

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

Injury No.: 99-069654

Employee: David Schmitt
Employer: City of St. Louis
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated June 20, 2012. The award and decision of Administrative Law Judge John K. Ottenad, issued June 20, 2012, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 26th day of March 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: David Schmitt

Injury No.: 99-069654

Dependents: N/A

Employer: City of St. Louis

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

Additional Party: Second Injury Fund

Insurer: Self-Insured C/O
Cannon Cochran Management Services

Hearing Dates: December 14, 2011, January 9, 2012
Record Closed on January 13, 2012

Checked by: JKO

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: June 16, 1999
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 utility and maintenance worker for Employer's Water Division and injured his left knee, neck and body as a whole, when he was down in a trench working on a water main, and the trench wall collapsed, partially burying him.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Left Knee and Body as a Whole—Neck & Psych
14. Nature and extent of any permanent disability: 25% of the Left Knee
15. Compensation paid to-date for temporary disability: \$8,747.44
16. Value necessary medical aid paid to date by employer/insurer? \$29,656.67

Employee: David Schmitt

Injury No.: 99-069654

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$534.00
- 19. Weekly compensation rate: \$356.00 for TTD/ \$294.73 for PPD
- 20. Method wages computation: By agreement (stipulation) of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable:

| | |
|---|--------------|
| 40 weeks of permanent partial disability benefits | \$11,789.20* |
|---|--------------|

22. Second Injury Fund liability:

| | |
|---|------------|
| 29.5625 weeks of permanent partial disability | \$8,712.95 |
|---|------------|

TOTAL: \$20,502.15

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 attorneys for necessary legal services rendered to the claimant: Ellen E. Morgan and Gerald V. Tanner, Jr. Pursuant to the terms of this award, Mr. Tanner is to receive \$2,000.00 in full and final satisfaction of his attorney's lien and Ms. Morgan will receive the balance of the 25% fee awarded. Mr. Tanner will also receive an additional \$642.50 for expenses from the proceeds of this case.

*Employer is entitled to a credit of \$5,000.00 for the advance on the settlement/award that they previously paid to Claimant and his attorney, leaving a balance owed to Claimant, pursuant to this award, of \$6,789.20.

FINDINGS OF FACT and RULINGS OF LAW:

| | | |
|-------------------|--|------------------------------------|
| Employee: | David Schmitt | Injury No.: 99-069654 |
| Dependents: | N/A | Before the |
| Employer: | City of St. Louis | Division of Workers' |
| Additional Party: | Second Injury Fund | Compensation |
| | | Department of Labor and Industrial |
| | | Relations of Missouri |
| | | Jefferson City, Missouri |
| Insurer: | Self-Insured C/O Cannon Cochran Management Services | Checked by: JKO |

On December 14, 2011, the employee, David Schmitt, appeared in person and by his attorney, Ms. Ellen E. Morgan, for a hearing for a final award on his claim against the employer, the City of St. Louis, which is duly self-insured under the statute C/O Cannon Cochran Management Services, and the Second Injury Fund. The employer, the City of St. Louis, which is duly self-insured under the statute C/O Cannon Cochran Management Services, was represented at the hearing by its attorney, Mr. Thomas J. Goeddel. The Second Injury Fund was represented at the hearing by Assistant Attorney General Carol L. Barnard.

Along with this Claim [Injury Number 99-069654, with a date of injury of June 16, 1999, alleging injury to the left knee, neck, back and body as a whole], Claimant also tried his three other open companion claims at the same time. Injury Number 98-172753, with a date of injury of April 14, 1998, alleges injury to the back and body as a whole. Injury Number 99-044054, with a date of injury of April 10, 1999, alleges injury to the back and body as a whole. Injury Number 00-120471, with a date of injury of August 2, 2000, alleges injury to the left foot. Separate awards have been issued for each of these other cases.

On the initial day of the hearing, it was determined that additional evidence and witnesses needed to be presented to deal with some of the issues raised in these matters. Therefore, the record of evidence was left open for up to 30 days to allow the parties to gather the evidence and to allow any additional witnesses to testify. The hearing was reconvened for the taking of additional evidence on January 9, 2012 and then the record formally closed on January 13, 2012.

