Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 08-045994

Employee: Richard D. Sanders

Employer: Advanced Logistics, LLC (Settled)

Insurer: American Home Assurance Company
c/o Chartis Claims, Inc. (Settled)

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by § 287.480 RSMo. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the April 30, 2012, award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

The parties stipulate that we modify the administrative law judge's award by the inclusion of the following language:

> Employee's wife, Judith Sanders, is entitled to receive Employee's Permanent Total Disability benefits in the event she remains married to Employee and Employee predeceases her while they remain married. Her entitlement to Permanent Total Disability benefits shall cease upon her death or remarriage.

We accept the stipulation and we modify the award accordingly.

We approve and affirm the administrative law judge's allowance of attorney's fee as being fair and reasonable.

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

The award and decision of Administrative Law Judge Maureen Tilley, issued April 30, 2012, is attached and incorporated by this reference except to the extent modified herein.

Given at Jefferson City, State of Missouri, this 31st day of October 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T
Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee:	Richard D. Sanders	Injury No.: 08-045994
Employer:	Advanced Logistics, LLC – (settled)	
Insurer:	American Home Assurance Company c/o Chartis Claims, Inc. – (settled)	
Additional Party:	Missouri State Treasurer as Custodian of the Second Injury Fund	
Hearing Date:	February 1, 2012	Checked by: MT/kb

SUMMARY OF FINDINGS

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? June 3, 2008.

5. State location where accident occurred or occupational disease contracted: Jackson, Cape Girardeau County, Missouri.

6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.

7. Did employer receive proper notice? Yes.

8. Did accident or occupational disease arise out of and in the course of the employment? Yes.

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 happened or occupational disease contracted: The employee was struck and twisted by a forklift causing injury to his low back and right lower extremity.

12. Did accident or occupational disease cause death? No.

13. Parts of body injured by accident or occupational disease: Right Lower Extremity, Low Back and Body as a Whole.

14. Nature and extent of any permanent disability: The employee settled his claim with the Employer by stipulation for compromise; settlement based on the following nature and extent of permanent partial disabilities: 25% of the Right Knee and 2% of the Body as a whole, referable to the back.

15. Compensation paid-to date for temporary total disability: $3,733.36.

16. Value necessary medical aid paid to date by employer-insurer? $10,320.17.

17. Value necessary medical aid not furnished by employer-insurer? None.

18. Employee's average weekly wage: $700.00

19. Weekly compensation rate: $466.67 for permanent total disability and $389.04 for permanent partial disability.

20. Method wages computed: By Agreement.

21. Amount of compensation payable: See Award.

22. Second Injury Fund liability: See Award.

23. Future Requirements Awarded: See Award.

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: D. Matthew Edwards.

FINDINGS OF FACT AND RULINGS OF LAW:

On February 1, 2012, Richard D. Sanders, the employee, appeared in person and by his attorney, D. Matthew Edwards, for a final award hearing. The employer/insurer was not present as the employee had settled the primary claim with the employer/insurer by stipulated settlement. The Missouri State Treasurer as Custodian of the Second Injury Fund was represented at the Hearing by Assistant Attorney General Jon Lintner. The Court took administrative notice of all of the records contained within the files of the Division of Workers' Compensation. The record was closed on February 1, 2012 and the parties filed their briefs on the due date of March 2, 2012. At the time of the Hearing, the parties agreed on certain undisputed facts and identified the

issues that were in dispute. These undisputed facts and issues, together with a Summary of the Evidence and the Findings of Fact and Rulings of Law, are set forth below as follows:

UNDISPUTED FACTS:

1. Covered Employer - On or about June 3, 2008, Advanced Logistics, LLC was operating under and subject to the provisions of the Missouri Workers' Compensation Act and their liability was fully insured by American Home Assurance Company c/o Chartis Claims, Inc.
2. Covered Employee - On or about June 3, 2008, Richard D. Sanders was an employee of Advanced Logistics, LLC and was working under the Missouri Workers' Compensation Act.
3. Accident – On or about June 3, 2008, the employee sustained an accident arising out of and in the course of his employment.
4. Notice - Employer had notice of Employee's accident.
5. Statute of Limitations - Employee's claim was filed within the time allowed by law.
6. Average Weekly Wage and Rate – The employee's Average Weekly Wage is $700.00 per week. The employee's rate for permanent total disability is $466.67 per week and the employee's rate for permanent partial disability is $389.04.
7. Medical Causation – The employee's injuries were medically causally related to the work accident.
8. Medical Aid Furnished - Employer furnished $10,320.17 in medical aid to Employee.
9. Temporary Disability Paid by employer/insurer - Employer paid $3,733.36 in temporary total disability benefits to Employee for a period of 8 weeks from June 3, 2008 through July 29, 2008.
10. Maximum Medical Improvement – The employee reached maximum medical improvement for his work related injuries on February 18, 2010.

ISSUES:

1. Second Injury Fund Liability – Whether the Second Injury Fund is liable for either permanent partial or permanent total disability.
2. Dependency of Employee's spouse and applicability of *Schoemel* decision – Whether the employee's spouse, Judith A. Sanders, is a dependent within the meaning of Mo. Rev. Stat. §287.240 and whether Judith A. Sanders would be entitled to Permanent Total Disability Benefits in the event that Judith A. Sanders were to survive the employee?

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee's Exhibits:

A. Copy of Approved Stipulation for Compromise Settlement for Injury No. 08-045994.
B. Medical Records from St. Francis Medical Center.
C. Medical Records from Heartland Spine.
D. Medical Records from Orthopaedic Associates – Dr. Michael Trueblood.
E. Medical Records from Southeast Missouri Hospital.
F. Medical Records from Dr. Craig Aubuchon.
G. Medical Records from Mid-America Rehabilitation.
H. Medical Records from Select Physical Therapy.
I. Photographs.
J. Deposition of Dr. Annamaria Guidos.
K. Deposition of Dr. Dwight Woiteshek.
L. Deposition of Dr. Jeff Magrowski.

Second Injury Fund Exhibits:

None

TESTIMONY:

Employee's Witnesses:

- Richard D. Sanders, Injured Employee
- Judith A. Sanders, Injured Employee's Spouse

Second Injury Fund's Witnesses:

None

APPLICABLE LAW:

- **Burden of Proof** - An Employee has the burden of proving all the essential elements of a claim for workers' compensation benefits by reasonable probability, not absolute certainty. *McDermott v. City of Northwoods Police Dep't,* 103 S.W.3d 134, 138 (Mo.App. E.D. 2002).
- **Second Injury Fund Liability for Permanent Partial Disability –** Mo. Rev. Stat. §287.220.1 sets forth the following test for finding whether the Second Injury Fund is liable for permanent partial disability benefits:
  If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity

injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for.

