

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

Injury No.: 06-078381

Employee: Saban Saric
Employer: Centaur Building Services, Inc. (Settled)
Insurer: North River Insurance Company (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 (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence and considered the whole record, we find that the award of the administrative law judge denying compensation is not supported by competent and substantial evidence. Pursuant to § 286.090 RSMo, we reverse the award and decision of the administrative law judge dated December 20, 2011. The findings, conclusions, award and decision of Administrative Law Judge John K. Ottenad are attached and incorporated to the extent they are not inconsistent with our findings, conclusions, award, and decision herein.

Findings of Fact

Preliminaries

Employee is a 62 year-old gentleman. In 1998, employee came to the United States via Germany as a refugee from Bosnia. The parties stipulated that on or about July 25, 2006, employee sustained an accidental injury arising out of and in the course of his employment. In particular, employee suffered a low back injury while lifting a trash can. The July 25, 2006, injury was employee's fourth low back injury. Employee settled his claim against employer/insurer and proceeded to trial against the Second Injury Fund seeking permanent total disability benefits.

The primary issue for our determination is the nature and extent of Second Injury Fund liability.

Vocational and Educational History

Employee attended school in Bosnia through the fourth grade. He has not received any formal education since that time. Employee served in the Yugoslavian Army for approximately one year as a soldier.

Employee's primary work experience is as a general laborer. He worked in street maintenance in Bosnia for 17 years. He was working in street maintenance from the time the Bosnian war began in 1992 until he fled to Germany in 1993. The street maintenance job involved street cleaning of all types, including transporting dead bodies for burial. Employee was not authorized to work in Germany.

One of Dr. Lee's medical records contains a notation that employee reported that he and his wife operated a clothing store in Bosnia. There is no other evidence to

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corroborate this notation. We find that there is insufficient evidence to support a finding that employee operated a retail store or that he acquired vocationally significant skills through such an endeavor.

Since his arrival in the United States, employee has worked on a line sorting chemicals, as an assembler, as a janitor, and as a dish washer.

Employee cannot read, write, or speak English. He testified at the hearing through an interpreter. He primarily communicated with treating professionals and experts through a family member or friend acting as an interpreter. The record is rife with notations of various individuals having difficulty communicating with employee.

Preexisting Conditions

Before the primary back injury, employee sustained three lifting-related back injuries.

1st back injury--2001

On February 28, 2001, employee suffered a work-related low back injury while lifting a cabinet. Employee reported low back and left leg pain. After an MRI, Dr. Lee diagnosed a herniated disc at L3-4, with diffuse radicular symptoms. Dr. Lee placed employee on light duty and prescribed pain medication and physical therapy. A follow-up MRI and a CT scan revealed that in addition to the herniation at L3-4, employee had a diffuse disc bulge at L4-5. Dr. Lee diagnosed degenerative disc disease at L3-4 and L4-5. Dr. Lee treated employee conservatively through May 23, 2001, at which time Dr. Lee released employee to return to work full-duty. Employee was still reporting persistent symptoms at that time.

2nd back injury--2002

On August 19, 2002, employee was admitted to the emergency room with low back pain. Employee reported he injured his back on August 16, 2002, lifting trash at work. An August 19th MRI suggested a central herniated disc at L3-4, asymmetric to the left. Dr. Backer recommended treatment with pain medications. A myelogram and CT scan were performed on August 26, 2002, after which Dr. Backer diagnosed a herniated nucleus pulposus at L3-4 central and slightly right. The CT scan also revealed bulging discs at L4-5 and L5-S1. Employee underwent a lumbar steroid injection. Employee was released from the hospital August 27, 2002. Dr. Backer examined employee again on October 1, 2002, at which time employee reported continued low back and left leg pain. On examination, employee displayed a decreased pin appreciation down his entire left leg in a non-dermatomal distribution. Dr. Backer requested a new MRI which showed no significant change from the earlier MRI. Dr. Backer last examined employee on October 25, 2002.

Dr. Chabot assumed treatment of employee. He initially examined employee on November 18, 2002, at which time he noted moderate spasm in the lumbar region and decreased sensation in the left lower extremity in a diffuse, non-dermatomal distribution. Dr. Chabot recommended pain medication, muscle relaxers, and physical therapy. Dr. Chabot next examined employee on December 16, 2002, at which time employee

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complained of persistent left buttock pain into his legs. Dr. Chabot did not think the October 2, 2002, MRI correlated with employee's complaints of radiating pain. Dr. Chabot diagnosed sacroiliitis, sciatica, and back pain. Employee received three trigger point injections of Mercaine, after which he reported a marked reduction in his symptoms. Dr. Chabot continued employee on pain medication and physical therapy. Dr. Chabot examined employee on January 13, 2003, at which time he released employee to return to work light duty with a 25-pound lifting restriction. Dr. Chabot recommended a functional capacity evaluation (FCE), which was conducted on January 20, 2003. The physical therapist reported that he was unable to accurately identify employee's abilities and limitations due to employee's self-limiting performance on the FCE. Dr. Chabot last examined employee on January 30, 2003. Dr. Chabot released employee from his care with a lifting restriction of 20 pounds and a recommendation that employee limit twisting and bending. Dr. Chabot opined that employee sustained a 5% permanent partial disability of the body as a whole as a result of the lumbar strain resultant from his August 2002, work injury.

3rd back injury--2004

On October 17, 2004, employee collapsed while lifting a trash can. Employee reported he was unsure what the trash can weighed, but it was heavy enough that two workers were needed to lift it. Employee reported to the emergency room on October 23, 2004, complaining of severe low back pain. An MRI was performed revealing a right paracentral disc herniation at L3. The MRI also revealed an annular tear or fissure at L4.

Employee resumed treatment with Dr. Lee. On November 1, 2004, Dr. Lee examined employee. Dr. Lee diagnosed a right paracentral protrusion/herniated nucleus pulposus. He prescribed pain medications and physical therapy. Dr. Lee recommended restrictions of no lifting over 15 pounds, no bending, and no stairs. Dr. Lee saw employee on November 17, 2004, at which time employee's complaints included right gluteal pain and right sacroiliac pain. On December 1, 2004, employee complained of right lower extremity pain (thigh or whole leg) and right sacroiliac pain. Dr. Lee felt a new MRI revealed a more focal right-sided disc protrusion at L3. Dr. Lee raised employee's lifting restriction to 20 pounds. Dr. Lee recommended that employee undergo epidural injections, which were performed on December 3rd and December 14th. Employee continued with physical therapy. On examination January 3, 2005, employee reported improvement with pain medication. Dr. Lee last saw employee on January 17, 2005. Dr. Lee believed employee was self-limiting his activity. Dr. Lee found employee to be at maximum medical improvement. He raised employee's lifting restriction to 25 pounds and recommended employee refrain from repetitive twisting. He prescribed pain medication and muscle relaxers. Dr. Lee opined that employee sustained a 2% permanent partial disability of the body as a whole as a result of the October 17, 2004, lifting incident.

Psychological condition

Employee testified that when he lived in Bosnia, he witnessed horrible atrocities including bombings and the brutal killing of individuals.

Dr. Iliana Moreno, a licensed psychologist and native speaker of Yugoslavian languages, began counseling employee in his home on April 15, 2006. She prepared a report dated

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June 14, 2007, detailing her assessment of employee's mental health. Dr. Moreno's assessment was that employee suffered from severe depression and post-traumatic stress disorder (PTSD). Dr. Moreno noted that employee had significant impairments in social, occupational, and other important areas of functioning. She also reported that employee's cognitive functioning is impaired as is manifested by his memory loss, poor concentration, and short attention span. Dr. Moreno believes employee would have difficulty maintaining work and work relationships. Eventually, due to the seriousness of employee's diagnoses and his need for medication, Dr. Moreno referred employee to psychiatrist Dr. Marcu.

Dr. Marcu began treating employee on June 1, 2006. Dr. Marcu's assessment was that employee suffered from bipolar disorder and post-traumatic stress disorder (PTSD). Dr. Marcu assigned a GAF score of 40. Dr. Marcu prescribed an anti-depressant, an anti-anxiety medication, and therapy. Employee participated in therapy through Dr. Marcu's office once or twice monthly through March 2009.

Other Preexisting Conditions

Employee has long suffered from asthma for which he uses an inhaler. Dr. Lee's earliest record in 2001 reports a history of asthma. Employee's asthma causes him shortness of breath and loss of stamina. The shortness of breath is exacerbated by cold, damp, and humid weather.

While undergoing medical tests to determine if he was fit for surgery after the 2006 back injury, doctors determined that employee had markedly abnormal left ventricular function with a large region of fixed inferoposterior defect, which was consistent with a previous inferior infarct. Dr. Hess performed a cardiac catheterization which revealed coronary artery disease. Employee had an 80% blockage of his proximal circumflex vessel and a 90% blockage of his mid left anterior descending vessels. Dr. Hess placed stents in both vessels. After the procedure, both vessels were fully patent. Dr. Hess cleared employee for surgery but noted that employee would be at an increased risk for surgical complications. We find that this heart condition preexisted the primary injury. But since no medical expert offered an opinion regarding the disability associated with the preexisting heart condition, we make no findings regarding the nature and extent of any preexisting disability associated with the heart condition.

The medical records and expert testimony confirm that employee has had long-standing problems with his blood pressure. Again, no medical expert offered an opinion regarding the disability associated with the preexisting hypertension, so we make no findings regarding the nature and extent of any preexisting disability associated with his preexisting hypertension.

Primary injury

4th back injury--2006

On July 25, 2006, employee experienced sudden lumbosacral pain while lifting a trash can. On July 27th, employee reported to Concentra where he was seen by Dr. Raikar. Examination revealed tenderness in lumbosacral spine on the right. Employee denied radiating pain. The straight leg raising test was negative. Dr. Raikar diagnosed a

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lumbar strain and prescribed a pain reliever and a muscle relaxer. Employee returned to Concentra on July 28th using a cane. Employee reported low back pain and pain radiating to both knees. Contrary to just a day earlier, the straight leg raising test was positive bilaterally. Dr. Raikar ordered an MRI and prescribed physical therapy and pain medication. On August 1st, Dr. Raikar prescribed a Medrol dosepak (methylprednisolone).

An MRI was performed on August 4, 2006. The MRI revealed an L3-L4 right paracentral disc protrusion with right L4 nerve root compression and moderate stenosis. The MRI also revealed an L4-L5 central posterior annular tear with mild facet hypertrophy.

On August 8th, employee continued to complain of low back and right leg pain. He reported some relief from the Medrol dosepak. Dr. Raikar recommended referral to Dr. Samson. By August 10th, employee returned to Concentra using a walker. Dr. Janan Lane diagnosed a herniated nucleus pulposus at L3-L4 and L4-L5. Dr. Lane noted that the insurer approved the referral to Dr. Samson.

Instead of Dr. Samson, Dr. Raskas took over employee's care. He first examined employee on August 11, 2006. Employee was still using a walker and complained of back pain, right buttock pain, and bladder issues. Dr. Raskas reviewed the August 4th MRI and diagnosed a herniation at L3-L4 that lateralizes to the right. Dr. Raskas also noted moderate spinal stenosis in the area. Dr. Raskas recommended that employee undergo a microdiscectomy if employee is medically cleared for surgery.

Due to cardiac problems, employee was not cleared for surgery until February 2007. By the time he was cleared for surgery, employee no longer wished to proceed with the surgery because he feared he would not wake up afterwards. Based upon Dr. Hess' opinion that employee was at an increased risk for surgical complications, we find employee's refusal to undergo the surgery was reasonable.

Employee's Current Complaints, Lifestyle and Activities

Employee is separated from his wife of over 40 years. Employee lives in an assisted living facility. Employee has a personal care attendant who assists him with his personal needs including showering, cooking, and cleaning. A home health nurse visits employee's home once a week to assist him with his medications.