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 June 16, 1999, David Schmitt (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 the City of St. Louis (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 \$534.00, resulting in applicable rates of compensation of \$356.00 for total disability benefits and \$294.73 for permanent partial disability (PPD) benefits.
- 7) Employer paid temporary total disability (TTD) benefits in the amount of \$8,747.44, representing a period of time of 24 4/7 weeks.
- 8) Employer paid medical benefits totaling \$29,656.67.
- 9) Employer previously paid Claimant an advance of \$5,000.00, which the parties agree is to serve as a credit against any award of disability in this matter.

ISSUES:

- 1) What is the nature and extent of Claimant's permanent partial disability attributable to this injury?
- 2) What is the liability of the Second Injury Fund?
- 3) Whether or not there is a valid attorney's lien and to what extent, if any, the lien requires a division of attorney's fees in this case?

EXHIBITS:

The following exhibits were admitted into evidence:

Employee Exhibits:

- A. Deposition of Dr. Adam Sky, with attachments, dated June 30, 2011
- B. Deposition of Dr. Jeffrey Magrowski, with attachments, dated June 24, 2011
- C. Deposition of Dr. Jerry Meyers, with attachments, dated June 24, 2011
- D. Deposition of Dr. Thomas Musich, with attachments, dated June 21, 2010
- E. Certified medical treatment records of Orthopedic and Sports Medicine, Inc.
- F. Certified medical treatment records of Allen M. Jacobs & Associates
- G. Certified medical treatment records of Creve Coeur Pain Control
- H. ***Exhibit offered but not admitted***
- I. Certified medical treatment records of Dr. Daniel Schwarze/St. Louis
Orthopedic Surgeons

- J. ***Exhibit offered but not admitted***
- K. Certified medical treatment records of Washington University Department of Orthopaedic Surgery
- L. Medical treatment records of HealthSouth Rehabilitation Center of St. Louis
- M. Medical treatment records of Forest Park Hospital
- N. Medical treatment records of St. Louis University Hospitals
- O. Certified medical treatment records of Dr. Collins Corder
- P. ***Exhibit offered but not admitted***
- Q. Medical report of HealthSouth Industrial Rehabilitation Program
- R. Certified medical treatment records of Forest Park Hospital
- S. Certified medical treatment records of SSM St. Clare Health Center of Fenton and St. Joseph Hospital of Kirkwood
- T. Medical (operative) report from St. Joseph Hospital dated March 31, 2000
- U. Certified medical treatment records of Dr. Christopher Maret
- V. Certified medical treatment records of Dr. Christopher Maret
- W. ***Exhibit marked but withdrawn by Employee***

Employer/Insurer Exhibits:

- 1. Deposition of Dr. Gregg Bassett, with attachments, dated November 4, 2011
- 2. Deposition of Dr. William C. Kostman, with attachments, dated August 4, 2010
- 3. Transaction details regarding Advance on Settlement paid to Employee on January 24, 2005
- 4. Transaction details regarding Advance on Settlement paid to Employee on September 27, 2007
- 5. Report of Injury for the June 16, 1999 accident

Second Injury Fund Exhibits:

Nothing offered or admitted at the time of hearing

Court's Exhibits:

- I. Memorandum signed by the parties and Administrative Law Judge Matthew Vacca regarding Attorney Gerald Tanner's withdrawal and assertion of an attorney's lien, dated March 12, 2002
- II. Attorney Gerald Tanner's Contingent Legal Fees agreement with Employee for the April 1998 and April 10, 1999 injuries
- III. Attorney Gerald Tanner's Contingent Legal Fees agreement with Employee for the June 16, 1999 injury
- IV. Attorney Gerald Tanner's Contingent Legal Fees agreement with Employee for the August 2, 2000 injury
- V. Correspondence from Mr. Gerald Tanner to Ms. Ellen Morgan dated October 7, 2009 regarding attorney's fees and expenses in these cases

Notes: 1) Unless otherwise specifically noted below, any objections contained in the exhibits are overruled and the testimony is fully admitted into evidence in this case.

2) 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 December 14, 2011 or January 9, 2012.

3) With regard to Exhibits H, J and P, the record will reflect that the Exhibits were offered and objections were raised by Employer and the Second Injury Fund regarding the admissibility of these Exhibits. Generally speaking, the Exhibits were expert opinion reports obtained by Claimant's former counsel in anticipation of litigation. However, the experts who wrote the reports and offered their opinions were never made available for deposition nor brought live at trial to testify regarding the opinions contained in those reports. They also were never made available to the opposing parties in these matters for cross-examination on their opinions and conclusions. Given these circumstances, the objections of Employer and the Second Injury Fund to the admissibility of these Exhibits are SUSTAINED and the Exhibits are not admitted into evidence in this case. Claimant made an offer of proof on the record regarding these excluded Exhibits and, given that, the Exhibits are maintained with the rest of the admissible evidence in the record, but I have not reviewed nor considered the Exhibits in reaching my conclusions in this case.