- **Permanent Total Disability –** Mo. Rev. Stat. §287.020.6 (2005) states that the term "total disability" means an inability to return to any employment and not merely mean the inability to return to the employment in which the employee was engaged at the time of the accident. The phrase "the inability to return to any employment" has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration, in the manner that such duties are customarily performed by the average person engaged in such employment. *Kowalski v. M-G Metals and Sales, Inc.,* 631 S.W.2d 919, 922 (Mo. App. S.D. 1982). The test for permanent total disability is given the employee's situation and condition, whether he is competent to compete in the open labor market. *Reiner v. Treasurer of State of Mo.,* 837 S.W.2d 363, 367 (Mo.App.E.D. 1992). Total disability means the "inability to return to any reasonable or normal employment." *Brown v. Treasurer of Mo.,* 795 S.W.2d 479, 483 (Mo.App.E.D. 1990). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Id.* Finding that an employee might be able to "sit on the street and sell peanuts, pencils and shoe strings" does not make him employable in the open labor market. *Maddux v. Kansas City Public Service Co.,* 111 S.W.2d 208, 214 (Mo. App. K.C. 1937). The key question is whether any employer in the usual course of business would reasonably be expected to employ the employee in his present physical condition. *Reiner, 837 S.W.2d at 367. See also Kowalski, 631 S.W.2d at 922.*

- **Second Injury Fund Liability for Permanent Total Disability -** Mo. Rev. Stat. §287.220.1 sets forth the following test for finding whether the Second Injury Fund is liable for permanent total disability benefits:
  If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury or a major extremity injury shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the "Second Injury Fund."

- ***Schoemel* Dependency –** Mo. Rev. Stat. §287.240.4(b) states that a wife is conclusively presumed to be totally dependent for support upon a husband with whom she lives or who is legally liable for her support. In *Schoemel v. Treasurer of State,* 217 S.W.3d 900, 902 (Mo. 2007), the Court stated,
  Section 287.240.4, which applies to the entire workers' compensation chapter, states that "[t]he word '***dependent***' as used in this chapter shall be construed to mean a relative by blood or marriage of a deceased employee, *who is actually dependent for support*, whole or part, *upon his or her wages* ***at the time of the injury***." *Emphasis added.* As such, any "dependent" would have to be born and dependent at the time of the injury.

The holding in *Schoemel* was subsequently abrogated with the passage of Mo. Rev. Stat. §287.230.2, which was effective June 26, 2008. However, in *Bennett v. Treasurer of Missouri*, 271 S.W.3d 49, 53 (Mo. App. W.D. 2008), the Court recognized that "recovery under *Schoemel* is limited to claims for permanent total disability benefits that were pending between January 9, 2007, the date of the *Schoemel* decision and June 26, 2008." Pending means no final decision has yet been rendered. *Tilley v. USF Holland Incorporated*, ED94431 (Mo. App. E.D. 09-21-2010).

SUMMARY OF THE EVIDENCE

Testimony of Richard D. Sanders

Richard D. Sanders (Employee) testified that he was born on May 16, 1952 and is currently 59 years old. The employee resides in Oak Ridge, Missouri with his wife of 42 years, Judith A. Sanders. The employee stated that he and his wife are dependent upon each other for support and have lived together continuously throughout their marriage.

Educational and Work History

The employee stated that he graduated from Chaffee High School in 1970 and subsequently obtained a 2 year associates degree from a community college. The employee stated that he has not received any additional schooling.

In the early to mid 1970s, the employee began working for General Pest Control as an exterminator. The employee described his work as entailing lifting tanks of chemicals, spraying around businesses and homes for pests and weed control along with selling services to customers. The employee stated that he worked for General Pest Control for about 16 years.

Around 1989, the employee began working at Dana Corporation in Cape Girardeau. The employee described Dana as an automobile components manufacturer. The employee stated that he started out working on the factory line, but was eventually promoted to shift coordinator supervising and training line workers along with performing maintenance work. The employee recalled working for Dana for about 12 years and he left as the factory was downsizing.

Prior Low Back Injury

In July 1999, the employee testified that he was working on his Ford Bronco at home changing a gas tank when he experienced an extreme onset of low back pain. The employee stated that he was working under the vehicle and could not get up. The pain was mainly concentrated in the left side of his low back shooting down his left hip and left leg.

The employee stated that he sought medical attention from his primary care physician, Dr. Thomas. The employee reported that Dr. Thomas treated his low back, left hip and left leg pain with medication, a series of steroid shots and physical therapy. His pain persisted and eventually Dr. Thomas ordered an MRI. Based on the MRI results, the employee stated that he was referred to Dr. Kee Park for further treatment.

In March 2000, the employee stated that Dr. Park proceeded with low back surgery. The employee stated that it was his understanding that Dr. Park removed two low back disks, inserted four spacers, attached two rods down each side of his spine, removed bone from his hip and packed the bone around the rods. Following the surgery, the employee stated that his left hip and leg pain improved, but he still had pain across his lower back and it felt like a brick was implanted in the middle of his low back. The employee testified that he still feels the “brick” in his low back to this day. The employee stated that he was off work from Dana for about three months following the surgery.

At the time of his release, the employee recalled that Dr. Park provided restrictions of avoiding twisting movements such as loading a sack of feed or swinging a shovel and Dr. Park told him that his back would let him know if he was doing too much. The employee took this to mean that when his back started hurting to stop what he was doing.

The employee stated that following his release in 2000 that he followed Dr. Park's advice and avoided twisting as much as possible. The employee also stated that bending was "one heck of a problem" and his back would let him know if he tried to bend, lift or do too much.

Following Dr. Park's release, the employee sought further medical care for his low back from Dr. Thomas. The employee stated that Dr. Thomas monitored his low back pain and prescribed a home exercise program which included walking on a treadmill. The employee usually tried to walk on the treadmill four to six times a week, especially before work, because it helped strengthen and loosen his low back.

The employee also found that resting in a recliner was the best relief for his ongoing low back pain and that some nights he would come home from work and stay there for the rest of the evening or get up from bed and sleep in the recliner overnight. Additionally, the employee stated that he took muscle relaxers and Ibuprofen for the pain. If his back pain would not improve, the employee stated that he would use a vacation or sick day from work to allow for recovery of his low back pain.