Employee deals with constant back pain for which he takes pain medication three times a day. Even still, the pain returns before his next dose is due, so employee spends considerable time in pain. Employee's legs are frequently numb and they swell. Walking, standing, or sitting for any period of time makes his back and leg symptoms worse. Employee generally lies down three times a day for 1½ to 2 hours to relieve the pain.

Due to his asthma and his heart issues, employee cannot walk for more than 5 minutes. Employee is unable to stand for more than 10 or 15 minutes. He cannot drive a car due to the pain in his back and legs. He also fears an asthma-related coughing spell could cause him to lose control of a car. He seldom leaves home. Employee typically spends his day watching sports on television or spending time with his grandson.

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He does not believe he can work due to the combination of his back pain, leg pain, and asthma.

Expert testimony

Medical Opinion

Dr. Berkin, an osteopathic physician, first evaluated employee on March 10, 2005, after employee's third back injury. On March 27, 2005, Dr. Berkin issued a report containing his impressions, findings, and opinions.

Dr. Berkin again evaluated employee on October 17, 2008. Dr. Berkin testified that he found some differences between employee's March 2005 physical examination and employee's October 2008 examination. Dr. Berkin reported the following differences in October 2008: employee had more tenderness to the lower back; employee walked with a walker in a lurching gait; employee had a greater loss of range of motion; employee's straight leg raising test was more compelling; and, employee had an inability to elevate on his toes and heels.

Dr. Berkin diagnosed a lumbosacral strain with right L4 radiculopathy and a herniated nucleus pulposus of the L3-4 intervertebral disc. He reported employee had continuing complaints of pain in the low back and left leg. Dr. Berkin opined that the July 2006 accident was the prevailing factor in causing the lumbosacral strain with right L4 radiculopathy. Dr. Berkin believes that as a result of the primary injury, employee suffered a 20% permanent partial disability of the body as a whole.

Dr. Berkin opined that the prior disabilities enumerated in the 2005 report constituted hindrances or obstacles to employment leading up to the time of the 2006 injury. Dr. Berkin believes employee's pre-existing disabilities combine with the disability resulting from primary injury such that his overall disability exceeds the simple sum of the disabilities. Finally, Dr. Berkin opined that employee is permanently and totally disabled based upon the nature and extent of his disability from the primary injury coupled with his age, limited education and his inability to speak English.

We believe Dr. Berkin's opinions are entitled to great weight in light of the fact that he had occasion to evaluate employee before and after the primary injury.

Psychiatric Opinion

Dr. Adam Sky, a licensed psychiatrist, evaluated employee on November 2, 2010. Dr. Sky noted in his report that the examination was partially based on the subjective complaints and history given by employee. Employee's granddaughter was present at the evaluation and served as employee's interpreter. Dr. Sky's psychiatric assessment was as follows:

- Axis I: Bipolar affective disorder type II, most recent episode depressed
The possibility of a unipolar mood disorder; i.e.: a Major Depression cannot be excluded
PTSD by history.
- Axis II: Marital Discord

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Axis III: COPD/Asthma, Multiple back injuries, CAD with stent placement and chronic lower back pain

Axis IV: Moderate; ongoing family and financial stress, language barriers and chronic medical issues

Axis V: Poor 40/100

Dr. Sky diagnosed employee with bipolar disorder and PTSD. Dr. Sky conceded that employee appeared to be in major depressive state at the time Dr. Sky examined employee. However, Dr. Sky explained that bipolar patients spend 95% of their time in a depressed state, so Dr. Sky's observation of only a major depressive state does not rule out a diagnosis of bipolar disorder where the medical records over time support the diagnosis of bipolar disorder. Dr. Sky opined that employee suffers from an overall permanent partial disability of 50% of the body as a whole related to his psychological condition. Dr. Sky opined that half of the psychological disability preexisted the primary injury and half of the disability was caused by the primary injury. Dr. Sky also testified that the combination of the psychiatric disability with the primary physical disability would definitely create a greater overall disability. Dr. Sky recommended that employee receive further treatment from a psychiatrist.

We find credible the opinions of Dr. Sky. We find that at the time of the primary back injury, employee suffered from a 25% permanent partial disability of the body as a whole relative to his psychological condition. We find that the psychiatric disability was a hindrance or obstacle to employee's employment or reemployment.

Vocational Opinion

Mr. Lalk, a certified vocational expert, evaluated employee on September 3, 2009. Mr. Lalk reviewed extensive medical treatment records, discussed employee's education, background, past work history and jobs, and then issued his report dated September 23, 2009. Despite the presence of an interpreter, Mr. Lalk noted that employee was a poor historian and could only provide limited information. At the time of the evaluation, employee walked with a walker that he had obtained after his first low back injury and displayed difficulty with any physical activity or position. Employee reported to Mr. Lalk that his asthma and shortness of breath decreases when he uses his inhaler and his "depression is controlled with his medication." Employee told Mr. Lalk that he did not believe he could work because he cannot walk or bend and because of limitations from his asthma, heart condition, and depression. Mr. Lalk did not conduct any vocational testing because of employee's inability to read English. Mr. Lalk opined that based upon the symptoms and limitations reported by employee and based upon his review of the medical records, he did not believe employee would be capable of securing or maintaining employment in the open labor market. Mr. Lalk opined that no employer would consider employee for any position due to employee's presentation.

Discussion

Preexisting Disabilities

Employee is unable to read or speak English. The administrative law judge discussed in detail why he refused to consider employee's inability to speak English in his permanent total disability analysis:

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[T]here is no permanent functional or mental reason why [employee] cannot learn English, and so it is inappropriate to consider his English skills, or lack thereof, when determining his employability and the liability of the Second Injury Fund.

...

[I]n order for conditions like illiteracy and deficient English skills, to be considered permanent partial disabilities for Second Injury Fund purposes, there must be a finding that those conditions come from a mental or physical inability to learn, instead of merely a lack of education. If those conditions merely come from a lack of education, then they are not permanent, since acquiring the additional education would correct the deficiency.

In this case, there is no doubt that [employee] has deficient English skills, and that those deficient English skills negatively impact his ability to find a job in the open labor market. However, there is no physician opining that his deficient English skills come from a permanent functional or mental inability to learn the language. ...I find it is improper in this case to consider his deficient English skills as a component of finding him permanently and totally disabled. To the extent that any of the experts, including Dr. Berkin factored in his deficient English skills in their opinions on permanent total disability, that is yet one more reason that I find their opinions, in that regard, are not competent, credible or persuasive.

Award pp. 24-25.

While the administrative law judge's understanding of the state of the law is sound, the administrative law judge apparently believes a physician is the only type of expert who can establish that employee has a mental or physical inability to learn English. There is no authority so limiting the type of expert who can competently speak to this issue.

The administrative law judge was clearly aware of the report of Dr. Iliana Moreno, a licensed psychologist and native speaker of Yugoslavian languages, because the administrative law judge summarized a portion of her report, thusly:

[Dr. Moreno] opined that [employee] has high clinically significant impairments in social, occupational, and other important areas of functioning. She believed that due to his severe mental health problems, [employee]'s cognitive functioning was impaired, resulting in memory loss, poor concentration and short attention span. She opined that, "He has difficulties learning and retaining new information and is not able to hold even the most simple job."

Award p. 13.

We find the opinion of Dr. Moreno highly persuasive and we find that it clearly establishes that employee has a mental inability to learn English. We believe the inability is permanent. All of the experts opined that the deficient English skills

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constitute an obstacle to employee securing or performing employment. Employee's deficient English skills are properly considered a preexisting permanent disability.

Based upon the records of Dr. Marcu, Dr. Moreno, and the opinion of Dr. Sky, we find that at the time of the primary injury employee suffered from a preexisting psychological/psychiatric disability of 25% of the body as a whole.

Employee testified about his many back injuries. He explained that he had to periodically ask coworkers to assist him with his work duties – particularly lifting. The administrative law judge found employee had preexisting permanent partial disability to his back of 42.5% of the body as a whole. We affirm this finding.

We find employee's preexisting disabilities identified herein were permanent as of the date of the primary injury. We further find that they are capable of measure, and constituted hindrances or obstacles to employee's employment or reemployment when employee sustained his 2006 work injury.

Primary Injury

Employee demonstrated that as a result of the primary injury, he sustained a new back injury distinct from his previous injuries. A review of the multitude of diagnostic studies done over the years reveals that employee has long had a herniation at L3-4 and a bulging disc at L4-5. But the studies also reveal that the extent and direction of the disc protrusions has varied over time. After reviewing these studies and considering Dr. Berkin's explanation, we are convinced that employee's L4 nerve root compression and resultant radiculopathy was caused by the primary injury. The administrative law judge found that employee sustained a 7.5% permanent partial disability referable to the primary back injury. We affirm the administrative law judge's conclusions regarding the nature and extent of the primary back injury.

Based upon the mental health records and the opinion of Dr. Sky, we find that employee suffered from a psychological/psychiatric disability of 25% of the body as a whole attributable to the primary injury.

We find employee reached maximum medical improvement as of February 20, 2007. It was that date that Dr. Hess medically cleared employee for a back surgery (although, thereafter, employee reasonably refused the surgery due to his fear of surgical complications).

Conclusions of Law

The first issue we must consider is whether employee is permanently and totally disabled.

"To determine if claimant is totally disabled, the central question is whether, in the ordinary course of business, any employer would reasonably be expected to hire claimant in his present physical condition."

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"The 'extent and percentage of disability is a finding of fact within the special province of the Industrial Commission.'" "The Commission may consider all of the evidence, including the testimony of the claimant, and draw all reasonable inferences in arriving at the percentage of disability."

"The testimony of . . . lay witnesses as to 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."

"The Commission is not bound by the expert's exact percentages and is free to find a disability rating higher or lower than that expressed in medical testimony." "The acceptance or rejection of medical evidence is for the Commission." "The decision to accept one of two conflicting medical opinions is a question of fact for the Commission."

Pavia v. Smitty's Supermarket, 118 S.W.3d 228, 234 (Mo. App. 2003) (citations omitted).

The administrative law judge found that employee is not permanently and totally disabled. We disagree with the administrative law judge's conclusion. The administrative law judge asserted the following legal standard.

In order for [employee] to meet his burden of proving an entitlement to permanent total disability benefits from the Second Injury Fund, [employee] first needed to provide credible testimony on his own behalf to support such an award. I find that [employee] has failed to provide any such credible testimony in this case.

Award p. 23.

If the administrative law judge is saying that a claimant cannot recover permanent total disability benefits unless the claimant credibly testifies that he is permanently and totally disabled or unable to compete in the open labor market, the administrative law judge misstates a claimant's burden of proof regarding permanent total disability. The rule is that a claimant's testimony, if believed, *can* constitute substantial evidence of the nature, cause, and extent of his disability, especially when taken in connection with, or where supported by, some medical evidence. See *Walker v. Pickwick Hotel, Inc.*, 211 S.W.2d 55, 57 (Mo. App. 1948), *Pavia v. Smitty's Supermarket*, 118 S.W.3d 228 (Mo. App. 2003). But there is no rule that a claimant himself *must* provide credible testimony on the issue of permanent total disability. That is because to determine if a claimant is totally disabled, the central question is whether, in the ordinary course of business, any employer would reasonably be expected to hire claimant in his present physical condition. See *Pavia*, supra. It is seldom the case that a claimant has the expertise or qualifications to know whether an employer would reasonably be expected to hire him in his condition. That is generally the role of a vocational expert who has specialized training and experience regarding the job market and employers' hiring expectations.

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As we have previously discussed, the administrative law judge found employee's presentation and complaints not to be credible or reliable. Specifically, the administrative law judge found:

After observing [employee] at trial, hearing his testimony and comparing that testimony to the medical treatment records and reports in evidence, I find that [employee] routinely exaggerated the nature and extent of his conditions and disabilities, and was less than fully truthful regarding his low back problems.