FINDINGS OF FACT:

Based on a comprehensive review of the substantial and competent evidence, including Claimant's testimony, the expert medical opinions and depositions, the vocational expert opinion and deposition, the medical records, the other records, and the testimony of Claimant's former attorney, Gerald Tanner, as well as based on my personal observations of Claimant at hearing, I find¹:

- 1) **Claimant** is a 52-year-old, currently unemployed individual, who worked for the City of St. Louis (Employer) in the Water Division from April 6, 1992 until he quit working for Employer on May 20, 2004, because of the pain and suffering he felt while performing his job duties. Claimant currently receives Social Security disability.
- 2) Prior to his work for Employer, in May of 1978, Claimant was involved in a serious motorcycle accident. He was riding his motorcycle and was struck by a car. Claimant testified that his left foot went through the car's radiator. He was in a coma for approximately a month and was in various hospitals for several months. In addition to his head injury, Claimant testified that he shattered his left ankle, fractured his hip and tailbone, ruptured his spleen and had a collapsed lung.
- 3) Medical treatment records from **St. Louis University Hospitals** (Exhibit N) document Claimant's hospitalization at that facility from May 14, 1978 through June 17, 1978, following his motorcycle accident. He was noted to have been found

¹ Only those facts relevant to the determination of this case, and upon which I am basing my Rulings of Law in this matter, are included in this Findings of Fact.

comatose when he was first taken to the hospital after the accident. During his hospitalization, he had his spleen removed. He was found to have fractures of the left pubis and ischium, as well as a trimalleolar fracture involving the medial, lateral and posterior malleolar regions of the left ankle and the mid-portion of the talus bone. His discharge diagnosis was the following: Cerebral concussion, hemothorax, left tibial fracture, and multiple abrasions, contusions and lacerations.

- 4) Claimant had another hospitalization from June 3, 1982 to June 5, 1982 at **Deaconess Hospital** (Exhibit R) as a result of the problems he continued to have as a result of the motorcycle accident. Claimant had broken sutures in the anterior abdominal wall which were causing discomfort when he moved, so the wire sutures were removed during this hospitalization. Notes from his hospitalization indicate that following the motorcycle accident, Claimant “forgets a lot of things in recent past and does not comprehend.”
- 5) Claimant testified that he was out of work as a result of this accident for approximately three years. When he went back to work in 1982, he said that he was limited in that he could not climb ladders and was unable to perform heavy lifting with his left side. Claimant testified that his left ankle still bothers him up to the current time as a result of the motorcycle accident.
- 6) Claimant was admitted yet again to **Deaconess Hospital** (Exhibit R) from April 10, 1985 until May 3, 1985 to the alcohol rehabilitation unit as a result of his excessive drinking over the years following his motorcycle accident. The history noted that he was depressed after the accident, feeling that he was disabled and that he saw a psychiatrist. A neurology consultation failed to reveal any definite neurological deficit at that time. Claimant was diagnosed with alcohol abuse and adjustment disorder with depressed mood.
- 7) On April 14, 1998, while performing his normal job duties for Employer, Claimant slipped and fell as he was climbing down a ladder into an excavation hole, in muddy and wet conditions. He landed, striking his shoulder, back and tailbone on a 12-inch valve for the 20-inch water main. Claimant reported some upper and lower back pain and discomfort as a result of the injury.
- 8) Claimant never sought any medical treatment for this injury. He was on light-duty work for a couple days and then returned to his regular full-duty work activities for Employer.
- 9) Claimant testified that he continued to have soreness in the back following this injury as he continued to work for Employer.
- 10) On April 10, 1999, while performing his normal job duties for Employer, Claimant was down in an excavation hole and was handling large, heavy pieces of pipe, when he noticed an increase in his back/torso pain. He reported the injury and sought medical treatment.