The low back surgery also changed his hobbies away from work. The employee stated that he sold his motorcycle and mountain bike. Before his back surgery, he enjoyed restoring old cars in his shop. Afterwards, he gave up his hobby because of the bending required to work on cars.

Work at Advanced Logistics, LLC

Around February 2002, the employee began working for Advanced Logistics, LLC (Advanced) in Jackson. The employee described Advanced as a warehouse and shipping agent for the Proctor & Gamble factory in Jackson. The employee stated that he initially started as a fork lift driver, operating a fork lift to load and unload trailers. Eventually, he was promoted to a coordinator which entailed supervising forklift and truck drivers in the warehouse and drop lot.

The employee stated that there were not many physical demands working for Advanced apart from walking or sitting in a straight back chair. The employee stated that on rare occasions the heaviest item that he would lift with assistance would be a manual battery changer, which weighed about 100 pounds, but this would only be needed if the battery changing machine was down. Before June 3, 2008, the employee reported earning a salary of $700 per week.

Leading up to June 3, 2008, the employee testified that he was still having low back pain. He stated that he was using a lumbar cushion at work and home to allow him to sit in a straight backed chair. He was still following Dr. Thomas' recommendation of walking at home on the treadmill as much as possible to keep his back in shape and his pain diminished. He would also occasionally take a sick day or vacation day as needed if his back was bothering him. He would use his recliner if his back was bothering him to rest or sleep.

Work Injury of June 3, 2008

On June 3, 2008, the employee stated that he was walking in the Advanced warehouse when a forklift struck him in the back, drove over him and twisted him around. The employee described that his right foot and leg were twisted in such a way that the forklift had to drive forward over him again to untwist the leg. After he was freed from the forklift, he could not get up and his right leg began swelling. An ambulance was called, and the employee was taken to the Southeast Missouri Hospital emergency room.

Medical Treatment following June 3, 2008 injury

At Southeast Hospital, the employee recalled that his right leg was wrapped and braced and he was sent to Dr. Trueblood for further medical care. When the employee saw Dr. Trueblood, the employee stated that he was told his heel was broken and that he had suffered a friction burn on his calf from being run over. The employee's right leg was casted, he was placed in a walking boot, and he was prescribed silvadene for the burn. The employee identified the photographs of the burn on his leg to the court. The employee believed that he was placed off work by Dr. Trueblood for about 8 weeks and was subsequently told to return to work.

When the employee returned to work, he was still experiencing many problems with his right leg. He still had a large open sore. His right leg was swelling especially if he stood or walked more than a few minutes. His right heel was completely numb and it felt like he was walking on a rolled up sock or a marshmallow. The employee tried to accommodate the problem at work by getting off his feet and elevating his right leg. The employee was also experiencing more severe low back pain, which he also tried to relieve by reclining at home and at work. The employee stated that he returned to Dr. Trueblood in October 2008 and told the doctor about his ongoing problems. It was the understanding of the employee from Dr. Trueblood that all of his problems in his right leg, foot and heel would take time to improve. When asked how much time, it was the understanding of the employee from Dr. Trueblood that it would take a year from the accident to heal.

The employee again returned to work but continued to have the same problems as before with the swelling and numbness. Additionally, the employee stated that his right ankle felt like it was permanently sprained and it began changing the way he walked. This in turn made his back pain worse. The employee stated that because he was a supervisor, he would get off his feet and recline at work for his back and leg problems. The employee also reported seeing his primary care doctor for his ongoing back pain.

In November 2008, Advanced lost their contract with Proctor & Gamble and a new company took over the facility. The employee stated that all of the former Advanced employees transitioned over to the new employer. However, the new company would not allow the employee to recline during his work shift, and by the end of the day the employee could barely walk at all. Because the employee knew he could not be on his feet due to his back and leg problems, he asked for and was granted a demotion to a forklift driver. This job meant

significantly less pay and fewer hours, but allowed the employee to sit on a forklift most of the day.

Despite having less physical demands and fewer hours, the employee was still experiencing continued back and leg symptoms, which caused him to miss work. The employee said that his right leg was swelling so bad that his wife had to split his socks to get them on his leg. Also, his low back pain was more intense because he could not exercise anymore, which included using the treadmill.

The employee stated that he returned to Dr. Trueblood in June 2009, which was a year following his accident, reporting that his ongoing symptoms had not diminished with time. This time Dr. Trueblood obtained an MRI of his right leg and prescribed compression stockings to wear. It was the understanding of the employee that the need for compression stockings was due to artery damage in his right leg because fluids were building up and causing his leg to swell. The employee stated that he discussed his ongoing back problems with Dr. Trueblood, but was told that he was only being seen by him for his right foot and ankle.

Eventually, the employee stated that he was referred to Dr. Tolentino for his ongoing back pain. The employee stated that Dr. Tolentino placed him off work and referred him to physical therapy for his back. The physical therapy helped a little, but his discomfort was still intense. The employee was then referred to Dr. Cleaver for injections and he received a TENS unit, which again helped a little but the back pain was still there.

Following the injections, Dr. Tolentino referred Employee to Dr. Guidos for further treatment. The employee recalled that Dr. Guidos found that his right leg was shorter than the left and he was told that he had a joint dysfunction in his back. The employee was prescribed a shoe lift and sent again to physical therapy. The employee stated that the therapist had to limit the treatment because of his leg injury and prior back surgery. He was eventually released by Dr. Guidos with restrictions of no repetitive bending, twisting, stooping, no lifting more than 30 lbs and standing and walking as tolerated.

During his treatment with Drs. Tolentino and Guidos, the employee asked for a second opinion regarding his right leg and he was referred to Dr. Aubuchon in St. Louis. Dr. Aubuchon provided an injection and physical therapy for his right leg. The employee said that injection helped somewhat, but the therapy only irritated his right foot and the therapy was ended. The employee stated that he was told he would have to wear compression stockings for the rest of his life and he was given restrictions of no climbing ladders or walking on any uneven surfaces.

The employee stated in August 2009 his company placed him on disability leave and he was never able to return. When the employee was released by Dr. Aubuchon in February 2010, he was terminated because he could no longer physically work due to his back and leg problems. The employee stated that he was approved for Social Security and he began receiving payments around the time he was released by Dr. Aubuchon.

Since he was released, the employee stated that he continues to see his primary care physician for his ongoing pain in his right leg and low back. The employee stated that he is prescribed Lortab and also uses over-the-counter medication including Aleve and Ibuprofen to help with his symptoms.

