the food pantry. Claimant supports himself through Social Security Disability benefits, which were awarded retroactive to May 2012, and food stamps. He gets help from friends and family members. Claimant no longer enjoys hobbies such as fishing, attending sporting events and going to rock concerts.

Dr. David Volarich examined Claimant, issued a report, and testified by deposition. He diagnosed right tibia, fibula fracture status post placement of a tibial intramedullary nail with retained hardware. He also diagnosed left knee pain syndrome secondary to abnormal weight bearing. The left knee pain was due to patellofemoral syndrome from abnormal weight bearing. He did not find anything wrong with the right knee (no crepitus or evidence of derangement), while the left knee had significant crepitus. The work accident of October 26, 2009 was the prevailing factor in causing diagnoses. The disability ratings he assigned were 45% PPD of the right lower extremity due to the fracture, and 35% PPD of the left knee due to the patellofemoral syndrome.

The only preexisting disability Dr. Volarich found was morbid obesity, which has not changed significantly since the accident. He rated the disability at 35% PPD of the body as a whole due to difficulties with agility, endurance and shortness of breath, and found the obesity to be a hindrance to employment. Dr. Volarich recommended Claimant pursue a weight loss

program and consider bariatric surgery, because weight loss would have a positive impact on several of his problems. Furthermore, Dr. Voalrich acknowledged there is no medical reason Claimant could not lose weight, and because of the possibility he could lose weight with bariatric surgery, his obesity is not permanent. He further found the combination of injuries to be greater than the simple sum.

Regarding his diabetes and its combination with the work injury, Dr. Volarich specifically testified, "I don't think he really had a problem from the diabetes." Dr. Volarich testified it got worse after Claimant was released at MMI from the work injury, specifically in August of 2012. He did not rate diabetes as a preexisting condition or disability, and did not relate it or his obesity in whole or in part to his work injury.

Dr. Volarich did not make the assessment that Claimant was permanently and totally disabled. Furthermore, he did not testify in his deposition to any need for future medical treatment related to the work injury. In his report, Dr. Volarich wrote surgery is not indicated as of the exam, although if the hardware were to fail or otherwise become painful, the need to perform additional surgeries could arise. "In order to maintain his current state," Dr. Volarich recommended ongoing conservative care for his pain syndrome³. The final recommendation was for Claimant to follow up with his personal physician for any additional medical care required in the future, including consideration of a weight loss program and possible bariatric surgery.

Dr. Robert Medler, the treating surgeon, testified on Employer's behalf. Dr. Medler described how he surgically repaired Claimant's leg, followed him postoperatively in the hospital while Claimant was concurrently treated for high blood pressure and previously undiagnosed diabetes, and discharged Claimant to a rehab center because he lacked the independence to go home. Claimant demonstrated progress during follow up office visits, although he still had right leg pain, and in July 2010, also complained of left knee pain. Dr. Medler did not think the left knee pain was related to the right leg injury because he did not make left knee complaints immediately after the accident. By September 2010, Claimant reported he had passed his DOT physical and was back at work.

As of November 12, 2010, Dr. Medler placed Claimant at MMI with a diagnosis of healed tibia fracture. His incisions were well healed, his x-rays looked 95% healed, and there was no significant swelling. However, Claimant did make complaints of daily pain. Dr. Medler assigned PPD of 5% of the leg below the knee, and felt with a reasonable degree of medical certainty that no additional medical treatment was necessary.

Regarding the left knee complaints, Dr. Medler did not think Claimant's abnormal weight bearing from favoring his right leg would cause internal derangement or patellofemoral syndrome. On cross exam, he conceded Claimant could be experiencing some pain from putting more weight on his left leg while recovering from the fracture in the right, but such complaints get "sorted...out" with the resumption of normal gait. There is no damage to the joint from extra walking.

³“ Including but not limited to narcotics and non-narcotic medications (NSAID's), muscle relaxants, physical therapy, and similar treatments as directed by the current standard of medical practice for symptomatic relief of his complaints.” He also recommended Glucosamine supplements.