- 11) The first medical treatment record in evidence following this injury is the April 20, 1999 emergency department report from **Deaconess Health System** (Exhibit M). Claimant provided a consistent history of the injury at work on April 10, 1999 and complained of continued back pain. He was diagnosed with a lumbar strain.
- 12) Claimant was then examined by **Dr. Andrew Wayne** (Exhibit E) on April 28, 1999. In that report, Dr. Wayne confirms the history of the April 1998 fall off the ladder while repairing a water main. He notes that Claimant continued to work and had some improvement in his back pain, but he continued to have intermittent aching and stiffness in the back over the course of that year. Dr. Wayne also notes the history of the increased low back pain while handling pipe during the 15th hour of his 17-hour shift that day. Dr. Wayne noted that X-rays revealed significant degenerative disc disease at L5-S1 and mild disc degeneration at L4-5. Claimant reported burning pain primarily in the right lower back region, without radiation, made worse with prolonged standing, lifting or bending. The physical examination showed decreased range of motion, negative straight leg raising tests and negative Waddell's signs. Dr. Wayne diagnosed a lumbar sprain secondary to the April 10, 1999 work injury and lumbar spondylosis. He recommended physical therapy, medications and a return to work with restrictions.
- 13) Claimant followed up with Dr. Wayne through May 27, 1999, at which point he was reporting improvement with the physical therapy treatment he was receiving, but still some limitations regarding repeated lifting and bending activities. Although he was back to work full duty, with restrictions, Claimant reported having pain in the right low back while working. His physical examination showed improved, but still decreased, range of motion compared to normal. Dr. Wayne again diagnosed a lumbar sprain secondary to the April 10, 1999 work injury. Claimant asked about perhaps being placed in a different department with less intense work, but Dr. Wayne did not think that was necessary given his current condition. Dr. Wayne placed Claimant at maximum medical improvement for this injury and released him from care at that time, with no restrictions.
- 14) On June 16, 1999, while performing his normal job duties for Employer, Claimant was down in a trench working on a water main, when the trench wall collapsed, partially burying him. He said that the debris came down on top of him and knocked him facedown to the ground in the trench. Claimant testified that he heard a "crunching" sound in his neck. He said that a co-worker pulled the dirt off of him and got him out. He said that he was scared, so he got out of there. He was able to climb the ladder to get out of the trench. Claimant testified that they wanted him to wait for the ambulance, but he did not want to wait. He indicated that he suffered injuries to his neck and knee, and he generally hurt all over his body. He noted that the injury also caused him a lot of stress, which continued to get worse over time and keeps getting worse.
- 15) The **Report of Injury** (Exhibit 5) confirmed the accident on June 16, 1999 when Claimant was complaining of left knee, neck and shoulder problems after he was

pinned by falling debris, while he was working down in a trench on a water pipe for Employer.

- 16) Claimant received initial medical treatment following this injury at **Forest Park Hospital** (Exhibit M) on June 16, 1999. The record contains a consistent history of the trench collapse earlier that day with complaints of neck, low back and left knee problems. X-rays showed effusion in the left knee, but no interval change in the lumbar spine, and a negative cervical spine. He was diagnosed with post traumatic effusion of the left knee and musculoskeletal pain. Claimant was given crutches, medications, and an off-work slip and was told to follow up in a couple days with the doctor.
- 17) Claimant followed up with **Dr. Andrew Wayne** (Exhibit E) on June 18, 1999. Claimant provided a consistent history of the injury at work two days earlier, when the trench collapsed on him. He described initial pain in the low back, left knee and neck, but said that he was mainly having low back and left knee pain at the time of this examination. Dr. Wayne diagnosed a left knee contusion/sprain and a right lumbosacral contusion as a result of this injury. He prescribed medication and physical therapy at **HealthSouth** (Exhibit L). When Claimant continued to have left knee symptoms, Dr. Wayne ordered a left knee MRI, which was taken on June 30, 1999. It showed bone marrow edema consistent with a trabecular microfracture of the posterior aspect of the medial femoral condyle. Claimant was, then, referred to Dr. Schwarze for further evaluation and treatment on the left knee.
- 18) **Dr. Daniel Schwarze** (Exhibit E) first examined Claimant on July 7, 1999. He believed Claimant's signs and symptoms were most compatible with a left knee strain and possible patellar subluxation or dislocation as a result of the June 16, 1999 work accident. He ordered more medication and physical therapy at HealthSouth (Exhibit L). Claimant seemed to make slow but steady progress in physical therapy for a time and was advanced to work hardening (Exhibit Q) by Dr. Schwarze on September 15, 1999. He was eventually released back to light-duty work and kept in physical therapy. Claimant still complained of knee problems and low back stiffness and symptoms that prevented some activities.
- 19) Although Dr. Schwarze changed offices (Exhibit I), he continued to treat Claimant on December 15, 1999 with reported continued complaints in the left knee, neck and low back associated with the June 16, 1999 injury. When Claimant was still complaining of knee problems despite the extensive course of physical therapy and medications he had been given, Dr. Schwarze performed a cortisone injection on January 18, 2000 and then ordered a new left knee MRI. Dr. Schwarze compared the new and old knee MRIs and felt that they showed a post traumatic fracture cyst of the patella, which accounted for his discomfort and symptoms. He recommended arthroscopic surgery for the left knee.
- 20) On March 31, 2000, **Dr. Daniel Schwarze** (Exhibit I) took Claimant to surgery at **St. Joseph Hospital** (Exhibits S & T). He performed a left knee arthroscopy, post fracture drilling of the patella cyst, and chondroplasty of the medial compartment