Current Complaints and Functioning

The employee reported that he still continues to experience low back pain going down in his right groin and leg. The employee described the pain as sharp occasionally and otherwise a dull ache all the time. His back pain worsens moving from side to side, turning or doing any bending. Because of his back pain, he spends most of his time in a recliner or in a chair with a lumbar pillow. The employee stated that his back hurts lifting and carrying anything over 10 lbs. The employee thought he could lift more if he did not have to carry the item. Anything he lifts and carries feels like it weighs much more than it actually does. He takes Lortab and over-the-counter medications along with using his TENS unit and he wears a heel lift in his right shoe to help his low back pain.

Regarding his right leg, the employee stated that he continues to wear his compression stockings every day. The employee said that the stockings are uncomfortable and painful on his toes trying to walk. His right heel is still numb and feels like a marshmallow. His right ankle still feels permanently sprained and he tries to keep his right leg elevated during the day. On cross-examination, the employee described that his right leg feels much weaker and he still wears his shoe insert to help his back and allow him to walk better.

The employee stated that he has not worked since 2009 because he cannot physically do a lot and spends most of his time resting due to his back and leg. His only income source is drawing his disability check and using his savings.

His hobbies have also been affected by his back and leg conditions. The employee said he formerly enjoyed hunting. Before June 2008, he deer hunted every year and did a lot of squirrel hunting. In 2011, he tried hunting again, this time by sitting in a recliner in his bedroom.

At home, he cannot ride the lawn tractor or push mow because of his back and leg. He can ride a 4-wheeler with suspension for short durations and mow the flat parts of his yard if his wife or son-in-law hooks it up for him, but he must take frequent breaks. He stated that his wife or son-in-law mows the rest of yard and does the trimming. He can no longer stand and rake, garden or dig. The employee said he can stand for about 5-10 minutes at a time washing dishes, but he cannot sweep or vacuum. His wife does the shopping because walking on hard floors increases his back and leg pain.

The employee also reported problems driving due to his injuries. The numbness in his right foot feels funny and makes it difficult for him to hold down the accelerator. Because of his back pain, he has to be able to stretch his back. The employee stated that he and his family went on car trips, but that stopped following his work injury.

The employee said that his injuries affected his ability to care for his grandchildren. He cannot pick them up anymore or get down and play with them.

In a normal day, the employee stated he usually wakes up around 2 or 3 in the morning and gets in his recliner because of his back and leg pain. He either stays there and tries to sleep or tries to go back to bed after a couple of hours. He usually gets up again around 7, and is lucky to get 4 or 5 hours of restful sleep at night. As far as getting dressed, the employee said that he wears slip on shoes. He spends most of his day in a recliner trying to nap, read or watch TV. He stated that his wife is at home during the day to help him when needed.

The employee believed that there was no job available that would accommodate his back and right leg problems. It was noted that the employee was sweating profusely and looked flush in appearance, which he attributed to his back pain from sitting through the hearing despite using his lumbar cushion.

Testimony of Judith Sanders-

Judith Sanders (Judy) reported that she and her husband have been married and living together for 42 years. She stated that she stopped working several years ago to care for her grandchildren and also now takes care of her husband. Judy observed that her husband can no longer do many of the chores he used to such as yard work. She stated that she does most of the "grunt work" and her son-in-law does the rest. She also relies on her son-in-law to perform most household maintenance or maintain the family vehicle.

Judy reported that her husband cannot sit in straight back chairs. She stated that this has limited him from attending mass and trying to sit in a pew even with his lumbar cushion. She observed that he sits in a recliner during most of the day and at night because he cannot sleep.

Judy believed that her husband's limitations depress him and sometimes make him irritable. She said that he tries to help doing a few dishes or setting the table, but that she does most all of the chores such as laundry, vacuuming or mopping.

Exhibits

<u>Employee's Exhibit A – Stipulation for Compromise Settlement for Injury No. 08-045994</u>

A Stipulation for Compromise Settlement entered between Advanced Logistics, LLC and the employee for the June 3, 2008 injury reflects a settlement based upon an approximate disability 25% of the right knee, 2% of the body as a whole referable to the back and an additional sum for payment of the employee's compression stockings. (Employee's Exhibit A, A1). The Stipulation was approved by the Division on October 20, 2010. *Id.*

Employee's Exhibit B – Medical Records from St. Francis Medical Center

The records show that Employee was diagnosed with L3/L4 and L4/L5 degenerative disk disease in 2000. (Employee's Exhibit B, B2). On March 1, 2000, Dr. Kee Park performed L3/L4 and L4/L5 microdiscectomies with microdissection; L3/L4 and L4/L5 Ray threaded fusion cage insertion times four; L3/L4 and L4/L5 posterior segmental fixation using TSRH 3D system; L3/L4 and L4/L5 posterior intertransverse fusion using autograft; and, preparation of morcellized autograft and harvesting of left iliac crest bone. *Id.* The operative report indicated finding a "focal herniation on the left side at the L4 disk level" along with a "large central disk herniation especially on the left side" which was removed. (Employee's Exhibit B, B3). Bi-lateral pedicle screws 45 mm in length were also drilled into place from the L3 through L5 disk levels. *Id.*

Employee's Exhibit C – Medical Records from Heartland Spine

A letter from Heartland Spine dated August 5, 2009 stated that the employee was last seen by Dr. Kee Park in 2000, but that the Cape Neurological Surgeons records were destroyed in 2008. (Employee's Exhibit C, C2).

Employee's Exhibit D – Medical Records from Orthopaedic Associates – Dr. Michael Trueblood

Employee was seen on June 4, 2008 by Dr. Michael Trueblood after being backed over by a forklift "weighing many 100's of lbs and crushed his leg." (Employee's Exhibit D, D2). Dr. Trueblood diagnosed a crushing injury to the right leg with a nondisplaced fracture of the right fibula shaft and possible fracture of tubercle of calcaneus and noted that there was a great deal of swelling. *Id.* Dr. Trueblood prescribed a well padded short cast and instructed Employee to elevate the leg above his heart. *Id.* At follow-up visits, Dr. Trueblood modified his diagnosis to include "significant contusion heel" and "calf burns." (Employee's Exhibit D, D3-4). The employee was prescribed a walker boot and silvadene for the burns. *Id.*