ADDITIONAL FINDINGS OF FACT AND RULINGS OF LAW

1. Medical Causation Regarding Left Knee Complaints

Under Missouri law, it is well-settled that the claimant bears the burden of proving all the essential elements of a workers' compensation claim, including the causal connection between the accident and the injury. *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo.App. W.D.2002)⁴; *see also Davies v. Carter Carburetor*, 429 S.W.2d 738, 749 (Mo.1968). While the claimant is not required to prove the elements of his claim on the basis of "absolute certainty," he must at least establish the existence of those elements by "reasonable probability." *Sanderson v. Porta-Fab Corp.*, 989 S.W.2d 599, 603 (Mo.App. E.D.1999); *see also Shelton v. City of Springfield*, 130 S.W.3d 30, 38 (Mo.App. S.D. 2004).

In cases involving medical causation, which is not within the common knowledge or experience, the claimant must present medical or scientific evidence showing the cause and effect relationship between the complained-of condition and the asserted cause. *McGrath v. Satellite Sprinkler Systems, Inc.* 877 S.W.2d 704, 708 (Mo.App. E.D. 1994). Where the opinions of medical experts are in conflict, the fact-finding body determines whose opinion is the most credible. *Hawkins v. Emerson Electric Co.*, 676 S.W.2d 872, 877 (Mo. App. 1984). Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *George v. Shop 'N Save Warehouse Foods Inc.*, 855 S.W.2d 460, 462 (Mo. App. E.D. 1993); *Hutchinson v. Tri-State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo. App. 1986). *See also, Kelley v. Banta & Stude Construction Co., Inc.*, 1 S.W.3d 43, 48 (Mo.App. E.D. 1999).

Where an employee sustains an injury arising out of and in the course of his employment, every natural consequence that flows from the injury, including a distinct disability in another area of the body, is compensable as a direct and natural result of the primary or original injury. *Cahall v. Riddle Trucking, Inc.*, 956 S.W.2d 315, 322 (Mo. Ct. App. 1997), citing *Lahue v. Missouri State Treasurer*, 820 S.W.2d 561, 563[2] (Mo.App. W.D.1991).

While causation of the right lower extremity injury is not at issue, there is conflicting evidence as to whether the work accident was the prevailing factor in causing any permanent disability in the left knee. Specifically, Claimant seeks to recover compensation for left knee patellofemoral/pain syndrome secondary to abnormal weight bearing.

Dr. Volarich explained that due to his right lower extremity injury and favoring his right leg, Claimant developed left knee pain from abnormal weight bearing. The key fact supporting his opinion on causation was that Claimant had no complaints, pain or difficulties with either knee before the accident. On physical exam, Dr. Volarich could find nothing wrong with the right knee – no crepitus or signs of internal derangement (the fracture site was below the knee). The left knee, however, showed significant crepitus behind the kneecap, with mistracking. There were no meniscal or ligament tears or other signs of internal derangement. Had the left knee been related to his morbid obesity or otherwise chronic and preexisting, Dr. Volarich would

⁴ This is one of several cases cited herein that were among those overruled, on an unrelated issue, by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224-32 (Mo. banc 2003). Such cases do not otherwise conflict with *Hampton* and are cited for legal principles unaffected thereby; thus I will not further note *Hampton's* effect thereon.

expect the right knee to show similar findings, which it did not.

On the other hand, Dr. Medler concluded no specific injury to the left knee occurred at the time of the original bus injury because Claimant did not come into the emergency room complaining of leg and knee pain, and the symptoms arose several months after the date of injury. In so concluding, he did not consider the principle that every natural consequence which flows from the injury, including a distinct disability in another area of the body, is compensable as a direct and natural result of the primary or original injury (See *Cahall v. Riddle Trucking, supra*). He did not examine the left knee or take any steps to diagnose the ailment. Dr. Medler agreed the left knee pain could be a secondary problem related to recovery from the right leg injury, but while overuse problems can cause pain, it does not cause internal derangement, and the pain resolves upon resumption of normal gait. He did not think abnormal weight bearing could cause patellofemoral syndrome and he did not think Claimant's pain was disabling.