Award p. 23.

We agree with the administrative law judge and the expert witnesses that employee is a poor historian, but we do not believe employee is untruthful. The records of Dr. Moreno explain that employee's psychiatric condition impairs his cognitive functioning and memory. Employee was unable to recall information favorable to his claim (eg. that he treated with Dr. Marcu before the primary injury) and information unfavorable to his claim (e.g. details about each prior back injury). Memory difficulties do not make employee "less than truthful;" they simply make him unable to recall and share the truth.

Further, we do not believe that employee routinely exaggerated his condition or symptoms. It is true that physicians noted they were, at times, unable to correlate each of employee's complaints with the most recent diagnostic testing but that does not mean employee's complaint was not real or was exaggerated. For example, some physicians noted that employee's complaint of numbness in his legs in a non-dermatomal pattern did not correlate with the diagnostic imaging of his lumbar spine. At the time they made these observations, the observations may have reasonably led to suspicions of symptom magnification. But with the benefit of hindsight, we now know that employee suffers from uncontrolled diabetes mellitus with neurological manifestations – a condition that might easily account for employee's complaint. In any event, while some medical providers and physical therapists noted their suspicions that employee *might* be magnifying symptoms or self-limiting his efforts on testing or therapy, no medical expert offered an opinion that employee was, *in fact*, magnifying his symptoms or self-limiting.¹

Because each of employee's experts relied to some degree on employee's presentation and complaints, the administrative law judge discredited the testimony of each expert. We do not believe the testimony of employee's experts is felled by their reliance upon the history, presentation, or complaints of employee. By their curriculum vitae and testimony, the experts convince us they are experienced enough and savvy enough to adequately account for deficiencies in employee's ability to recall and properly recount his medical history. We are also convinced they have the skills to appropriately

¹ We note the Second Injury Fund offered no evidence in this case. The Second Injury Fund points out in its brief that the Second Injury Fund is not obligated to offer evidence since employee has the burden of proof. This is true. And that strategy might work in a case where employee's evidence did not establish a prima facie case. But in a case such as this one, where we find employee has made a prima facie case for his requested relief, the burden shifted to the Second Injury Fund to rebut the prima facie case.

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consider any self-limitation or exaggeration when forming their opinions.² We find the testimony of employee's experts credible.

Based upon the credible testimony of employee's experts, we find employee is unable to compete in the open labor market.

The next issue to be decided is the extent of disability resultant from the primary injury. We have previously found that employee's disability from the primary injury is 32.5% permanent partial disability of the body as a whole (7.5% attributable to the low back and 25% attributable to his psychiatric injury).

Employee provided ample evidence through the medical records and through the testimony of Dr. Berkin, Dr. Sky, and Mr. Lalk to show that employee's preexisting permanent disabilities related to his prior back injuries, his asthma, his psychiatric condition, and his inability to learn English, constituted hindrances or obstacles to his employment or reemployment, and we so find. We also find that employee was rendered unable to compete in the open labor market by the effects of his primary injury in combination with his preexisting disabilities.

Employee met his burden of offering substantial and competent evidence that he is unable to compete in the open labor market as a result of the effects of his primary injury combined with his preexisting disabilities. The Second Injury Fund offered no evidence to overcome employee's prima facie case for compensation from the Second Injury Fund.

We conclude that employee is permanently and totally disabled as a result of the effects of his primary injury combined with his preexisting disabilities.

The parties have stipulated that employee's permanent partial and permanent total disability rate is \$172.68. We have found that as a result of his 2006 work injury employee suffered permanent partial disability of 7.5% of the body as a whole relative to his low back (30 weeks) and 25% of the body as a whole relative to his psychiatric condition (100 weeks.) The Second Injury Fund's obligation to pay permanent total disability benefits begins 130 weeks after February 20, 2007; the date employee reached maximum medical improvement from his primary injury.

Award

We reverse the award of the administrative law judge. We award permanent total disability from the Second Injury Fund to employee.

² If we were to accept the administrative law judge's approach of discrediting experts simply because the experts rely upon information provided by a cognitively-impaired claimant, we would close the door to compensation for claimants whose cognitive or mental impairments prevent them from perfect recall or cause them to somatize symptoms. We have faith that medical and psychological professionals possess the training and experience to properly account for reporting anomalies when they render their opinions such that we need not resort to a blanket rejection of their opinions.

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We direct the Second Injury Fund to pay to employee the weekly benefit of \$172.68 for permanent total disability benefits from August 22, 2009, for the remainder of employee's lifetime or until modified by law.

Kevin D. Wayman, Attorney at Law, is allowed a fee of 25% of the benefits awarded for necessary legal services rendered to employee, which shall constitute a lien on said compensation.

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

Given at Jefferson City, State of Missouri, this 20th day of September 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Saban Saric

Injury No.: 06-078381

Dependents: N/A

Employer: Centaur Building Services, Inc. (Settled)

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

Additional Party: Second Injury Fund

Insurer: North River Insurance Company
C/O Crum & Forster (Settled)

Hearing Dates: August 11, 2011

Checked by: JKO

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
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: July 25, 2006
5. State location where accident occurred or occupational disease was contracted: St. Louis City
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant worked as a building cleaner for Employer and he injured his low back, when he picked up a heavy trash can at work to dump the trash into a Dumpster.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Body as a Whole—Low Back
14. Nature and extent of any permanent disability: 7.5% of the Body as a Whole referable to the Low Back
15. Compensation paid to-date for temporary disability: \$3,108.24
16. Value necessary medical aid paid to date by employer/insurer? \$2,898.50

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- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$258.03
- 19. Weekly compensation rate: \$172.68 for TTD/ \$172.68 for PPD
- 20. Method wages computation: By agreement (stipulation) of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable:

Employer previously settled its risk of liability

22. Second Injury Fund liability:

Claim denied \$0.00

TOTAL: \$0.00

23. Future requirements awarded: None

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Kevin D. Wayman.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Saban Saric	Injury No.: 06-078381
Dependents:	N/A	Before the
Employer:	Centaur Building Services, Inc. (Settled)	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	North River Insurance Company	Department of Labor and Industrial
	C/O Crum & Forster (Settled)	Relations of Missouri
		Jefferson City, Missouri
		Checked by: JKO

On August 11, 2011, the employee, Saban Saric, appeared in person and by his attorney, Mr. Kevin D. Wayman, for a hearing for a final award on his claim against the Second Injury Fund. The employer, Centaur Building Services, Inc., and its insurer, North River Insurance Company C/O Crum & Forster, were not present or represented at the hearing since they had previously settled their risk of liability in this case. The Second Injury Fund was represented at the hearing by Assistant Attorney General Carol Barnard. At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of fact and rulings of law, are set forth below as follows:

STIPULATIONS:

- 1) On or about July 25, 2006, Saban Saric (Claimant) sustained an accidental injury arising out of and in the course of his employment that resulted in injury to Claimant.
- 2) Claimant was an employee of Centaur Building Services, Inc. (Employer).
- 3) Venue is proper in the City of St. Louis.
- 4) Employer received proper notice.
- 5) The Claim was filed within the time prescribed by the law.
- 6) At the relevant time, Claimant earned an average weekly wage of \$258.03, resulting in applicable rates of compensation of \$172.68 for total disability benefits and \$172.68 for permanent partial disability (PPD) benefits.
- 7) Employer paid temporary total disability (TTD) benefits in the amount of \$3,108.24, representing a period of time of 18 weeks.
- 8) Employer paid medical benefits totaling \$2,898.50.

ISSUES:

- 1) What is the nature and extent of Claimant’s permanent partial and/or permanent total disability attributable to this injury?
- 2) What is the liability of the Second Injury Fund?

EXHIBITS:

The following exhibits were admitted into evidence:

Employee Exhibits:

- A. Certified medical treatment records of Tesson Heights Orthopaedic & Arthroscopic Associates, P.C. (Dr. Thomas Lee)
- B. Medical treatment records of HealthSouth
- C. Medical treatment records of Metro Imaging
- D. Medical treatment records of PROrehab
- E. Medical treatment records of St. John’s Mercy Medical Center
- F. Medical treatment records of West County Neurological Surgery, Inc. (Dr. Robert Backer)
- G. Medical treatment records of OrthopedicSpecialists (Dr. Michael Chabot)
- H. Medical treatment records of Excel Imaging
- I. Certified medical treatment records of St. Louis University Health Sciences Center—David P. Wohl, Sr. Memorial Institute
- J. Medical treatment records of Concentra Medical Centers
- K. Certified medical treatment records of St. Louis University Hospital
- L. Certified medical treatment records of Missouri Baptist Medical Center
- M. Medical treatment records of St. Louis Spine Care Alliance (Dr. David Raskas)
- N. Certified medical treatment records of National Medical
- O. Certified medical treatment records of Town & Country Cardiovascular (Dr. John Hess)
- P. Medical treatment records of Dr. Robert Holloway
- Q. Certified medical treatment records of the Center for Interventional Pain Management (Dr. Jawed Siddiqui)
- R. Certified records of the Missouri Division of Workers’ Compensation regarding Injury Numbers 01-019739, 02-083223 and 04-110150
- S. Certified records of Centaur Building Services, Inc.
- T. Stipulation for Compromise Settlement in Injury No. 06-078381 between Claimant and Employer
- U. Deposition of Dr. Shawn Berkin, with attachments, dated March 9, 2010
- V. Deposition of Mr. Timothy Lalk, with attachments, dated March 12, 2010
- W. Deposition of Dr. Adam Sky, with attachments, dated March 16, 2011
- X. List of current medications taken by Claimant

Second Injury Fund Exhibits:

Nothing offered or admitted at the time of trial

Notes: 1) Any stray marks or handwritten comments contained on any of the exhibits were present on those exhibits at the time they were admitted into evidence, and no other marks have been made since their admission into evidence on August 11, 2011.

2) Some of the exhibits were admitted with objections contained in the record. Unless otherwise specifically noted below, the objections are overruled and the testimony fully admitted into evidence.

FINDINGS OF FACT:

Based on a comprehensive review of the evidence, including Claimant's testimony, the expert medical and vocational opinions and depositions, the medical records, the Stipulation for Compromise Settlement between Claimant and Employer in this case, and the Stipulations for Compromise Settlement between Claimant and his employers in the prior cases, as well as based on my personal observations of Claimant at hearing, I find:

- 1) **Claimant** is a 61-year-old, currently unemployed individual, who last worked for Centaur Building Services, Inc. (Employer) on July 25, 2006, the date of his last injury, as a building cleaner. Claimant testified that he has not been able to work at all since that time. He said that his current source of income is Social Security.
- 2) Claimant was born in Bosnia, where he only went to school through the fourth grade (four years). He testified that he had no other vocational training. He said that he served in the Yugoslavian Army for approximately one year as a soldier. After that, he worked basically as a street cleaner or in street maintenance in Bosnia. Claimant testified that he came to the United States as a refugee in 1998 and became a United States citizen approximately 1 ½ to 2 years ago.
- 3) Claimant is unable to speak or read English. Therefore, an interpreter was required at trial in order to take his testimony for this hearing.
- 4) Claimant testified that after coming to the United States, he first worked at a chemical company on a line, where he was responsible for separating chemicals. However, at some point, he was unable to continue performing that job, so he got another job at Engineered Air Systems, Inc. in 2001. He worked at various workstations making air filters for army vehicles.
- 5) Claimant suffered his first injury on the job on February 28, 2001, when he picked up heavy materials and hurt his low back. He testified that he treated with Dr. Lee, but even though he was released with no restrictions to return to work, he was unable to keep up with his job, so he had to find other employment.