through section of the medial plica, to treat Claimant's left knee distal patella fracture and chondromalacia of the medial compartment with medial shelf plica grooving on the medial femur. According to the follow-up notes from Dr. Schwarze, Claimant did very well following surgery with increased function and decreased complaints in the left knee. He was released back to regular-duty work as of June 19, 2000 and he was placed at maximum medical improvement and released from care for the left knee as of August 28, 2000. Dr. Schwarze rated Claimant as having 5% permanent partial disability of the left knee attributable to the June 16, 1999 work injury.

- 21) Claimant testified that following his release from the left knee treatment, he continued to have problems and pain with walking and using steps.
- 22) Employer paid \$29,656.67 for medical treatment connected to this accident and also paid \$8,747.44 for 24 4/7 weeks of temporary total disability connected to this June 16, 1999 accidental injury.
- 23) Although the treatment records following the June 16, 1999 injury occasionally referenced neck complaints following that accidental injury, it did not appear that Claimant received any significant neck treatment until February 18, 2002, when he saw **Dr. Heidi Prather** (Exhibit K). He complained of progressively worsening neck pain and numbness and tingling in both hands that he related back to the wall collapsing on him in June 1999 at work. Dr. Prather ordered a cervical spine MRI taken on March 2, 2002, which showed degenerative disc disease at C5-6 and C6-7, with mild disc bulge, but no evidence of herniation or canal compression. Claimant had two cervical nerve root injections, which provided only temporary relief of his complaints. An EMG and nerve conduction study taken on September 11, 2002 revealed no electrodiagnostic evidence of cervical radiculopathy. Dr. Prather suggested follow up with Dr. Daniel Riew.
- 24) Claimant came under the care of **Dr. Daniel Riew** (Exhibit K) on September 12, 2002. He gave Dr. Riew the same history of his neck complaints starting with the work injury in June 1999, when the wall collapsed on him. Dr. Riew ordered X-rays that showed degenerative disc disease at C6 to C7. He did not think surgery was a good option for Claimant given his findings and complaints, so he recommended continued, conservative, non-operative management of his cervical pain. He repeated these same recommendations through the time of his last examination of Claimant on December 2, 2003.
- 25) Claimant testified that he continued to have pain in his neck. He said that he has to support his neck at times and he has headaches from the disc problems in his neck. He has soreness and popping in the neck with movement and it affects his ability to sleep. Claimant noted that he takes Percocet for this and all of his other pain. He also takes anxiety medications.
- 26) The deposition of **Dr. Thomas Musich** (Exhibit D) was taken by Claimant on June 21, 2010 to make his opinions in this case admissible at trial. Dr. Musich is board certified in family practice. He examined Claimant on one occasion, December 7,