While the experts have comparable experience and training, I find Dr. Volarich's opinion to be more persuasive in this case because he examined the knee, and carefully considered the facts before reaching his conclusion. He gave a reasonable explanation for his diagnosis and cited objective evidence in support (unequal findings bilaterally denotes a cause other than obesity or other chronic condition). Dr. Medler did not even examine the left knee, and failed to consider that a secondary cause (abnormal gait while rehabbing one extremity can cause pain in the opposite extremity) can be causally related to a work injury. Furthermore, Claimant's knee has not returned to its asymptomatic state as Dr. Medler predicted. I am persuaded by Dr. Volarich's opinion that the work injury and associated treatment is the prevailing factor in causing Claimant's left knee pain from patellofemoral syndrome.

2. Future Medical Care.

The Missouri Workers' Compensation Act includes an allowance for future medical treatment for an injured worker in § 287.140.1, which provides in part:

In addition to all other compensation ..., the employee shall receive and the employer shall provide such medical ... treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

The employee has the burden of establishing all of the statutory elements of a compensable workers' compensation claim. *Fitzwater v. Dep't of Pub. Safety*, 198 S.W.3d 623, 627-28 (Mo. Ct. App. 2006)(citations omitted). In order to receive future medical benefits under the Act, a claimant is not required to present "conclusive evidence" of the need for future medical treatment. *Id.* Rather, he need only demonstrate a "reasonable probability" that future medical treatment is needed by reason of his work-related injury. *Id.* The employee also must establish that the future medical care is "reasonably required" to "cure and relieve from the effects of the injury." § 287.140.1. The claimant must show that the need for the care requested "flow[s] from the accident." *Id.*

The only expert evidence presented by Claimant regarding future medical is in the report of Dr. Volarich. He did not testify as to any ongoing need for treatment in his deposition. In his

report, he acknowledged future circumstances could lead to the need to remove the hardware. Although he recommended conservative treatment to maintain his current state and provide symptomatic relief, he also specifically mentioned that Claimant was to “follow up with his personal physician for any additional medical care required in the future.” The treating physician, Dr. Medler, released Claimant from care and did not recommend any future medical treatment. He thought the remaining hardware could stay since it is not causing any discomfort.

At hearing, Claimant mentioned that his left knee was “bone on bone,” sometimes locked up, and needed to be replaced. There is no other evidence in the record to suggest the need for a knee replacement or any additional surgery to the knee related to the work accident, and Claimant’s lay testimony is not sufficient or competent to support an award of future medical.

Based on the substantial and competent evidence, I find it reasonable to require Employer to provide future medical care to remove the hardware should it be necessary. Although such care is not currently recommended, based on the testimony of Dr. Volarich, I find it reasonably probable such care could be required in the future. If so, it would flow from the accident and cure and relieve from the effects of the injury. Other than future treatment related to the hardware, I find there is insufficient evidence to support an award of additional medical treatment. Dr. Volarich’s report, not his testimony, suggests conservative treatment “to maintain his current state and provide symptomatic relief” but does not establish that such treatment flows from the accident. To the contrary, he directs Claimant to follow up with his personal doctor to obtain any additional medical care required in the future. Other than treatment to address future problems with the hardware, Claimant has failed to meet his burden of proving Employer is responsible for future medical care.

3. Permanent Disability

An award of disability is intended to include the employee’s permanent limitations resulting from a work injury and any restrictions that his limitations may impose on employment opportunities. *Phelps v. Jeff Work Construction Co.*, 803 S.W.2d 641 (Mo. App. 1991). The administrative law judge has discretion as to the amount of permanent partial disability awarded and how it is calculated. *Rana v. Land Star, TLC*, 46 S.W.3d 614, 626 (Mo. App. W.D. 2001).