On October 27, 2008, Employee returned complaining of "recurrent and persistent swelling in the calf" and "diminished skin sensation" from the calf to heel. (Employee's Exhibit D, D6). Dr. Trueblood believed that Employee was "doing well" and that Employee could "expect improvement over time." *Id.* Dr. Trueblood stated that he was "sending Employee on his way" and released him from care. *Id.*

The employee returned to Dr. Trueblood on June 15, 2009 reporting that his symptoms had not improved, and Employee was experiencing discomfort and diminished sensation and that the leg was "uncomfortable particularly at night." (Employee's Exhibit D, D7). An MRI was ordered of the right leg and ankle which showed: subcutaneous edema throughout the mid/distal right calf that likely represent subcutaneous fluid and scarring/fibrosis; low grade strain of the gastrocnemius/soleus at the level of the myotendinous junction; minimally displaced fracture of the fibula along with marrow edema; osteochondral lesion measuring 2 mm within the extreme lateral aspect of the talar dome along with adjacent edema; chronic sprains of the anterior tibiofibular and anterior talofibular ligaments; peroneus longus tendinosis; and Os Trigonum with mild secondary degenerative changes. (Employee's Exhibit D, D13; 15).

Following the MRIs, the employee returned to Dr. Trueblood and Dr. Trueblood believed the "biggest issue is his swelling" for which knee high support stockings were prescribed. (Employee's Exhibit D, D10). The employee returned for follow-up and reported that the stockings helped with the swelling, but were difficult to put on. (Employee's Exhibit D, D11).

On October 28, 2009, the employee returned to Dr. Trueblood and reported that the swelling returns when he takes off his compression stockings. (Employee's Exhibit D, D12). Dr. Trueblood believed that Employee would have to wear the compression stockings on a permanent basis and that Employee would continue to retain the numbness in his heel and the back of his calf. *Id.* Dr. Trueblood believed that Employee was unable to work without the support hose. *Id.*

Employee's Exhibit E – Medical Records from Southeast Missouri Hospital

The Emergency Room record of Southeast Missouri Hospital for June 3, 2008 shows that Employee was seen after he was hit, knocked down, and run over by a lift truck. (Employee's Exhibit E, E3). The employee's right leg was trapped under the truck and the truck had to back over his leg to get him out. *Id.* The emergency room treated the moderate abrasion on the calf with antibiotics, took x-rays which showed a right fibula fracture and referred to Dr. Trueblood for further medical care. *Id.*

Employee's Exhibit F – Medical Records from Dr. Craig Aubuchon

On October 26, 2009, Employee was seen by Dr. Craig Aubuchon for an independent medical evaluation of the right leg injury. (Employee's Exhibit F, F2). Dr. Aubuchon noted that Mr. Sanders suffered a prior right ankle injury 30 years earlier that was treated with a cast and healed uneventfully. *Id.* Dr. Aubuchon recorded that Employee was frustrated with Dr. Trueblood telling him "over and over [the right leg] would get better." *Id.* The employee reported that his right heel was numb and sometimes burning, that the compression stockings help and that he was wearing a wedge in his right shoe due to his prior back fusion. *Id.* On physical exam, Dr. Aubuchon found diffuse scarring on the posterolateral calf, tenderness throughout the ankle, and atrophy in the right leg. (Employee's Exhibit F, F3).

Based on his examination and review of the records and radiology films, Dr. Aubuchon diagnosed Employee with an injury to the sural nerve which innervates the posteromedial aspect of the heel; an osteochondral lesion of the ankle; arthritis of the Os trigonum, which was preexisting, but aggravated by the injury. (Employee's Exhibit F, F4). Dr. Aubuchon recommended an ankle injection and then to consider surgery to debride and remove the Os trigonum. *Id.*

On December 17, 2009, Dr. Aubuchon saw the employee again noting that further medical care had been transferred to him. (Employee's Exhibit F, F5). Dr. Aubuchon injected the ankle, which Employee thought helped with the symptoms. *Id.* At the follow-up visit of

January 14, 2009, Dr. Aubuchon and Employee discussed surgical risks, but opted to proceed with physical therapy for the ankle. (Employee's Exhibit F, F6).

On February 18, 2010, Dr. Aubuchon reported that he spoke with the physical therapist and they believed that Employee "would probably always have difficulty with the [right] leg." (Employee's Exhibit F, F7). On physical examination, Dr. Aubuchon noted diminished strength and tenderness along with swelling in the leg and ankle. *Id.* Dr. Aubuchon believed the employee had reached maximum medical improvement for the injuries and assessed permanent restrictions. (Employee's Exhibit F, F8). The permanent restrictions for the right leg and ankle were no work on uneven terrain, no ladders and continued use of the compression hose. *Id.*

Employee's Exhibit G – Medical Records from Mid-America Rehabilitation

Employee was seen for physical therapy directed to his low back pain, which was reported as chronic left sided low back pain since his 2000 fusion surgery. (Employee's Exhibit G, G5). Employee reported benefit from using his TENS unit to help relieve his pain. (Employee's Exhibit G, G28). The employee attended low back therapy from September 28, 2009 until his release of December 22, 2009. (Employee's Exhibit G, G54).

Employee's Exhibit H – Medical Records from Select Physical Therapy

On January 10, 2010, the employee was seen at Select Physical Therapy for treatment of difficulty in walking, Achilles tendonitis and ankle joint pain. (Employee's Exhibit H, H1). The therapist planned to work on strength and improve the employee's gait. (Employee's Exhibit H, H3). After two visits, the physical therapist opined that Employee's strength remained decreased, his gait remained antalgic, and his balance was fair and that further therapy sessions would not improve the condition. (Employee's Exhibit H, H6).

Employee's Exhibit I – Photographs

The employee identified photographs of his right leg from that were taken from June 2008 through late October 2008. (Employee's Exhibit I, I1-7).

Employee's Exhibit J – Deposition of Dr. Anna Maria Guidos

Dr. Anna Maria Guidos testified that she is a physical medicine specialist at the Brain and NeuroSpine Clinic. (Guidos Deposition, p. 6). Dr. Guidos stated that Employee was referred to her by Dr. Tolentino on September 28, 2009 for treatment of Employee's low back and SI joint pain. (Guidos Deposition, p. 6-7). Dr. Guidos saw the employee on multiple occasions and then performed a total medical evaluation on May 5, 2010. (Guidos Deposition, p. 8).

Dr. Guidos noted the history of the forklift accident hitting the employee in the back and causing Employee to twist his back. (Guidos Deposition, p. 9). Moreover, Dr. Guidos noted that Employee's abnormal walking and inability to proceed with his regular exercise routine increased his low back symptomology and led to his treatment with Dr. Tolentino. *Id.* Dr.