2009, at the request of Claimant's attorney and provided no medical treatment. Dr. Musich took an extensive history from Claimant of his pre-existing problems and complaints, as well as of his various work injuries. He reviewed extensive medical records regarding treatment he received for his various injuries. He also performed a physical examination of Claimant. Referable to the April 14, 1998 injury, Dr. Musich diagnosed chronic mid and low back pain. Referable to the April 10, 1999 injury, Dr. Musich diagnosed additional low back pain. Referable to the June 16, 1999 injury, Dr. Musich diagnosed severe trauma adversely affecting the neck, low back and left knee, which resulted in severe chronic neck, low back and left knee pain, and which eventually required epidural steroid injections into the spine and arthroscopic surgery to the left knee. He opined that Claimant had permanent partial disability referable to these accidental injuries at work at the levels of the head, neck and low back, but he was unable to divide out what specific amount of disability Claimant sustained to the head, neck and low back referable to each of these specific accidents. With respect to the left knee injury and surgery from the June 16, 1999 accident, he rated Claimant as having 40% permanent partial disability at the level of the left knee. As a result of the 1978 motorcycle accident, he opined that Claimant had permanent partial disabilities of 15% of the body as a whole referable to the pelvis for the pelvic fractures and 30% of the left ankle for the trimalleolar fracture. Dr. Musich opined that the combination of the past and present disabilities is significantly greater than the simple sum and will continue to produce a chronic hindrance to his routine activities of daily living.

- 27) The deposition of **Dr. Jerry Meyers** (Exhibit C) was taken by Claimant on June 24, 2011 to make his opinions in this case admissible at trial. Dr. Meyers was a board certified surgeon, now retired from performing active surgery, who still works as a treating physician at a pain clinic. He examined Claimant on one occasion, April 12, 2011, at the request of Claimant's attorney and provided no medical treatment. Dr. Meyers took an extensive history from Claimant of his pre-existing problems and complaints, as well as of his various work injuries. He reviewed extensive medical records regarding treatment he received for his various injuries. He also performed a physical examination of Claimant. In his initial report dated May 26, 2011, Dr. Meyers opined that Claimant sustained multiple injuries involving his neck, lumbar spine, left knee and left foot, secondary to his four work-related accidents between 1998 and 2000. He also noted that Claimant had depression secondary to his persisting symptoms of pain and inability to work.
- 28) Dr. Meyers was subsequently asked to divide the disability between the various work injuries, and, therefore, issued his supplemental report dated June 8, 2011. Referable to the April 14, 1998 injury, Dr. Meyers diagnosed soft tissue injuries with continuing symptoms and functional impairment, for which he rated Claimant as having 10% permanent partial disability of the body as a whole referable to the back. Referable to the April 10, 1999 injury, Dr. Meyers diagnosed a recurrent back injury with continuing symptoms and functional impairment. He opined that Claimant had an additional 15% permanent partial disability of the body as a whole referable to the back attributable to the April 10, 1999 injury, or a total of 25% permanent partial disability of the body as a whole referable to the back, when considering both injuries together. Referable to the June 16, 1999 injury, Dr. Meyers diagnosed a microfracture

of the patella, surgically treated, for which he rated Claimant as having 35% permanent partial disability of the left knee. Dr. Meyers further opined that the disabilities combined synergistically to produce overall disability greater than the simple sum of the disabilities added together.

- 29) The deposition of **Dr. Adam Sky** (Exhibit A) was taken by Claimant on June 30, 2011 to make his opinions in this case admissible at trial. Dr. Sky is a board certified psychiatrist. He examined Claimant on one occasion, January 6, 2011, at the request of Claimant's attorney and provided no medical/psychiatric treatment. Dr. Sky took an extensive history from Claimant of his pre-existing problems and complaints, as well as of his various work injuries. He reviewed extensive medical records regarding treatment Claimant received for his various injuries. He also performed a psychiatric evaluation of Claimant. Claimant reported a long history of mood symptoms associated with progressively worsening chronic pain, which he estimated began ten years prior (subsequent to the 2000 injury). He felt anxious and upset, had poor memory and concentration, and constantly lost his "train of thought." In addition to his work injuries, Dr. Sky also had the history of the motorcycle accident, from which he found that Claimant had suffered a significant traumatic brain injury with decreased psychomotor functioning, fatigue, altered speech and short term cognitive dysfunction.
- 30) Dr. Sky diagnosed dementia, most likely secondary to closed head injury from the motorcycle accident, with depression and anxiety. Dr. Sky opined that Claimant had 75% permanent partial psychiatric disability. He opined that Claimant had a pre-existing permanent partial psychiatric disability, whose symptoms were exacerbated by the work-related injuries, particularly the 2000 injury, to the point that he is no longer employable in the open labor market. Dr. Sky explained that individuals with head injuries, like Claimant, are not near as able to handle stressful situations, be it physically or emotionally, as someone without a previous head injury. However, he admitted that between 1978 and 1998, he found no records confirming a diagnosis of dementia following the motorcycle accident.
- 31) The deposition of **Dr. Gregg Bassett** (Exhibit 1) was taken by Employer on November 4, 2011 to make his opinions in this case admissible at trial. Dr. Bassett is a board certified psychiatrist. He examined Claimant on one occasion, July 8, 2011, at Employer's request and provided no medical/psychiatric treatment. He issued his report dated July 17, 2011. Dr. Bassett took an extensive history from Claimant of his pre-existing problems and complaints, as well as of his various work injuries. He reviewed extensive medical records regarding treatment Claimant received for his various injuries. He also performed a psychiatric evaluation of Claimant. Dr. Bassett diagnosed pre-existing conditions of learning disorder not otherwise specified and cognitive disorder not otherwise specified from the 1978 motorcycle accident, for which he opined that Claimant had 15% permanent partial psychiatric disability. He also diagnosed pre-existing alcohol dependence (substance dependence/abuse), for which he rated Claimant as having 10% permanent partial psychiatric disability. He opined that these conditions did not keep Claimant from being employed as a laborer, but they did limit him to relatively unskilled occupations.