Based on the substantial and competent evidence, including Claimant’s testimony, the medical records, and the opinions of the medical experts, I find Claimant suffered permanent partial disability of 35% of the right lower extremity at the level of the knee, and 15% permanent partial disability of the left lower extremity at the level of the knee. I further exercise my discretion and award a multiplicity factor of 12 ½%. A multiplicity factor is “a special or additional allowance for cumulative disabilities resulting from a multiplicity of injuries.” *Eagle v. City of St. James*, 669S.W.2d 36, 42 (Mo.App.1984). The commission has the discretion to include a multiplicity factor in assessing cumulative disabilities but is not required to do so. *Chambliss v. Lutheran Medical Center*, 822 S.W.2d 926, 932 (Mo.App.1991). Whether the injuries warrant the use of a multiplicity factor in assessing disability is a question of fact. *Sharp v. New Mac Elec. Co-op.*, 92 S.W.3d 351, 354 (Mo. Ct. App. 2003).

The liability of Employer for permanent disability is calculated as follows: (.35 x 160 weeks) = (.15 x 160 weeks) = 56 + 24 = 80 weeks x 1.125 (loading factor) = 90 weeks of PPD x rate of \$350.00 = \$31,500.00.

4. Liability of the Second Injury Fund.

Claimant seeks to recover permanent total disability from the Second Injury Fund in addition to the compensation due from Employer. To receive benefits from both the employer and the Fund, an employee must have had a prior, permanent disability serious enough to constitute a hindrance or obstacle to employment. *See* Section 287.220; *Null v. New Haven Care Ctr., Inc.*, 425 S.W.3d 172, 178 (Mo. Ct. App. 2014). To trigger Fund liability, Claimant was required to demonstrate that his preexisting disability “represented an obstacle or hindrance to his ability to work.” *Second Injury Fund v. Steck*, 341S.W.3d 869, 873 (Mo.App. W.D.2011) as cited in *Pursley v. Christian Hosp. Ne./Nw.*, 355 S.W.3d 508, 515 (Mo. Ct. App. 2011). The Fund is liable where a claimant establishes either that he is permanently and totally disabled due to the combination of his present compensable injury and his preexisting partial disability or the combination of his present compensable injury and his preexisting permanent partial disabilities create a greater overall disability than the sum of the disabilities independently. *Lewis v. Treasurer of State*, ED100657, 2014 WL 2928017 (Mo. Ct. App. June 30, 2014) citing *Highley v. Von Weise Gear*, 247 S.W.3d 52, 55 (Mo.App.E.D.2008); *Elrod v. Treas. of Missouri as Custodian of Second Injury Fund*, 138 S.W.3d 714, 717–18 (Mo. banc 2004).

To be clear, the only preexisting disability is morbid obesity – that is the only condition identified and rated by Claimant’s expert. Already obese at the time of the accident, Claimant did not gain a more than a few pounds in the two subsequent years, so the nature and extent of his morbid obesity was essentially the same before and after the primary injury. Although Claimant downplayed any work limitations from his size, Dr. Volarich gave some credible examples of how the reduced movement, agility, speed and shortness of breath can hinder job performance. However, Dr. Volarich recommended weight loss and admitted his obesity is not permanent.

There is no evidence to support a finding that Claimant’s diabetes was a preexisting disability serious enough to constitute a hindrance or obstacle to employment. Claimant did not learn he even had diabetes until after the accident, and despite a diagnosis of diabetes in 2009, he did not actively treat for the disease until 2012. Furthermore, there is no evidence to suggest that the unknown, undiagnosed condition of diabetes caused Claimant any disability as of the time of the last accident. Dr. Volarich did not identify diabetes as a preexisting disability, did not provide a rating, specifically testified it was not a problem with physicals until 2012, and stated it did not worsen until 2012.

More importantly, there is absolutely no evidence to suggest the preexisting disability was “morbid obesity and associated diseases, including uncontrolled diabetes,” as asserted by Claimant in his proposed award.⁵ They are two separate conditions. Furthermore, Dr. Volarich testified he did not provide any disability rating for either obesity or diabetes related to the primary injury. I find no evidence to support Claimant’s theory that the diabetes was worsened by the primary accident.