- 6) Medical treatment records from **Dr. Thomas Lee at Tesson Heights Orthopaedic & Arthroscopic Associates, P.C.** (Exhibit A) document the treatment Claimant received following this February 28, 2001 work injury. In Dr. Lee's first report dated March 21, 2001, Claimant described feeling a pop and then pain in his low back, with the development of left lower extremity symptoms down to his foot, after lifting a cabinet at work. He denied prior back or left leg problems, but provided a history of asthma and heavy smoking. Dr. Lee reported that an MRI Claimant brought with him, showed a proximally extruded disc herniation at L3-4. Dr. Lee diagnosed a herniated disc at L3-4 and prescribed medications and physical therapy. Claimant participated in a course of physical therapy for his low back and left leg complaints at **HealthSouth** (Exhibit B) from March 22, 2001 through May 29, 2001. He seemed to have some improvement from the therapy, reporting that the radiating leg pain was less constant. On April 18, 2001, Dr. Lee suggested that Claimant may need a decompression, given his examination and the persistence of his complaints. He ordered a lumbar myelogram and CT scan to further evaluate the situation. The records also began to mention pain complaints into the right leg, just not as severe as those on the left.
- 7) Claimant had the lumbar myelogram and CT scan at **Metro Imaging** (Exhibit C) on May 2, 2001. It showed a prominent disc bulge at L3-4 centrally that deforms the thecal sac anterior surface, as well as a less prominent bulge at L4-5 and degenerative changes of the L4-5 facet joints, especially on the right, but no central spinal stenosis. On May 8, 2001, Dr. Lee (Exhibit A) read the CT scan as showing very broad-based disc bulges at L3-4 and L4-5, with no central canal stenosis and no nerve root cut-off, consistent with degenerative disc disease. He diagnosed L3-4 and L4-5 degenerative disc disease and recommended a functional capacity evaluation to assess his level of functioning. He did not think a surgery would be of benefit to Claimant given these findings.
- 8) **Dr. Thomas Lee** (Exhibit A) next examined Claimant on May 23, 2001, after the Functional Capacity Evaluation (FCE) had been completed. Dr. Lee found that, according to the FCE, Claimant was self-limiting his level of activity and he tested positive for 5 out of 7 Waddell's signs. Dr. Lee again diagnosed L3-4 and L4-5 degenerative disc disease. He recommended a home exercise program and released Claimant at maximum medical improvement, back to full-duty work without restrictions.
- 9) According to the records of the **Missouri Division of Workers' Compensation** (Exhibit R), Claimant filed a Claim for Compensation for this February 28, 2001 injury, which was assigned Injury Number 01-019739. Claimant and his employer eventually settled that case by Stipulation for Compromise Settlement for the payment of \$18,777.50, or approximately 17.5% permanent partial disability of the body as a whole referable to the back. That Stipulation was approved by Legal Advisor Louise Tutt on March 28, 2002.

- 10) Claimant began working for the Frontenac Hilton Hotel in 2002 as a dishwasher and sustained his next work injury on August 18, 2002. Claimant testified that he hurt his back lifting a trash can with a co-worker. He said that he received another course of treatment for his low back and was released with a 25-pound lifting restriction.
- 11) Claimant received initial medical treatment following this injury at **St. John's Mercy Medical Center** with **Dr. Robert Backer** (Exhibits E and F). An MRI of the lumbar spine taken on August 19, 2002 (Exhibit F), showed a central L3-4 disc herniation with superior migration of the disc material and a bulging disc at L4-5. He was treated with bed rest, medication, physical therapy and an epidural steroid injection (lumbar facet injection), since Dr. Backer did not think this was a surgical situation. When Claimant was slow to improve, on August 29, 2002, Dr. Backer ordered a lumbar myelogram that suggested a central herniation at L3-4 and then a CT scan, which Dr. Backer described as "not very impressive." He recommended continued conservative care for the herniated disc at L3-4, located centrally and slightly to the right. Claimant followed up with Dr. Backer on October 1, 2002, continuing to complain of low back pain and left leg pain. Dr. Backer noted that his physical examination showed decreased pin sensation down the entire left leg from the groin in a non-dermatomal distribution. He ordered a repeat MRI, which was taken on October 2, 2002, which again showed a central/right (not left) lateralizing disc herniation at L3-4. In his last office note dated October 25, 2002, Dr. Backer (Exhibit F) noted that the MRI showed no change and Claimant was still complaining of severe low back pain and left leg pain. He noted the inconsistency in Claimant complaining of left leg problems, when the herniation was to the right, and suggested a discogram to determine if that disc was the source of his current pain complaints.
- 12) Claimant, then, came under the care of **Dr. Michael Chabot at Orthopedic Specialists** (Exhibit G) on November 18, 2002. Dr. Chabot recorded Claimant's continued complaints of low back pain that radiated into the left leg. Claimant's past medical history was positive for asthma, shortness of breath, chronic cough and back pain, but Claimant denied having ever been treated for any emotional or psychiatric disorder. He was using a cane to ambulate and had a mild limp on the left. Decreased sensation throughout the whole left leg in a diffuse non-dermatomal pattern was again recorded. X-rays of the lumbar spine revealed no evidence of significant disc degeneration, spondylolysis or spondylolisthesis. Dr. Chabot diagnosed back pain, back strain and sciatica. He recommended medication, physical therapy and a repeat MRI to rule out spinal stenosis or a disc herniation. When Claimant returned on December 16, 2002, Dr. Chabot noted that the MRI showed no evidence of an obvious focal disc herniation. He performed three trigger point injections to the left SI region to see if they could delineate the etiology of his complaints. Claimant reported marked reduction in his complaints after the injections. Dr. Chabot suggested continued physical therapy and medications.
- 13) Claimant attended physical therapy at **PRORehab** (Exhibit D) starting on December 19, 2002. Of interest in the initial notes from the physical therapist is the indication from Claimant that he has had "no previous LB [low back] injuries," before the August 2002 injury for which he was seeking treatment. He also scored an 86% on

the Oswestry Pain Questionnaire, by reporting such complaints as an inability to lift or carry anything at all, an inability to sit or stand for more than 10 minutes, sleeping less than two hours at a time, and an inability to perform any job or homemaking chores. The therapist found diffuse pain to the left, increased pain with superficial pressure in the low back, but an inconsistency in reporting similar pain complaints when palpation was repeated. He found numerous positive Waddell's signs. By January 8, 2003, Claimant reported his complaints had decreased but activity still increases the pain in his low back. The therapist again recorded signs of magnified pain behavior, but noted some progress in therapy. By January 13, 2003, Dr. Chabot (Exhibit G) released Claimant to limited work duties with no lifting more than 25 pounds and ordered a Functional Capacity Evaluation.

- 14) The Functional Capacity Evaluation was performed at **PRORehab** (Exhibit D) on January 20, 2003. The therapist concluded that he was unable to classify Claimant's work demand level secondary to an invalid effort by Claimant. He noted that Claimant failed a number of validity criteria suggesting self-limiting performance, and, so his true work demand level was unable to be established. Claimant failed 8 out of 10 validity criteria that were tested, including showing 7 out of 8 positive Waddell's signs.
- 15) When Claimant returned to Dr. Chabot (Exhibit G) on January 30, 2003, Claimant reported that he was feeling much worse than he did at the last two visits. Dr. Chabot had reviewed the Functional Capacity Evaluation results and performed a physical examination, once again showing the decreased sensation in the whole left leg. He confirmed that the MRI showed no evidence of neural compression to corroborate with his complaints. Dr. Chabot opined that "there is a large degree of symptom magnification in this individual." He released Claimant at maximum medical improvement for this injury, back to work with a restriction of no lifting over 25 pounds, and limited squatting and twisting. He opined that Claimant sustained 5% permanent partial disability of the body as a whole as a result of the August 18, 2002 work injury, referable to his persisting symptoms with his lumbar strain.
- 16) According to the records of the **Missouri Division of Workers' Compensation** (Exhibit R), Claimant filed a Claim for Compensation for this August 18, 2002 injury, which was assigned Injury Number 02-083223. Claimant and his employer eventually settled that case by Stipulation for Compromise Settlement for the payment of \$8,533.20, or approximately 10% permanent partial disability of the body as a whole referable to the back. That Stipulation was approved by Legal Advisor Lori Neidel on May 20, 2003.
- 17) Claimant testified that he next went to work for the Holiday Inn, performing the same type of work he had been doing for the Hilton. He estimated that he worked there a year before his next work injury. On October 17, 2004, Claimant testified that he was lifting a heavy trash can filled with extra food with a co-worker, when he hurt his back yet again. He said that he received additional treatment, including injections, and was sent back to work, but he did not return to the Holiday Inn.

- 18) Claimant was sent for initial medical care and an MRI was performed on October 23, 2004 at **Metro Imaging** (Exhibit C). It showed a right paracentral disc herniation contained by the posterior longitudinal ligament at L3 that extends above the disc space, as well as an annular tear or fissure in the left paracentral region at L4.
- 19) Claimant was sent back to **Dr. Thomas Lee** (Exhibit A) for medical care following this new injury. At the examination on November 1, 2004, Claimant provided a history of the October 17, 2004 work injury and of his prior injury from three years earlier for which Dr. Lee had treated him, but there was no mention of the additional low back injury from 2002. He told Dr. Lee that prior to the October 17, 2004 injury, he had some low back symptoms, but he was able to work full duty without any restrictions, and since that injury he had been unable to work at all. Claimant complained of right back pain and right lower extremity pain to the proximal thigh. Dr. Lee noted that the MRI report suggested a paracentral herniation at L3-4. He needed to retrieve the prior treatment records to see the extent of the prior injury and treatment, but ordered medication, physical therapy and limited work duty in the meantime. By November 17, 2004, Dr. Lee recorded that Claimant was showing objective improvement with increased range of motion and strength, although Claimant was reporting no subjective improvement in his complaints. On December 1, 2004, Claimant was still reporting little improvement, with complaints in the right leg, at times to the thigh and at times the entire leg in a stocking distribution to the toes. He compared the prior diagnostic tests to the new MRI and suggested that perhaps there may be more of a focal right paramedian protrusion. He recommended epidural injections for the diagnosis of a right L3 disc protrusion, and returned him to restricted work of no lifting over 20 pounds and no bending or stairs.
- 20) According to the records of **Excel Imaging** (Exhibit H), Claimant received an L4-5 epidural steroid injection on December 3, 2004 and an L3-4 epidural steroid injection on December 14, 2004. He returned to Dr. Lee (Exhibit A) on December 15, 2004, indicating that the first epidural and the physical therapy was helping, but he still was having pain. Dr. Lee continued the conservative treatment and on January 3, 2005, noted that he had now learned about the additional prior low back injury and the treatment with Dr. Backer. He continued the medications and therapy with a plan to get a Functional Capacity Evaluation. On January 17, 2005, Dr. Lee recorded that Claimant had the Functional Capacity Evaluation and "there are inconsistencies." He released Claimant at maximum medical improvement, back to restricted work of no lifting over 25 pounds and no repetitive twisting. On March 2, 2005, Dr. Lee opined that Claimant sustained 2% permanent partial disability of the body as a whole referable to the October 17, 2004 injury.
- 21) Claimant first saw **Dr. Shawn Berkin** (Exhibit U) for an independent medical examination at his attorney's request on March 10, 2005. Dr. Berkin examined Claimant on that occasion and provided no medical treatment. He took a complete history from Claimant of the work injury and his pre-existing injuries and conditions. Dr. Berkin also reviewed Claimant's medical treatment records, recorded his continuing complaints and performed a physical examination. Claimant complained of pain at a level of 7 out of 10, and tenderness, in his low back. He also reported

right leg pain aggravated by bending and lifting, as well as walking, squatting and kneeling. He said that he was unable to perform his job when he was released to go back to the Holiday Inn and so he was terminated. He was unemployed as of this examination with Dr. Berkin. Dr. Berkin's physical examination revealed tenderness and lost range of motion in the low back, with normal muscle bulk and tone, normal reflexes and no swelling or atrophy in the lower extremities. Claimant complained of back pain on the straight leg raising test. Dr. Berkin diagnosed a lumbosacral strain, herniated nucleus pulposus of the L3-4 intervertebral disc and an annular tear at L4 with bulging of the L4-5 intervertebral disc, all of which he medically causally related to the October 2004 work injury. He rated Claimant as having 25% permanent partial disability of the body as a whole referable to the lumbosacral spine attributable to the October 2004 injury. He also rated Claimant as having a pre-existing permanent partial disability of 35% of the body as a whole referable to the lumbosacral spine, attributable to his prior low back injuries/condition.