- 32) Finally, Dr. Bassett opined that the pain and decreased physical functioning from the June 16, 1999 and August 2, 2000 injuries represent a substantial factor in causing Claimant to develop a constellation of symptoms (irritability, sadness, poor motivation, and possibly sleep problems), which he diagnosed as depressive disorder not otherwise specified. He rated Claimant as having 15% permanent partial psychiatric disability from the depressive symptoms caused by the pain and decreased physical functioning attributable to those two work injuries. Dr. Bassett also opined that the combination of the pre-existing and primary psychiatric disabilities is such that it is hard to imagine Claimant being able (from a psychiatric perspective) to work in a manner commensurate with his physical abilities. He noted that Claimant's inadvertent abrasiveness and inability to keep up the pace as he becomes mentally fatigued, would not work well in an office setting.
- 33) According to the transaction details contained in Exhibit 3, Employer paid Claimant, and his attorney at the time, \$5,000.00 as an **advance on his settlement** in this case (Exhibit 3). The check for \$5,000.00 was printed and sent to Claimant, via his attorney, on January 24, 2005.
- 34) Claimant's former attorney, **Mr. Gerald V. Tanner, Jr.**, testified that at the time he withdrew from representing Claimant in this matter, March 12, 2002, Administrative Law Judge Matthew Vacca signed a memorandum (Court's Exhibit I) confirming Mr. Tanner's assertion of an attorney's lien in the total amount of \$10,550.00 for fees, and an additional total of \$1,285.00 in expenses for all four of Claimant's open Workers' Compensation injuries. Mr. Tanner confirmed that he had a Contingent Legal Fees agreement (Court's Exhibit III) with Claimant that provided for the payment of 25% of any amount collected, plus expenses, to be paid by Claimant as his attorney's fee for this case.

RULINGS OF LAW:

Based on a comprehensive review of the substantial and competent evidence described above and based on the applicable statutes of the State of Missouri, I find:

Claimant sustained a compensable injury to his left knee, neck and body as a whole on June 16, 1999, when he was down in a trench working on a water main, and the trench wall collapsed, partially burying him. I find that Claimant was diagnosed with a microfracture of the patella and chondromalacia of the medial compartment, surgically treated, as well as chronic, severe cervical complaints that required epidural steroid injections, all medically causally related to the June 16, 1999 accident at work. I further find that he was diagnosed with a depressive disorder not otherwise specified, medically causally related to this June 16, 1999 injury, as well as his subsequent August 2, 2000 accident. Claimant credibly testified, and the medical treatment records confirm, that he had continued pain, soreness and functional difficulties with his neck, left knee and psychiatric condition. These findings on Claimant's condition are supported by the medical treatment records of Dr. Wayne, Dr. Schwarze, Dr. Prather and Dr. Riew, as well as the reports and testimony of Dr. Meyers, Dr. Musich, Dr. Sky and Dr. Bassett.

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

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

Given that these two issues are so interrelated in this claim, I will address these two issues together.

In reviewing and weighing the evidence in this case, it is important to remember that according to **Mo. Rev. Stat. § 287.800 (1994)**, "All of the provisions of this chapter shall be liberally construed with a view to the public welfare..." All reasonable doubts as to an employee's right to compensation should be resolved in favor of the employee. ***Wolfgeher v. Wagner Cartage Service, Inc.***, 646 S.W.2d 781, 783 (Mo. 1983).