The record is devoid of any expert medical or vocational evidence supporting a finding of permanent total disability. Claimant’s own expert, Dr. Volarich, despite his awareness of Claimant’s SSD award, did not make the assessment that Claimant was permanently and totally disabled, and did not refer him to a vocational expert. Claimant did not submit the testimony or

⁵ Claimant included this factually-unsupported statement in the paragraph of his proposed award listing the stipulations of the parties, which is misleading at best.

report of a vocational expert. Although facts within the realm of lay understanding can constitute substantial evidence of the nature, cause, and extent of the disability, especially when taken in connection with, or where supported by, some medical evidence, *Treasurer of State-Custodian of Second Injury Fund v. Steck*, 341 S.W.3d 869, 875 (Mo. Ct. App. 2011), I do not find Claimant's testimony on the issue of total disability compelling. Nor is the testimony supported by medical evidence.

Additional evidence establishes Claimant failed to prove a combination PTD claim. I find compelling the fact that after he recovered from his primary injury, Claimant returned to work, passed annual physicals and a stringent DOT test, and was gainfully employed for two years. When Claimant finally stopped working in 2012, it was because his diabetes progressed, he had started insulin, and therefore could not pass the DOT physical. In addition, he had started to experience numbness in his feet due to diabetes, which also prevented him from safely operating the bus. Although an award of Social Security Disability is determined under different standards than workers' compensation, it is relevant to consider the date of disability of Claimant's SSD award – the fact his benefits began on May 24, 2012, over 18 months after the work accident, suggest his disability is due to more than just the combination of the primary and preexisting disabilities.

Despite not meeting his burden of proof regarding the PTD claim, Claimant can still recover from the Second Injury Fund if he proves the combination of his present compensable injury and his preexisting permanent partial disabilities create a greater overall disability than the sum of the disabilities independently. On his partial disability claim, Claimant has met his burden. I find Claimant has preexisting permanent partial disability equal to 25% of the body as a whole. The combination of his primary lower extremity injuries and his preexisting morbid obesity is greater than the sum of the individual disabilities. Dr. Volarich explained how the extreme forces of his 500 pound frame increase his pain complaints, cause gait issues that contribute to the left knee disability. I am persuaded by Dr. Volarich's opinion that the combination of the lower extremity disabilities and morbid obesity disabilities create a greater overall disability than the sum of the disabilities independently.

Recent cases have established that preexisting disabilities that have not yet reached MMI (become permanent) at the time of a work-related injury cannot be considered in calculating Fund benefits. *Lewis v. Treasurer of State*, ED100657, 2014 WL 2928017 (Mo. Ct. App. June 30, 2014) citations omitted. Although Dr. Volarich's admitted that the obesity is not "permanent" because he could undergo successful weight loss surgery, Dr. Volarich also provided a PPD rating for the obesity. I do not think speculation Claimant could undergo a major surgery to drastically alter his longstanding body mass should undermine his otherwise valid Fund claim.

Section 287.220 RSMo. sets forth the statutory authority for the determination of Second Injury Fund liability. Assuming the employee is entitled to receive compensation on the basis of a combined disability, the Administrative Law Judge is charged with making three determinations: 1) the degree of disability attributable to all injuries or conditions existing at the time the last injury was sustained; 2) the degree of disability which would have resulted from the last injury considered alone and of itself; and 3) the degree of disability which existed prior to the last injury. The sum of the second and third determinations is then subtracted from the first, with the balance representing the liability of the Second Injury Fund.

I find the degree of Claimant's disability that is attributable to all injuries existing at the time of the last injury is equivalent to 216 weeks of disability. The sum of the primary injury/disability (80 weeks) and the preexisting disability (100 weeks) is 180 weeks. The Second Injury Fund is liable for 36 weeks of PPD compensation (216 – 180 weeks = 36 weeks).

CONCLUSION

Claimant shall recover permanent partial disability benefits and future medical benefits as provided herein. This Award is subject to a lien of 25% in favor of attorney Keefe for legal services rendered.

Made by: _____
KARLA OGRODNIK BORESI
Administrative Law Judge
Division of Workers' Compensation