- 22) According to the records of the **Missouri Division of Workers' Compensation** (Exhibit R), Claimant filed a Claim for Compensation for this October 17, 2004 injury, which was assigned Injury Number 04-110150. Claimant and his employer eventually settled that case by Stipulation for Compromise Settlement for the payment of \$12,495.60, or approximately 15% permanent partial disability of the body as a whole referable to the low back. That Stipulation was approved by Legal Advisor Kathleen M. Hart on June 20, 2005.
- 23) Claimant testified that he next began working for Employer as a building cleaner. The records of **Centaur Building Services, Inc.** (Exhibit S) confirm that Claimant began working for Employer as a general cleaner in May 2005. Claimant testified that while working for Employer, he would get help from many of his co-workers to help him complete his tasks when they were done with theirs. He also testified that he missed time from work because of back pain. However, the employment records only show one absence from work on August 19, 2005, when he had to leave town for a family emergency. In fact, the pay records also show he often worked, not only his regular hours, but also often overtime hours as well during his period of employment with Employer leading up to his 2006 injury.
- 24) Claimant testified that on July 25, 2006, he was operating a machine that was supposed to take the trash out, when a can got stuck, and as he tried to lift it, he went down to his knees and ended up in the emergency room. Claimant testified that he has not been able to work at all since that accident.
- 25) Medical treatment records from **Concentra Medical Centers** (Exhibit J) document the treatment Claimant received there beginning on July 27, 2006 for his low back following this work injury. Claimant provided a consistent history of an injury at work on July 25, 2006 and also mentioned that he has had back pain in the past. He complained only of back pain, no radiation. Physical exam showed tenderness, but normal reflexes, strength and sensation, as well as no spasm. He was diagnosed with a lumbar strain. The next day, July 28, 2006, Claimant returned now with back pain radiating to both knees and a bilateral positive straight leg raising test. The doctor

ordered an MRI that was performed on August 4, 2006 at **St. Louis University Hospital** (Exhibit K). The MRI of the lumbar spine showed an L3-4 right paracentral disc protrusion with right L4 nerve root compression and moderate spinal canal stenosis, as well as lumbar spondylosis. When Claimant returned to Concentra (Exhibit J) on August 8, 2006, Claimant reported that his symptoms were improving, but he still had low back pain radiating to the right leg. In light of the MRI findings, he was referred to Dr. Samson for further evaluation and treatment for his lumbar radiculopathy and protrusion of the lumbar disc with nerve root compression. The final note from Concentra is dated August 10, 2006, when Claimant returned providing a consistent history of his last injury and complaining of low back pain with radiation to the left knee and right calf. He apparently said "he has never had any previous back pain nor problem." An evaluation with Dr. Samson was scheduled, based on a diagnosis of herniated discs at L3-4 and L4-5.

- 26) Instead of Dr. Samson, Claimant came under the care of **Dr. David Raskas** (Exhibit M), who examined Claimant on August 11, 2006. Claimant, through a translator, reported his injury on July 25, 2006 and said that he had continued right buttock and right lower back pain, with numbness predominantly in the right leg, but also some on the left. He said the left numbness "has been new and more recent." Claimant provided a history of hypertension and asthma, but otherwise "he has not had any significant medical problems." Claimant admitted that he had had backaches in the past, but said they would just go away. *Claimant denied any prior injuries to his back and denied ever having any leg symptoms in the past. Later in the report, Claimant denied that he had ever been injured on the job previously.* On physical examination, Dr. Raskas found that there was no spasm, sensory deficit or atrophy, but Claimant was very guarded in terms of walking, had severely limited range of motion and a positive straight leg raise test on the right. Based on the MRI, Dr. Raskas felt that Claimant had a disc herniation at L3-4 to the right and he recommended a microdiscectomy. He offered no specific opinion on the causation related to the need for the surgery and the diagnosis, but he did suggest a medical workup prior to surgery, given his age and smoking history.
- 27) Claimant testified that in the course of checking his heart to determine his readiness for surgery, a problem with his heart was discovered and had to be surgically treated.
- 28) According to the medical records of **Missouri Baptist Medical Center** (Exhibit L) and **Dr. John Hess at Town & Country Cardiovascular** (Exhibit O), when Claimant underwent the nuclear stress test, they found a markedly abnormal left ventricular ejection fraction of 46%, with evidence of essential akinesis of the apex of the left ventricle and a large region of fixed inferoposterior defect consistent with a previous inferior infarct with peri-infarct ischemia. It was decided that Claimant would need a coronary angiography before proceeding with any lumbosacral procedure. Therefore, on January 15, 2007, Dr. John Hess performed a left heart catheterization, cine left ventriculography and selective coronary arteriography. He had stents placed in the proximal circumflex and mid left anterior descending vessels to address the 80% and 90% blockages, respectively, in those vessels. Following the stent placement, those vessels were fully patent. In a final report to Dr. Raskas, dated

February 20, 2007, Dr. Hess (Exhibit O) reported that Claimant was feeling much better, had no recurrent episodes of angina and had no undue shortness of breath. He opined that Claimant would now be an acceptable cardiovascular risk for the planned lumbosacral surgery.

- 29) Despite being cleared for the lumbar surgery, Claimant testified that he never had the surgery because he was afraid that he may never wake up if he was put to sleep for that surgery. He said that he did some shredding of papers for Employer for a time, but he was unable to sit for so long, so he could not continue to do that.
- 30) Claimant and Employer entered into an agreement to resolve the July 25, 2006 Claim (Injury No. 06-078381) by **Stipulation for Compromise Settlement** (Exhibit T) for \$5,180.40, or 7.5% permanent partial disability of the body as a whole referable to the low back. According to the terms of the settlement, Employer paid \$2,898.50 in medical benefits and \$3,108.24 in temporary disability benefits. The Second Injury Fund Claim was left open and pending by the terms of this settlement. Administrative Law Judge Margaret D. Landolt approved this settlement on November 29, 2007.
- 31) Claimant testified that he began a course of psychiatric treatment with Dr. Marcu because he was losing his mind as a result of his life and war issues. He believed this treatment occurred after his last work injury in 2006. He said that he was remembering some of the things that he had observed in Bosnia, such as people being killed and houses being burned with people inside of them.
- 32) Claimant sought a course of psychiatric treatment that apparently began with psychological counseling with **Dr. Ilina Moreno** (Exhibit I) on April 15, 2006. Apparently due to the severity of his diagnoses, he was referred to **Dr. Mirela Marcu** (Exhibit I) for psychiatric treatment. In Dr. Marcu's Psychiatric Intake Summary dated June 1, 2006, Claimant, with an interpreter, was referred for an evaluation regarding depression, anxiety, sleep disturbance and signs of post-traumatic stress disorder. The report indicates, "He is unemployed, lost his job a few months ago." He said that he last worked as a dishwasher in a hotel and his highest level of education is high school. Claimant got agitated and cried when speaking about his war experiences. Dr. Marcu diagnosed: Axis I: Bipolar disorder, type II, and post-traumatic stress disorder; Axis II: Deferred; Axis III: Chronic back pain; Axis IV: Conflicts with family, jobless, financial problems; and Axis V: GAF [Global Assessment of Functioning] is 40, with the highest in the last year being 50. She prescribed medications and began a course of regular visits and medication adjustments that continued through March 26, 2009.
- 33) Also included in the records from the **St. Louis University Health Sciences Center—David P. Wohl, Sr. Memorial Institute** (Exhibit I) is the June 14, 2007 psychological report of Dr. Ilina Moreno. In the report, Dr. Moreno had an accurate description of his work history and noted that he had to stop working after his spinal cord injury the prior year. Claimant apparently reported that, "His back pain is so intensive that he can't walk, sleep and perform his regular ADL (Activities of Daily Living), and is using a cane." After discussing his back injury and more recent heart

surgery, Dr. Moreno notes, that, "Due to his severe health and adjustment problems in America, his previous PTSD reactivated and his depression exacerbated." Dr. Moreno diagnosed the following:

Axis I: Post-Traumatic Stress Disorder; chronic with psychotic features
Anxiety Disorder
Depression with suicidal ideation and psychotic features
Nightmare Disorder
Sleep Terror Disorder

Axis II: Borderline Personality Disorder due to war trauma

Axis III: Spinal cord injury at work, heart failure, high cholesterol, diabetes, arthritis, chest pain, ringing in the right ears, chronic headaches, persistent numbness and tingling, urinary tract infections and abdominal cramps

Axis IV: Problems with access to health care services: language and transportation

Education problems: Limited literacy

Economic problems, no income

Axis V: GAF: 41 at the outset and currently 50.

She opined that Claimant has high clinically significant impairments in social, occupational, and other important areas of functioning. She believed that due to his severe mental health problems, Claimant's cognitive functioning was impaired, resulting in memory loss, poor concentration and short attention span. She opined that, "He has difficulties learning and retaining new information and is not able to hold even the most simple job." She concluded, "Due to his severe war trauma and his recent experiences in the U.S. he would also have difficulties sustaining at work and keeping appropriate relationship both with his supervisors and coworkers."

34) Medical treatment records from **National Medical and Dr. Devon Golding** (Exhibit N) document the treatment Claimant received, first for his low back pain and then later for his other systemic conditions (coronary artery disease, hypertension and diabetes) from August 9, 2006 through May 18, 2009.

35) Medical treatment records of **Dr. Robert Holloway** (Exhibit P) dated from July 14, 2009 through October 27, 2010, as well as the records of the **Center for Interventional Pain Management** (Exhibit Q) during that same time frame, document the treatment Claimant was receiving and the extensive array of medications he was being prescribed for a whole host of medical conditions. Throughout these notes, Claimant was receiving treatment and/or medications for diabetes type II with neurological manifestations (bilateral hand paresthesias), asthma, chest pain, hypertension and chronic airway obstruction. The records documented an echocardiogram performed on December 14, 2009, as a result of Claimant's complaints of chest pain, swelling in his legs, shortness of breath and having lightheadedness. Following the echocardiogram, the notes suggest that Claimant had a cardiac catheterization in January 2010. Although Claimant provided a past medical history of low back pain, I found only a couple of references to lumbago in these records that spanned over a year of treatment.