Guidos found that the employee had previously undergone a fusion surgery of the L3/L4 and L4/L5 levels in 2000. (Guidos Deposition, p. 14).

In the medical records from the Brain and Neurospine Clinic, Dr. Paul Tolentino initially saw Employee on August 13, 2009 with a chief complaint of low back pain with intermittent left hip pain. (Brain and Neurospine Clinic Record August 13, 2009, p. 1). A recent MRI of the low back showed evidence of the prior fusion with degenerative disk disease and bilateral foraminal narrowing. (Brain and Neurospine Clinic Record August 13, 2009, p. 6). Employee was diagnosed with lumbar spondylosis with left hip pain, SI joint dysfunction and lumbago. *Id.* Low back injections were administered by Dr. Cleaver. (Brain and Neurospine Clinic Record August 19, 2009, p. 1). At follow-up visits, Dr. Tolentino recommended restrictions for the employee's chronic low back pain of no lifting more than 30 pounds with no repetitive bending, twisting or stooping and recommended referral to Dr. Guidos for further medical care. (Brain and Neurospine Clinic Record September 14, 2009, p. 1).

When Employee first saw Dr. Guidos on September 28, 2009, Dr. Guidos noted the prior fusion surgery in 2000 along with the crush injury to his right leg causing chronic edema. (Brain and Neurospine Clinic Record September 28, 2009, p. 1). The employee was off work due to pain, discomfort and inability to sleep with back pain radiating into his left thigh. *Id.* The employee was taking Lortab for his low back pain, which Dr. Guidos explained is a narcotic pain reliever. (Brain and Neurospine Clinic Record September 28, 2009, p. 2; Guidos Deposition, p. 10-11). At follow-up visits, Dr. Guidos advised that the right heel lift was helping the low back pain, but also prescribed a TENS unit for the continued multi-level spondylosis and back pain. (Brain and Neurospine Clinic Record October 19, 2009, p. 1; 4). Dr. Guidos noted that Employee was on short-term disability from work and also applying for Social Security disability. *Id.*

Dr. Guidos found in her physical examination of May 5, 2010 that Employee was wearing compression stockings, there was a 4 inch scar along the right medial gastroc and that the right leg had atrophied. (Guidos Deposition, p. 11). Dr. Guidos found pain and tenderness throughout the back and decreased sensation along the sural nerve in the right leg. (Guidos Deposition, p. 13). Dr. Guidos noted that the low back pain had been exacerbated by the employee's abnormal gait pattern and inability to ambulate on the treadmill due to the right lower extremity injury. (Guidos Deposition, p. 16). Dr. Guidos noted that walking exercises can help keep back pain down and that the employee was now unable to do so as a result of his right leg injury. *Id.*

Dr. Guidos prescribed permanent restrictions of no lifting more than 30 pounds, no repetitive twisting, bending, or stooping and to limit standing and walking as tolerated. (Guidos Deposition, p. 15). Dr. Guidos believed that the employee was permanently and totally disabled from his current occupation due to his chronic lower extremity edema, chronic injury to the right ankle and chronic low back pain and that the work related injury of June 3, 2008 was the prevailing factor in her findings of disability which were due to the chronic pain, dysesthesias, weakness, atrophy related to right lower extremity and exacerbation of the preexisting low back pain. (Guidos Deposition, p. 16-17). Dr. Guidos opined that there was a 50% permanent partial disability at the level of the knee and 15% permanent partial disability of the body as a whole due

to exacerbation of low back pain caused by the work related injury. (Guidos Deposition, p. 18). Dr. Guidos further believed that the employee had a pre-existing 25% permanent partial disability due to the 2 level fusion which was a hindrance and obstacle to employment or re-employment. *Id.* Dr. Guidos believed that is was a combination of the low back and right lower extremity conditions that made the employee permanently and totally disabled. *Id.*

On cross examination, the Second Injury Fund objected to Dr. Guidos' testimony because she was the employee's treating physician and, in the Fund's view, not entitled to perform an independent medical examination or give testimony in this case. (Guidos Deposition, p. 21-22).

Employee's Exhibit K – Deposition of Dr. Dwight Woiteshek

Dr. Dwight Woiteshek testified that he is a board certified orthopedic surgeon in St. Louis. (Woiteshek Deposition, p. 4-6). Dr. Woiteshek reviewed the medical records and took a history from the employee regarding the work accident. (Woiteshek Deposition, p. 7). Dr. Woiteshek also reviewed the MRI scans of the right leg and ankle and explained that they showed signs of a significant crush to soft tissues, but also bony and nerve injuries as well as muscle and tendon injuries. (Woiteshek Deposition, p. 9). Dr. Woiteshek explained that the employee had been left with chronic swelling and that the pressure stockings help control the swelling in the right lower extremity. (Woiteshek Deposition, p. 11). Dr. Woiteshek also noted that Employee had previously undergone an L3/4 and L4/5 interbody fusion in 2000, but his back pain intensified with the work injury. *Id.*

On physical examination, Dr. Woiteshek found diffuse scarring on the right posterolateral calf with "obvious discontinuity of the gastrocnemius soleus muscle complex." (Woiteshek Deposition, p. 12). There was sensory deficit over the right heel along with pain and tenderness over the right foot and ankle with swelling. *Id.* Dr. Woiteshek noted that the employee had difficulty walking on his heel or toes, atrophy in the right lower extremity and that there was a 25% loss of range of motion in the right ankle. (Woiteshek Deposition, p. 13). For the low back, Dr. Woiteshek found pain and tenderness in the lumbar spine, a positive Patrick sign which is a test for SI joint dysfunction and a 20% loss of range of motion in the lumbar spine. (Woiteshek Deposition, p. 14).

Regarding the June 3, 2008 injury, Dr. Woiteshek diagnosed a traumatic crush injury of the right lower leg and ankle with partial discontinuity of the gastrocnemius soleus muscle complex with chronic swelling; complete sensory disruption of the sural nerve of the right heel; chronic instability of the right ankle joint; and traumatic Osteochondritis dissecans of the right ankle. (Woiteshek Deposition, p. 15). Attributable to preexisting conditions of degenerative disk disease were the low back fusion and SI joint dysfunction. (Woiteshek Deposition, p. 16). Dr. Woiteshek believed that the work accident was the prevailing factor in causing the right lower extremity injury. *Id.*

Dr. Woiteshek opined that the employee had sustained a 50% permanent partial disability of the right lower extremity at the level of the knee due to the four diagnoses attributable to the work accident. (Woiteshek Deposition, p. 17). Dr. Woiteshek attributed a 35% permanent

partial disability to the preexisting low back fusion and 35% permanent partial disability due to the chronic SI joint dysfunction, both attributable to the preexisting low back condition. (Woiteshek Deposition, p. 18). Dr. Woiteshek believed the combination of the back and right lower extremity injuries created a greater overall disability and that Employee was permanently and totally disabled due to the combination of the work related injury and pre-existing disabilities. (Woiteshek Deposition, p. 19-20).