- 36) Claimant again saw **Dr. Shawn Berkin** (Exhibit U) for an independent medical examination at his attorney's request on October 17, 2008. Dr. Berkin again examined Claimant and provided no medical treatment. He issued his second report dated February 14, 2009. He noted that Claimant was a poor historian and so much of the information he had to rely on, came from the medical records. At the time of Dr. Berkin's second examination, Claimant complained of pain and tenderness to his low back, aggravated by kneeling and squatting. He also complained of left leg pain and stated that he was unable to lift. He rated the severity of his pain at a 7 on a scale of 1 to 10. In the report, Dr. Berkin also noted a history of asthma and coronary artery disease for which he received a cardiac catheterization in 2007. The physical examination revealed tenderness and lost range of motion in the low back (only slightly worse on flexion and left lateral flexion than the 2005 examination), with normal muscle bulk and tone, normal reflexes and no swelling or atrophy in the lower extremities. Claimant complained of back pain on the straight leg raising test. Dr. Berkin also noted that Claimant exhibited pain limiting movement with pain gestures of groaning in all planes of movement of the low back and with only 5 degrees of elevation of the legs on the straight leg raising test.
- 37) Dr. Berkin diagnosed a lumbosacral strain with right L4 radiculopathy and a herniated nucleus pulposus of the L3-4 intervertebral disc. He noted Claimant's continued complaints of pain in the low back and left leg. Dr. Berkin opined that the July 2006 accident was the prevailing factor in causing these diagnoses. He rated Claimant as having 20% permanent partial disability of the body as a whole referable to the lumbosacral spine, attributable to the July 25, 2006 injury. He opined that the previous disabilities he rated in the prior report remained unchanged and continued to exist as of the 2006 injury. He felt the pre-existing disabilities created a synergistic effect when considered in combination with the disability resulting from the July 25, 2006 injury, and that the synergistic effect creates overall disability that exceeds the simple sum, and so a loading factor should be applied. Finally, he opined that, "Based on the nature and extent of his disability coupled with his age, limited education and his inability to speak English, I feel Mr. Saric is unable to compete for gainful employment in the open labor market and is permanently and totally disabled to work."
- 38) Claimant met with **Mr. Timothy Lalk** (Exhibit V) for a vocational rehabilitation evaluation at the request of his attorney on September 3, 2009. Mr. Lalk reviewed extensive medical treatment records, discussed Claimant's education, background, past work history and jobs, and then issued his report dated September 23, 2009. Despite the presence of an interpreter, Mr. Lalk noted that Claimant was a poor historian and could only provide limited information. Claimant walked with a walker that he had obtained after his first low back injury and displayed difficulty with any physical activity or position. He indicated that his asthma and shortness of breath decreases when he uses his inhaler and his "depression is controlled with his medication." Claimant told Mr. Lalk that he did not believe he could work because he cannot walk or bend and because of limitations from his asthma, heart and depression. Mr. Lalk did not conduct any vocational testing because of Claimant's inability to read English. Mr. Lalk opined that based upon the symptoms and

limitations reported by Claimant and based upon his review of the medical records, he did not believe Claimant would be capable of securing or maintaining employment in the open labor market. Mr. Lalk opined that no employer would consider Claimant for any position based upon his experience due to his presentation. Mr. Lalk's opinion was heavily based on Claimant's presentation and complaints, and the belief that someone presenting himself in this manner would not be able to be hired.

- 39) Claimant was next evaluated by **Dr. Adam Sky** (Exhibit W) at his attorney's request on November 2, 2010 for an independent psychiatric evaluation. Dr. Sky met with Claimant and reviewed his psychiatric treatment records, as well as some of the other expert reports that had been obtained by Claimant's attorney. Dr. Sky noted in his report that the examination was partially based on the subjective complaints and history given by Claimant. Claimant had his granddaughter present to serve as an interpreter for him. Claimant reported that he was in his usual state of physical and mental health until his fall at work in 2004. Since that injury, he reported "severe back pain" that has left him "essentially unable to do any sort of physical labour." Dr. Sky apparently administered no psychiatric tests, but performed a mental status examination that showed a somewhat blunted affect, but no hallucinations, delusions, gross psychotic symptoms, no evidence of a phobic or dissociative disorder and no cognitive deficits. Dr. Sky's psychiatric assessment was:

Axis I: Bipolar affective disorder type II, most recent episode depressed
The possibility of a unipolar mood disorder; ie: a Major Depression cannot be excluded
PTSD by history.

Axis II: Marital Discord

Axis III: COPD/Asthma, Multiple back injuries, CAD with stent placement and chronic lower back pain

Axis IV: Moderate; ongoing family and financial stress, language barriers and chronic medical issues

Axis V: Poor 40/100

Dr. Sky recommended that Claimant needed further treatment from a psychiatrist. He opined that Claimant's psychiatric condition pre-existed the July 25, 2006 work injury. He further rated Claimant as having 50% permanent partial disability of the body as a whole referable to his psychiatric condition. Finally, he opined that the psychiatric disability would synergistically combine with the primary medical injury to create a greater amount of overall disability than the sum of the individual disabilities.

- 40) The deposition of **Dr. Shawn Berkin** (Exhibit U) was taken by Claimant on March 9, 2010 to make his opinions in this case admissible at trial. Dr. Berkin is an osteopathic physician, who is board certified in family practice and as an independent medical examiner. He testified consistent with the opinions from his reports described above. He confirmed that he found some differences on Claimant's physical examination when comparing the first with the second. He said that the second time, Claimant had more tenderness to the lower back, Claimant walked with a walker in a lurching gait, had more loss of range of motion and a more compelling straight leg raise test, as well as an inability to elevate on his toes and heels. He confirmed that the prior disabilities

enumerated in the 2005 report constituted a hindrance or obstacle to employment leading up to the time of the 2006 injury.

- 41) On cross-examination, Dr. Berkin admitted that at both the 2005 and 2009 evaluations, Claimant reported similar complaints in the low back of pain and tenderness, pain with activities, and, in fact, the same pain level in the low back. Dr. Berkin admitted that the restrictions he placed on Claimant would allow some people to return to some type of employment, but not Claimant, because of his age, education and inability to speak English. He admitted that his ratings of disability were based on a combination of objective physical evidence and Claimant's subjective complaints. When he was asked to try to differentiate the low back pathology found on the MRIs between the various injuries, Dr. Berkin initially responded that different radiologists read tests differently, so just because they use similar terms to describe it, does not mean the pathology was exactly the same. However, later he admitted that he only relied on the radiologists' reports as a basis for his opinions and did not review the diagnostics personally. Therefore, it is somewhat unclear how he could differentiate between the pathology attributable to the various low back injuries, when he was at the mercy of the potential differences in the radiologists' interpretations he earlier described as an issue. Nonetheless, he agreed that Claimant already had a large herniation at L3-4 back in 2001, but opined that Claimant had additional disability related to the 2006 injury by virtue of the fact that Dr. Raskas was suggesting surgery after the last injury.
- 42) The deposition of **Mr. Timothy Lalk** (Exhibit V) was taken by Claimant on March 12, 2010 to make his opinions in this case admissible at trial. Mr. Lalk is a certified vocational rehabilitation counselor. He testified consistent with the opinions from his report described above. He confirmed that he did not think any employer would be reasonably expected to employ Claimant in his present physical condition. He believed Claimant was unable to work based on his physical problems, even without considering his inability to speak English. However, he admitted that Dr. Berkin's restrictions would still permit Claimant to perform light-to-sedentary employment, and further admitted that it would be reasonable to consider that Claimant may be exaggerating the level of symptoms and problems, given the numerous such findings in the medical records. He said "that there is a possibility that that's occurring." He confirmed that he saw no evidence in the record of any intellectual impairment that would prevent Claimant from learning English. Mr. Lalk agreed that no physician had prescribed or recommended that Claimant needed to lie down during the day, but rather, Claimant was just doing that on his own. Mr. Lalk admitted that he saw no evidence of restrictions on exertional activities because of Claimant's heart condition. Given his admission that Dr. Berkin's restrictions would not prevent Claimant from performing sedentary-to-light work, Mr. Lalk was asked what medical records allowed him to conclude that Claimant was unemployable. He responded that his opinion in that regard was supported by Dr. Raskas' opinion indicating Claimant's back condition was significant enough that he needed surgery, as well as the extent of the symptoms and limitations reported by Claimant. Mr. Lalk testified that Claimant's self-reported opinion of his capabilities was "essential" to his opinion on Claimant's employability.

- 43) The deposition of **Dr. Adam Sky** (Exhibit W) was taken by Claimant on March 16, 2011 to make his opinions in this case admissible at trial. Dr. Sky is a board certified psychiatrist. He testified consistent with the opinions from his report described above. Dr. Sky testified that based on Claimant's presentation at his examination, he was so depressed that he would admit him to the hospital if Claimant showed up in his emergency room. When asked if he had any information, upon which he could base an opinion on Claimant's psychiatric condition prior to the 2006 injury, Dr. Sky responded that "it's very difficult to speculate because we just don't have the psychiatric records from then." Nonetheless, he suggested that perhaps "at least half of that 50%" was attributable to the work injury. When asked to explain that division, he said, "There's no magic formulation, but I am assuming that we had some very significant preexisting mood symptoms." He further opined that it would be very difficult for someone with a 50% psychiatric disability to perform any kind of gainful employment.
- 44) On cross-examination, Dr. Sky testified that the only reason he included a diagnosis of bipolar disorder, was the number of times in the old records where that diagnosis was made. He basically relied on Dr. Marcu's records in that regard. He did not see any symptoms at the time of his examination consistent with bipolar disorder, just depression. Despite including PTSD in his diagnosis too, Dr. Sky testified that he saw no supporting evidence for post-traumatic stress disorder either. He again just relied on Dr. Marcu's record. Finally, Dr. Sky admitted that since he did not examine and evaluate Claimant for his physical complaints and problems, he had to rely on the assessments of the other physicians to determine the synergistic combination in this case.
- 45) Claimant testified that he did not think that he was able to work at the current time, because of his back, legs, heart and asthma.
- 46) In terms of his current complaints, Claimant testified that he has low back pain every day, for which he takes pain pills three times a day. He said that his legs get numb or swell a lot. He has to take a number of medications for his heart. He said that he has a nurse that sets out all of his medications on Thursday to ensure that he takes them all. Claimant testified that he is unable to walk a lot, lift, sit or stand too long without increasing his low back pain. He testified that he has to lie down at least three times a day for 1.5 to 2 hours each time to relieve the pain in his low back and legs. He estimated that he is only able to walk for approximately 5 minutes because of his heart and asthma problems. He can only stand for 10 to 15 minutes before having problems. He said that he cannot go to visit people and he is even unable to go to the mosque to pray. During an average day, Claimant said that he watches television (sports channels) and spends time with his grandson. He has a personal care aide, who cooks, cleans and helps him take a shower. He said that he is unable to drive because of problems with his back and legs.
- 47) Claimant also placed into evidence his **current list of medications** (Exhibit X), which shows approximately 20 medications which he is currently prescribed. There

appears to be one medication for pain, at least five for breathing difficulties, and the rest for other assorted conditions, including his psychiatric problems, hypertension and diabetes.

48) On cross-examination, Claimant confirmed that he does not drive because of the pain in his legs and back, but he admitted that he is also afraid of losing control with coughing from his asthma. He said that he stopped driving approximately 2 years ago. When he has to see a doctor for his pain medication, he said that they send a car for him to take him to the doctor. He agreed that he has diabetes and has to test his blood sugar. He estimated that he began lying down to relieve his pain complaints approximately 2 ½ years ago. He estimated that he has been dealing with the legs swelling and numbness for about 1 to 1 ½ years. Claimant testified that Dr. Marcu was the first one to treat him for sadness or depression. He had no prior treatment before her and he has not continued to see her. He just takes the medication that she prescribed. Claimant testified that before the 2006 injury, he was in pain, but he could deal with it. After the 2006 injury, he just could not deal with the pain anymore.

RULINGS OF LAW:

Based on a comprehensive review of the evidence described above, including Claimant's testimony, the expert medical and vocational opinions and depositions, the medical records, the Stipulation for Compromise Settlement between Claimant and Employer in this case, and the Stipulations for Compromise Settlement between Claimant and his employers in the prior cases, as well as based on my personal observations of Claimant at hearing, and based on the applicable statutes of the State of Missouri, I find:

Claimant sustained a compensable injury to his low back as a result of his accident in the course and scope of his employment for Employer on July 25, 2006. I find that he was operating a machine that was supposed to take the trash out, when a can got stuck, and as he tried to lift it, he went down to his knees and ended up in the emergency room.

Given the nature of this Claim and the evidence submitted, both issues in this case can be effectively addressed at the same time.