Employee's Exhibit L – Deposition of Dr. Jeff Magrowski

Jeffrey Magrowski, PhD is a vocational expert and vocational rehabilitation consultant, who has worked in that capacity since the early 1980's for the Social Security Administration and U.S. Department of Labor. (Magrowski Deposition, p. 5-7). Dr. Magrowski observed that Employee was wearing compression stockings and that Employee had difficulty sitting throughout the interview. (Magrowski Deposition, p. 9). Dr. Magrowski explained that his observations are an important part of the vocational evaluation because when he interviewed the employee, he made observations like a potential employer would at a job interview and those observations impact the types of jobs the employee could potentially perform. *Id.*

Dr. Magrowski took a history of the work injury and the fact that Employee tried to perform a lighter job following the work injury. (Magrowski Deposition, p. 10). Dr. Magrowski noted that the employee was currently taking pain medication and using a TENS unit along with elevating his leg to reduce pain and swelling. *Id.* Dr. Magrowski also reviewed the prior medical treatment records noting the employee's pre-existing low back condition and surgery along with treatment for his right lower extremity. (Magrowski Deposition, p. 12). Dr. Magrowski noted that the employee was treating again for his low back with Dr. Tolentino and Dr. Guidos. (Magrowski Deposition, p. 13).

Dr. Magrowski noted in his report that Employee was 58 years old when interviewed in February 2011. (Magrowski Report, p. 6). Regarding prior hobbies and activities, Dr. Magrowski recorded that the employee formerly enjoyed hunting and restoring cars, but now the employee spends his time resting in a recliner. (Magrowski Deposition, p. 14). Dr. Magrowski reviewed the employee's work history and found prior work that had transferrable skills, but not skills which would be marketable due to the employee's limitations. (Magrowski Deposition, p. 16-17). Dr. Magrowski also reviewed the restrictions provided by the doctors. (Magrowski Deposition, p. 18).

After conducting the interview and reviewing the records, Dr. Magrowski believed that the employee was unemployable in the open labor market. (Magrowski Deposition, p. 19). In his report, Dr. Magrowski opined that work would be available to the employee if only the restrictions of Dr. Trueblood and Dr. Aubuchon were considered. (Magrowski Report, p. 7). However, when also considering the restrictions from Drs. Tolentino, Guidos and Woiteshek then the employee would be considered unemployable. *Id.* Dr. Magrowski identified that the serious nature of Employee's limitations including sitting in a recliner with his legs elevated, use of support hose, pain medication (Lortab) and use of TENs unit supported this conclusion that he was unemployable. *Id.* As a result, Dr. Magrowski believed that no employer would hire the

employee for a job reasonably expecting him to perform the full range of the job with his conditions. (Magrowski Deposition, p. 19).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Issue #1- Second Injury Fund Liability for Permanent Total Disability

There is a dispute between the parties as to whether the Fund is liable for permanent partial or permanent total disability benefits for the June 3, 2008 work injury. The Court finds that the Second Injury Fund is responsible for permanent total disability in this case due to a combination of the employee's pre-existing disabilities and those disabilities created by the June 3, 2008 work accident.

In reaching this finding, the Court first established that Employee was permanently and totally disabled. As previously stated, the employee has undergone extensive surgical and non-surgical care for his pre-existing and primary injuries. Moreover, there is no dispute or medical evidence that contravenes this determination. Upon finding that Employee was permanently and totally disabled, the Court then determined that the Fund was liable for permanent total disability benefits based on the combination of the June 3, 2008 primary work related injury and those injuries that pre-existed, which included his prior low back injuries.

The uncontradicted evidence established the following:

- Employee suffered from low back injuries which resulted in a surgical fusion of the L3/4 and L4/5 levels in 2000. The employee continued to treat this condition with his primary care physician and by home exercise, which included a regimen of using a treadmill to strengthen his low back.

- On June 3, 2008, Employee suffered a traumatic crush injury to his right leg which also twisted the employee and resulted in a fractured fibula, disruption of the sural nerve, chronic ankle instability and chronic swelling of the right lower leg.

- Dr. Aubuchon also noted from the employee's history that Employee had previously injured the right ankle approximately 30 years prior and a review of the MRI scan showed that the work injury had aggravated the pre-existing arthritis of the Os trigonum.

- Drs. Trueblood, Aubuchon, Guidos and Woiteshek all opined that Employee would require compression stockings permanently to control the chronic swelling of his right leg.

- Dr. Aubuchon, Select Physical Therapy, Dr. Guidos and Dr. Woiteshek all recorded that the employee's gait was also altered as a result the work injury.

- Employee testified that his persistent swelling and abnormal gait prevented him from continuing his home exercise for his low back or using a treadmill. Dr. Guidos testified

that the employee's inability to exercise and use a treadmill to exercise had exacerbated his pre-existing low back pain.

- Employee testified that he was demoted to lighter duty work, which allowed him to sit through the day, but during the course of his treatment he was unable to continue doing so as a result of his low back and right lower extremity injuries and symptoms.

- Dr. Guidos believed that the employee could only stand or walk as tolerated and should limit lifting, bending, twisting and stooping. Dr. Guidos prescribed a TENS unit and heel lift along with narcotic medication for his low back symptoms. Dr. Guidos also opined that Employee was permanently and totally disabled from his current occupation due to a combination of the low back and right lower extremity injuries.

- Dr. Woiteshek believed that Employee was permanently and totally disabled due to the combination of his right lower extremity and low back conditions. Dr. Woiteshek prescribed restrictions for both body areas.

- Employee and his wife testified that Employee is limited in his daily activities and that he spends most of his day in a recliner to both relieve his low back pain and keep his right leg elevated to minimize the swelling.

- Dr. Magrowski opined that Employee was unemployable in the open labor market. Dr. Magrowski identified that the serious nature of Employee's limitations including sitting in a recliner with his legs elevated, use of support hose, pain medication (Lortab) and use of TENS unit supported this conclusion that he was unemployable. Dr. Magrowski also believed that no employer would hire the employee for a job reasonably expecting him to perform the full range of the job with his low back and right leg conditions.