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

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

Considering the date of the injury, it is important to note that the new statutory provisions are in effect, including **Mo. Rev. Stat. § 287.800 (2005)**, which mandates that the Court "shall construe the provisions of this chapter strictly" and that "the division of workers' compensation

shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.” Additionally, **Mo. Rev. Stat. § 287.808 (2005)** establishes the burden of proof that must be met to maintain a claim under this chapter. That section states, “In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true.”

Under **Mo. Rev. Stat. § 287.190.6 (1) (2005)**, “‘permanent partial disability’ means a disability that is permanent in nature and partial in degree...” The claimant bears the burden of proving the nature and extent of any disability by a reasonable degree of certainty. *Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 138 S.W.3d 714, 717 (Mo. banc 2004). Proof is made only by competent substantial evidence and may not rest on surmise or speculation. *Griggs v. A.B. Chance Co.*, 503 S.W.2d 697, 703 (Mo. App. 1973). Expert testimony may be required when there are complicated medical issues. *Id.* at 704. Extent and percentage of disability is a finding of fact within the special province of the [fact finding body, which] is not bound by the medical testimony but may consider all the evidence, including the testimony of the Claimant, and draw all reasonable inferences from other testimony in arriving at the percentage of disability. *Fogelsong v. Banquet Foods Corp.*, 526 S.W.2d 886, 892 (Mo. App. 1975)(citations omitted).

Additionally, under the 2005 amendments to the Workers’ Compensation Law, the Legislature added further provisions that have an impact on the determination of the nature and extent of permanent partial disability. **Mo. Rev. Stat. § 287.190.6 (2) (2005)** states,

Permanent partial disability... shall be demonstrated and certified by a physician. Medical opinions addressing compensability and disability shall be stated within a reasonable degree of medical certainty. In determining compensability and disability, where inconsistent or conflicting medical opinions exist, objective medical findings shall prevail over subjective medical findings. Objective medical findings are those findings demonstrable on physical examination or by appropriate tests or diagnostic procedures.

Therefore, according to the terms of this statute, it is incumbent upon the claimant to have a medical opinion from a physician that demonstrates and certifies claimant’s permanent partial disability within a reasonable degree of medical certainty. Further, if there are conflicting opinions from physicians in a given case, then objective medical findings must prevail over subjective findings.

Under **Mo. Rev. Stat. § 287.020.6 (2005)**, “total disability” is defined as the “inability to return to any employment and not merely ... inability to return to the employment in which the employee was engaged at the time of the accident.” The test for permanent total disability is claimant’s ability to compete in the open labor market. The central question is whether any employer in the usual course of business could reasonably be expected to employ claimant in his present physical condition. *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173 (Mo. App. E.D. 1995) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003).

In cases such as this one where the Second Injury Fund is involved, we must also look to **Mo. Rev. Stat. § 287.220 (2005)** for the appropriate apportionment of benefits under the statute. In order to recover from the Fund, Claimant must prove a pre-existing permanent partial disability existed at the time of the primary injury, and was of such seriousness so as to constitute a hindrance or obstacle to employment or re-employment should employee become unemployed. *Messex v. Sachs Electric Co.*, 989 S.W.2d 206 (Mo. App. E.D. 1999) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). Then to have a valid Fund claim, that pre-existing permanent partial disability must combine with the primary disability in one of two ways. First, the disabilities combine to create permanent total disability, or second, the disabilities combine to create a greater overall disability than the simple sum of the disabilities when added together.

In the second (permanent partial disability) combination scenario, pursuant to **Mo. Rev. Stat. § 287.220.1 (2005)**, the disabilities must also meet certain thresholds before liability against the Second Injury Fund is invoked. The pre-existing disability and the subsequent compensable injury each must result in a minimum of 12.5% permanent partial disability of the body as a whole (50 weeks) or 15% permanent partial disability of a major extremity. These thresholds are not applicable in permanent total disability cases.

It is first necessary to determine the nature and extent of permanent partial and/or permanent total disability against Employer. Based on the evidence referenced above, including the medical treatment records, the expert opinions from the doctors and vocational expert, as well as based on my personal observations of Claimant at hearing, I find that Claimant is not permanently and totally disabled under the statute against Employer as a result of the last injury alone.

Of all of the medical records and expert opinions I reviewed, I only found two that clearly provided an opinion that Claimant was permanently and totally disabled, Dr. Berkin and Mr. Lalk. However, neither of those experts indicated that the permanent total disability was the result of the last injury alone. Therefore, I find there is no evidence in the record to substantiate a finding of permanent total disability against Employer.

I find that Claimant has successfully met his burden of proof that Employer is responsible for the payment of permanent partial disability referable to the low back, related to the July 25, 2006 injury.

The issue of nature and extent of permanent partial disability is further complicated in this case by the pre-existing low back injuries for which Claimant had received settlements before the July 25, 2006 accident. **Mo. Rev. Stat. § 287.190.6 (1) (2005)** also provides in pertinent part that,

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

Case law in this area has stood for the proposition that since pre-existing permanent partial disability to the same part of the body is conclusively presumed to continue undiminished, it is appropriate for the total amount of permanent partial disability to be reduced by the prior amount, leaving the balance to be paid by the Employer in the instant case. *Helm v. SCF, Inc.*, 761 S.W.2d 199 (Mo. App. 1988).

In awarding permanent partial disability for this injury under these new statutory provisions, it is, thus, necessary to deal with each of these sections. Considering the evidence listed above, I find that the medical opinion from Dr. Berkin demonstrates and certifies, within a reasonable degree of medical certainty, that Claimant sustained permanent partial disability as a result of his pre-existing low back injuries, as well as the work-related injury on July 25, 2006.

Although there are a couple of physicians whose records contained opinions on the nature and extent of Claimant's permanent partial disability attributable to some of his pre-existing low back injuries, only Dr. Berkin offered opinions on the nature and extent of Claimant's permanent partial disability referable to the low back, attributable to this accident at work on July 25, 2006, as well as the pre-existing low back injuries. In his first report from 2005, Dr. Berkin diagnosed a lumbosacral strain, herniated nucleus pulposus of the L3-4 intervertebral disc and an annular tear at L4 with bulging of the L4-5 intervertebral disc, all of which he medically causally related to the October 2004 work injury. In his second report following the 2006 injury, Dr. Berkin diagnosed a lumbosacral strain with right L4 radiculopathy and a herniated nucleus pulposus of the L3-4 intervertebral disc, attributable to the 2006 injury. In comparing the two diagnoses, it is readily apparent that the herniated disc at L3-4 that Dr. Berkin included in the 2006 diagnosis was already present before that 2006 injury, and, in fact, had already been causally related by Dr. Berkin to the 2004 accident in his first report. It is also readily apparent, from reviewing the medical records, that Claimant already had lower extremity radiculopathy complaints for a number of years leading up to the 2006 injury, so that was not really new to the 2006 injury either.

When asked to explain the differences between what he originally attributed to the 2004 injury (and the pre-existing conditions) and what he attributed to the 2006 injury, Dr. Berkin attempted to pass off any perceived lack of difference on the disparities attributable to different radiologists reading the diagnostic tests. This explanation made no sense since he too relied on those same radiologists' reports, as he never read the diagnostics himself personally, nor performed any himself. He pointed to the differences he found in the physical examination, but most of those differences relied on accurate reporting of complaints and the presentation Claimant made when he was examined, and for reasons that will be explained in more detail below, Claimant's presentation in that regard is not credible and cannot be relied upon. Even then, comparing the current complaints contained in each report, Claimant described pain in the same areas, with the same activities and even at the same level of severity (7 out of 10) in both reports. Finally, Dr. Berkin pointed to Dr. Raskas recommending surgery after the 2006 injury as evidence that there was additional disability in the low back attributable to the 2006 injury. However, for reasons explained in more detail below, that opinion from Dr. Raskas was based on faulty and incomplete information from Claimant, and, thus, it also cannot be used as a basis for an award of disability in this case.

All of that being said, while I do not believe the extent of the disability Dr. Berkin attributed to the 2006 work injury, and while I find that most of the diagnoses in Claimant's low back actually pre-existed that 2006 injury, I do find in the medical records and Dr. Berkin's physical examination findings, some differences in Claimant's low back condition that could be attributable to his 2006 injury, as Dr. Berkin has opined. Specifically, I found that Claimant's low back range of motion was slightly less following the 2006 injury than it was before. Therefore, I find that all of the disc pathology in the low back, as documented on the various diagnostic tests, actually pre-existed the 2006 work injury, and Dr. Berkin's conflicting causation opinions regarding that disc pathology, as contained in his second report, are not credible. However, I further find that Dr. Berkin's limited opinion that Claimant did sustain an additional lumbosacral strain following the 2006 injury, is consistent with the rest of the evidence and that part of his opinion is credible.

It is of further importance to note that Claimant entered into Stipulations for Compromise Settlement to settle the July 25, 2006 injury, as well as all of the pre-existing low back injury claims. Claimant and Employer entered into an agreement to resolve the July 25, 2006 Claim (Injury No. 06-078381) by Stipulation for Compromise Settlement for \$5,180.40, or 7.5% permanent partial disability of the body as a whole referable to the low back. Administrative Law Judge Margaret D. Landolt approved this settlement on November 29, 2007. With regard to the pre-existing low back injuries, Claimant and his employer settled Injury Number 01-019739 by Stipulation for Compromise Settlement for the payment of \$18,777.50, or approximately 17.5% permanent partial disability of the body as a whole referable to the back. That Stipulation was approved by Legal Advisor Louise Tutt on March 28, 2002. Claimant and his employer settled Injury Number 02-083223 by Stipulation for Compromise Settlement for the payment of \$8,533.20, or approximately 10% permanent partial disability of the body as a whole referable to the back. That Stipulation was approved by Legal Advisor Lori Neidel on May 20, 2003. Finally, Claimant and his employer settled Injury Number 04-110150 by Stipulation for Compromise Settlement for the payment of \$12,495.60, or approximately 15% permanent partial disability of the body as a whole referable to the low back. That Stipulation was approved by Legal Advisor Kathleen M. Hart on June 20, 2005.

Therefore, I find that Claimant has a total of 50% permanent partial disability of the body as a whole referable to the low back related to both his pre-existing injuries and his compensable work injury of July 25, 2006. I further find that Claimant previously settled Workers' Compensation claims for his pre-existing low back injuries for a total of 42.5% permanent partial disability of the body as a whole referable to the low back. Those settlements were properly approved by Legal Advisors at the Division of Worker's Compensation. Pursuant to statute, that 42.5% of the body as a whole referable to the low back is conclusively presumed to continue undiminished since we have another injury to that same part of the body.

Accordingly, I find that Employer was responsible for the payment of 7.5% permanent partial disability of the body as a whole referable to the low back related to this compensable accident at work on July 25, 2006.

Having now established the nature and extent of the permanent partial disability attributable to the primary injury against Employer, it is now appropriate to determine whether or

not Claimant has successfully met his burden of proving Second Injury Fund liability for permanent total or permanent partial disability.

In order for Claimant to meet his burden of proving an entitlement to permanent total disability benefits from the Second Injury Fund, Claimant first needed to provide credible testimony on his own behalf to support such an award. I find that Claimant has failed to provide any such credible testimony in this case. After observing Claimant at trial, hearing his testimony and comparing that testimony to the medical treatment records and reports in evidence, I find that Claimant routinely exaggerated the nature and extent of his conditions and disabilities, and was less than fully truthful regarding his low back problems.

A detailed review of the medical treatment records and reports in evidence, revealed a pattern of exaggerated complaints, self-limiting behaviors, inconsistent physical examination results and inaccurate medical histories to various physicians, that has led me to conclude that Claimant is not only an unreliable historian, but he is not credible or reliable in his presentation and complaints in this case. Going back all the way to his first back injury in 2001, the medical reports contain references to Claimant displaying self-limiting behaviors and positive Waddell's signs during his treatment. Those indications from the physicians continued following each back injury up until the 2006 injury. Physical examination results throughout the medical records in evidence showed such anatomically unexplainable results, as left leg complaints with a right-sided disc protrusion, or decreased sensation throughout the whole left leg in a diffuse non-dermatomal pattern. Then, of course, are the inaccurate histories Claimant provided when seeking treatment for his low back. When he treats with Dr. Lee following the 2004 injury, Claimant provided a history of the 2001 injury, but did not mention the 2002 low back injury. When he sees Dr. Raskas following the 2006 injury, he denies ever having any prior injuries or leg symptoms in the past and even denies ever having had a prior work injury. While initially, I thought that perhaps this was just a function of Claimant's inability to speak English, many of the reports specifically reference a translator being present with Claimant, so the language barrier does not account for these gross inaccuracies and outright falsehoods.

Claimant's inability to be truthful and accurate with his history, combined with the repeated references in the medical treatment records regarding his exaggerated symptoms and complaints, leaves me to conclude that I could not rely on Claimant's testimony to serve as a basis for an award of permanent total disability benefits.

In terms of meeting his burden of proof in this case, in addition to Claimant's testimony, Claimant also needed to produce competent, credible and reliable expert testimony to support his contention that he is permanently and totally disabled. I find that Claimant has similarly failed to produce such credible expert testimony on the issue of permanent total disability.

The only physician to opine that Claimant is permanently and totally disabled based on the combination of his disabilities is Dr. Berkin. However, I find that Dr. Berkin's opinion regarding permanent total disability is not competent, credible or reliable, because it is based on Claimant's presentation and complaints, which I have already found are not credible or reliable, and the opinion and report of Dr. Raskas, which is also not reliable as a result of the grossly inaccurate history given to him by Claimant. Since I have already found that Claimant's presentation and complaints are not credible or reliable, to the extent that Dr. Berkin clearly

relied on Claimant's complaints and presentation when reaching his opinions in this regard, then Dr. Berkin's opinions in this regard are, thus, similarly not competent, credible or reliable.

The same is true for any reliance on Dr. Raskas' opinions or conclusions. A number of the experts in this case relied on Dr. Raskas' opinion that Claimant needed surgery following the 2006 injury, as evidence of the significant worsening of Claimant's low back condition after the 2006 injury. However, Dr. Raskas reached his opinion based on the grossly inaccurate history that Claimant never had any prior low back injuries or leg symptoms/complaints. In fact, Claimant had a long history of low back injuries, complaints, diagnosed disc pathology and leg symptoms long before the 2006 work injury, which Dr. Raskas never knew, because Claimant was not truthful and accurate with his history to the doctor. It is completely unclear if Dr. Raskas would have reached the same conclusions on the need for surgery if, in fact, he had been provided with the whole history and knew that Claimant's complaints had actually been present for over five years. As a result of Claimant's grossly inaccurate history to Dr. Raskas, the opinions of Dr. Raskas cannot be relied on as competent, persuasive and reliable evidence in this case, and, further, any other experts who relied on his opinions and report are similarly not competent, persuasive and reliable.

Separate and apart from the credibility issues that have rendered Dr. Berkin's opinion on permanent total disability unusable, there is yet another reason why his opinion does not support a finding of permanent total disability against the Second Injury Fund in this case. Dr. Berkin clearly factored into his opinion Claimant's inability to communicate in English and the effect that has on his employability. However, there is no permanent functional or mental reason why he cannot learn English, and so it is inappropriate to consider his English skills, or lack thereof, when determining his employability and the liability of the Second Injury Fund.

Courts have previously dealt with the issue of whether a pre-existing deficiency in English skills should properly be considered as a component in a finding of permanent total disability. *Karoutzos v. Treasurer of the State of Missouri*, 55 S.W.3d 493 (Mo. App. W.D. 2001) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). In *Karoutzos*, the Commission considered Claimant's deficient English skills as a component of finding him permanently and totally disabled. The Court of Appeals ruled that he was still permanently and totally disabled just considering the combination of the rest of his disabilities, but noted that, "the Commission's consideration of Karoutzos' deficient English skills as a component of finding permanent total disability was improper." *Id.* at 499. In arriving at that conclusion, the Court relied on *Tiller v. 166 Auto Auction*, 941 S.W.2d 863 (Mo. App. S.D. 1997). In *Tiller*, Claimant alleged illiteracy as a pre-existing permanent partial disability that he claimed combined with his primary injury to make him permanently and totally disabled. The Court in that case ruled that, "Where illiteracy is not due to inability to learn, but to lack of education, it is not a permanent partial disability for Second Injury Fund purposes." *Id.* at 866.

Essentially then, in order for conditions like illiteracy and deficient English skills, to be considered permanent partial disabilities for Second Injury Fund purposes, there must be a finding that those conditions come from a mental or physical inability to learn, instead of merely a lack of education. If those conditions merely come from a lack of education, then they are not permanent, since acquiring the additional education would correct the deficiency.

In this case, there is no doubt that Claimant has deficient English skills, and that those deficient English skills negatively impact his ability to find a job in the open labor market. However, there is no physician opining that his deficient English skills come from a permanent functional or mental inability to learn the language. In fact, when asked on cross-examination, Mr. Lalk confirmed that he saw no evidence in the record of any intellectual impairment that would prevent Claimant from learning English. Given the Court's finding then in *Karoutzos*, I find it is improper in this case to consider his deficient English skills as a component of finding him permanently and totally disabled. To the extent that any of the experts, including Dr. Berkin factored in his deficient English skills in their opinions on permanent total disability, that is yet one more reason that I find their opinions, in that regard, are not competent, credible or persuasive.

The only other expert in the record to opine that Claimant was permanently and totally disabled and unable to compete for work in the open labor market, was Claimant's vocational expert, Mr. Lalk. Mr. Lalk admitted in the record that Claimant was a poor historian. Despite that admission, Mr. Lalk heavily relied on Claimant's presentation and complaints at the time of his meeting with him, as well as the opinion of Dr. Raskas on Claimant's need for surgery following the 2006 injury, to reach his ultimate conclusion that Claimant was unemployable. Mr. Lalk further admitted that Dr. Berkin's restrictions would still permit Claimant to perform light-to-sedentary employment, and it was his presentation and complaints that allowed Mr. Lalk to conclude that Claimant was unable to compete in the open labor market. He also admitted that it would be reasonable to consider that Claimant may be exaggerating the level of symptoms and problems, given the numerous such findings in the medical records. He said "that there is a possibility that that's occurring." He also relied on Claimant's statement to him that Claimant did not believe he could work because he cannot walk or bend and because of limitations from his asthma, heart and depression.¹ Since I have already found that Claimant's presentation and complaints are not credible or reliable, as is Dr. Raskas' opinion in this matter, to the extent that Mr. Lalk clearly relied on those things when reaching his opinions in this case, then Mr. Lalk's opinions are, thus, similarly not competent, credible or reliable.

Finally, Claimant offered the deposition testimony of Dr. Adam Sky into evidence to support his contention that he had significant psychiatric disability that pre-existed the July 25, 2006 injury, as well as apparently some psychiatric disability that occurred subsequent to it. Despite administering no psychiatric tests himself, he offered a number of diagnoses and an opinion on Claimant's permanent partial psychiatric disability based heavily on Claimant's presentation and complaints at the time of his examination and Claimant's prior psychiatric treatment records. Interestingly, Dr. Sky admitted that despite not seeing any symptoms or evidence consistent with bipolar disorder or PTSD at the time of his examination, he still included those diagnoses because they were included in the prior treatment records. It is unclear to me why a physician would include diagnoses in his report, when in the case of the PTSD, he apparently does not agree with that diagnosis, and in the case of the PTSD and the bipolar disorder, he sees no evidence of it at the time of his examination. It is also interesting to note

¹ It is important to note, regarding any inclusion of the heart or asthma conditions in any finding of permanent total disability, that Claimant has offered no medical rating of disability regarding the asthma or heart conditions, so there is no evidence in the record to substantiate a finding as to any amount of pre-existing disability for those conditions, nor whether the heart condition that manifested itself after the 2006 work injury was even a "pre-existing" disability under the statute.

that although Dr. Sky indicated that 50% of Claimant's psychiatric permanent partial disability arose after the 2006 work injury, Dr. Sky's GAF score of 40 is exactly the same as it was when Dr. Marcu originally evaluated Claimant on June 1, 2006, prior to the July 25, 2006 work injury. Dr. Sky even admitted that any division of the disability is speculative, yet he offered such an opinion anyway. Further, the history Dr. Marcu was given by Claimant, and that she used in her diagnosis, that Claimant had lost his job a few months prior to June 2006, was obviously incorrect. Dr. Sky clearly relied on Dr. Marcu's records containing the errant history to formulate his own opinions in this matter. For all of these reasons, and since I have already found that Claimant's presentation and complaints are not credible or reliable, to the extent that Dr. Sky clearly relied on Claimant's complaints and presentation when reaching his opinions in this case, then Dr. Sky's opinions are, thus, similarly not competent, credible or reliable.

Accordingly, as Claimant offered no credible testimony on his own behalf in this matter on the issue of permanent total disability, and as the only experts who offered opinions that Claimant was permanently totally disabled (Dr. Berkin and Mr. Lalk) have similarly been found not competent, credible or reliable, I find that Claimant has failed to meet his burden of proof in this matter. Claimant's claim for permanent total disability benefits from the Second Injury Fund is denied.

The last issue, then, is whether Claimant is entitled to some amount of permanent partial disability from the Second Injury Fund based on the combination of his primary (July 25, 2006) injury and any pre-existing permanent partial disabilities. Having thoroughly considered all of the competent and credible evidence in the record, I find that Claimant is not entitled to a permanent partial disability award against the Second Injury Fund.

In order for Claimant to have a valid claim for permanent partial disability benefits against the Second Injury Fund, Claimant must have disability from the primary (July 25, 2006) injury that meets the applicable threshold of 12.5% of the body as a whole (50 weeks) or 15% of a major extremity. In this case, I have already found that Claimant sustained only 7.5% permanent partial disability of the body as a whole referable to the low back on account of the July 25, 2006 injury. I have further found that Dr. Sky's opinion on any psychiatric disability that may possibly have been attributable to this work injury is speculative at best, and not competent, credible or reliable. In the absence of any permanent partial disabilities from the primary (July 25, 2006) injury that meet the necessary statutory threshold for Second Injury Fund benefits, I find that Claimant's Claim against the Second Injury Fund in this matter must be denied.

Accordingly, the Claim against the Second Injury Fund in this matter is denied and no benefits are awarded.

CONCLUSION:

Claimant sustained a compensable injury to his low back as a result of his accident in the course and scope of his employment for Employer on July 25, 2006. He was operating a machine that was supposed to take the trash out, when a can got stuck, and as he tried to lift it, he went down to his knees and ended up in the emergency room. Claimant sustained a lumbosacral strain medically causally related to the July 25, 2006 work injury. Claimant also sustained 7.5% permanent partial disability of the body as a whole referable to the low back on account of that July 25, 2006 work accident. Claimant failed to meet his burden of proof to show that the Second Injury Fund is responsible for the payment of any permanent total disability benefits in this case, because Claimant failed to provide credible testimony on his own behalf and further failed to produce competent, credible and reliable medical, psychiatric or vocational opinions that he is permanently and totally disabled. Additionally, Claimant is not entitled to any permanent partial disability benefits from the Second Injury Fund because the permanent partial disability from the primary (July 25, 2006) injury does not meet the necessary statutory threshold for Second Injury Fund benefits. The Claim against the Second Injury Fund in this matter is denied and no benefits are awarded.

Made by: _____
JOHN K. OTTENAD
Administrative Law Judge
Division of Workers' Compensation