- The employee testified and the contemporaneous medical records show that he applied for and was approved for Social Security Disability prior to his maximum medical improvement date of February 10, 2010. It is also noted that the employee was 57 years old as of his MMI date.

This is a clear case of a serious primary injury, the crushing and twisting of the employee's right leg, combining with old injuries to the low back and right ankle to create a greater overall disability. The primary injury made the low back condition worse by causing constant swelling in the right leg and altering the employee's gait. Logically, the employee's inability to walk for any length of time or in a normal stride prevents him from being able to continue exercising his low back as he did prior to the work accident and led to greater low back pain (i.e. the diagnosis of SI joint dysfunction).

The Court had the opportunity to observe and assess Employee at the hearing and found his testimony and behaviors to be persuasive in reaching the conclusion that he is permanently and totally disabled. The Court found Employee's testimony to be honest and credible. The Court noted that Employee used a lumbar support cushion to assist while seated and that by the end of

direct testimony the employee appeared to be in great discomfort with a reddened face and perspiring. Further, the Court notes that the Fund failed to offer any evidence to discredit the opinions of Drs. Guidos, Woiteshek or Magrowski. Therefore, the Court should not substitute its own opinion for uncontroverted medical evidence.

In considering all of the evidence, the Court finds that Employee is permanently and totally disabled due to the combination of the June 3, 2008 work related injury with the pre-existing low back and right ankle conditions. Because the Court finds that it is the synergistic combination of the pre-existing and primary injuries that render Employee permanently and totally disabled, and the Fund is therefore liable for permanent and total disability benefits.

The parties stipulated that Employee reached maximum medical improvement for his primary injury on February 10, 2010. Further, the Court concurs with the previously approved stipulation for compromise settlement and finds that the permanent partial disability resulting from the June 3, 2008 work injury is 25% of the right knee and 2% of the body as a whole, which translates to 48 weeks of benefits.

Second Injury Fund liability for permanent total disability begins on February 10, 2010 when Employee was determined to be at maximum improvement for his work related injury. However, the Second Injury Fund is entitled to a credit of 48 weeks for the permanent partial disability benefits paid by the employer. By calendar, 48 weeks after February 10, 2010 is January 12, 2011. Employee's rate for permanent total disability benefits is $466.67 and his rate for permanent partial disability benefits is $389.04. The Fund is entitled to a credit for the 48 weeks of permanent partial disability paid by the Employer/insurer. The Missouri State Treasurer as Custodian of the Second Injury Fund is therefore responsible to pay the difference between the two rates for a total of $3,726.24 for the period of February 10, 2010 through January 12, 2011. Thereafter, the Missouri State Treasurer as Custodian of the Second Injury Fund is ordered to pay Employee $466.67 per week beginning January 13, 2011 for the remainder of his lifetime or until suspended if he is restored to regular work or its equivalent as provided in §287.200.

Issue #2- Dependency of Employee's spouse and applicability of *Schoemel* decision

There is a dispute as to whether the employee's spouse, Judith Sanders, is a dependent within the meaning of Mo. Rev. Stat. §287.240 and whether Ms. Sanders would be entitled to Permanent Total Disability Benefits in the event that Ms. Sanders were to survive the employee pursuant to the *Schoemel* decision. I find that Judy is conclusively a total dependent of the employee and entitled to receive benefits in the event that Employee predeceases her.

§287.240.4 provides that a husband is a total dependent upon a wife with whom he resides. In *Schoemel,* 217 S.W.3d 902, the Court stated that §287.240.4 applied to the entire Workers' Compensation Act and meant that a "dependent" was a relative who was actually dependent upon the employee for support at the time of injury. Although the *Schoemel* decision was subsequently abrogated by §287.230.2, the *Bennett* decision recognized that recovery under *Schoemel* was limited to claims for permanent total disability benefits that were pending between January 9, 2007 and June 26, 2008.

The Fund argues that although the employee's primary injury of June 3, 2008 fell within this time period that Ms. Sanders has no right to potentially receive benefits because no formal claim was filed until after June 26, 2008. Essentially, it is the Fund's theory that Ms. Sanders is time barred from being considered a dependent pursuant to §287.230.2.

It is a general rule of law that courts should be reluctant to retroactively apply newly enacted legislation. *State Bd. of Registration for the Healing Arts v. Warren*, 820 S.W.2d 564, 565 (Mo. App. W.D. 1991). Statutory provisions that are substantive are generally presumed to operate prospectively unless there is clear legislative intent otherwise. *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 872 (Mo. banc 1993). Substantive law creates, defines and regulates rights, while procedural law prescribes a method for enforcing rights or obtaining redress. *Wilkes v. Mo. Highway & Transp. Comm'n*, 762 S.W.2d 27, 28 (Mo. banc 1988). Courts must weigh notions of justice and fair play in a particular case to determine if the consequence is procedural or substantive in nature. *State ex rel. St. Louis-San Francisco Ry. Co. v. Buder*, 515 S.W.2d 409, 411 (Mo. banc 1973).

§287.230.2 is a substantive law change in that it takes away the right of an injured employee's dependent to receive benefits in their place. The Fund is effectively asking for retrospective enforcement of this substantive law change to deny Ms. Sanders's eligibility as a dependent. The Court notes that Employee's case was pending from the date of the accident on June 3, 2008. As of that date, Employee was married and Ms. Sanders was a dependent within the meaning of the Act. The Claim for Compensation form was only required to be filed within the time frames prescribed by §287.430 and the form relates back to the pending case that started on June 3, 2008.

Based on the date of injury, this claim has been pending since June 3, 2008 until the issuance of this final award. This claim was therefore pending within the time recognized by *Bennett* for the *Schoemel* decision to be applicable.

The Court finds that Judith Sanders, the employee's spouse, was a conclusively presumed total dependent at the time of the employee's June 3, 2008 work accident and injury and remained in this status at the time of trial on February 1, 2012. Although Employee is not deceased, Judith Sanders would be entitled to his weekly permanent total disability payments ordered to be paid by the Second Injury Fund in the event that Judith Sanders survives Employee.

ATTORNEY'S FEE

D. Matthew Edwards, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

INTEREST

Interest on all sums awarded hereunder shall be paid as provided by law.

Made by:

_____

Maureen Tilley
Administrative Law Judge
Division of Workers' Compensation