Under **Mo. Rev. Stat. § 287.190.6 (1994)**, "'permanent partial disability' means a disability that is permanent in nature and partial in degree..." The claimant bears the burden of proving the nature and extent of any disability by a reasonable degree of certainty. ***Elrod v. Treasurer of Missouri as Custodian of Second Injury Fund***, 138 S.W.3d 714, 717 (Mo. banc 2004). Proof is made only by competent substantial evidence and may not rest on surmise or speculation. ***Griggs v. A.B. Chance Co.***, 503 S.W.2d 697, 703 (Mo. App. 1973). Expert testimony may be required when there are complicated medical issues. ***Id.*** at 704. Extent and percentage of disability is a finding of fact within the special province of the [fact finding body, which] is not bound by the medical testimony but may consider all the evidence, including the testimony of the claimant, and draw all reasonable inferences from other testimony in arriving at the percentage of disability. ***Fogelson v. Banquet Foods Corp.***, 526 S.W.2d 886, 892 (Mo. App. 1975) (citations omitted).

Claimant bears the burden of proof on all essential elements of his Workers' Compensation case. ***Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute***, 793 S.W.2d 195 (Mo. App. E.D. 1990) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). The fact finder is charged with passing on the credibility of all witnesses and may disbelieve testimony absent contradictory evidence. ***Id.*** at 199.

While there is no dispute that Claimant sustained an accident on June 16, 1999 while working for Employer, Employer does dispute the amount of permanent partial disability that Claimant may have sustained as a result of that accident.

I found credible testimony from Claimant, as well as entries in the medical treatment records, documenting the continued complaints and problems Claimant had with his left knee and neck on account of the June 16, 1999 accidental injury and the subsequent medical treatment. I further find that he began to suffer from a depressive disorder that became progressively worse over time as his pain complaints and functional limitations continued. While he was able to return to work after his knee surgery, it was only for a brief time before he suffered his next injury in August 2000.

I also find in the record that there are medical/psychiatric opinions from Dr. Schwarze, Dr. Musich, Dr. Meyers, Dr. Sky and Dr. Bassett, who opine that Claimant sustained some amount of permanent partial disability on account of his accident at work on June 16, 1999.

Based on all of the competent, credible and reliable evidence in the record, as described above, I find that Claimant sustained 25% permanent partial disability of the left knee, referable to his left knee microfracture of the patella and chondromalacia of the medial compartment, which was surgically treated, on account of the June 16, 1999 work injury. This finding accounts for, not only the medical findings and treatment, but also his continued complaints of pain and functional difficulties with the knee.

While both Drs. Musich and Meyers opine that Claimant sustained a cervical spine injury on account of the June 16, 1999 accident, Dr. Meyers assessed no disability at the level of the cervical spine for the June 16, 1999 injury and Dr. Musich was unable to divide out what amount of cervical spine disability was attributable to this June 16, 1999 injury, as opposed to the other injuries Claimant sustained at work in 1998 and 1999. Similarly, while both Drs. Sky and Bassett opine that Claimant sustained a psychiatric injury on account of the June 16, 1999 accident, neither of these physicians was specifically able to divide out what amount of this disability was related to the June 16, 1999 injury, as opposed to his pre-existing injuries/conditions, or his subsequent injury at work on August 2, 2000.

Because these physicians were unable to divide out a specific amount of cervical or psychiatric disability for this particular injury, as opposed to his other injuries or conditions, even though the injuries all occurred with the same Employer, I find that Claimant has failed to meet his burden of proving permanent partial disability for the cervical and psychiatric conditions specifically attributable to this accident on June 16, 1999. *Goleman v. MCI Transporters*, 844 S.W.2d 463 (Mo. App. W.D. 1992) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). As Claimant has the burden of proving the nature and extent of permanent partial disability for this injury, it is incumbent upon Claimant to have medical evidence that attributes permanent partial disability for these conditions attributable to this accident, separate and apart from the disability he may have for similar conditions attributable to other causes. In this case the record is devoid of any expert medical or psychiatric opinion that attributes any specific amount of cervical or psychiatric disability to the June 16, 1999 injury, as opposed to any other injury or pre-existing condition. In fact, a number of the physicians testified that they were completely unable to make any such specific division of the disability because of the close proximity of the injuries and the inter-relatedness of the conditions. If it is impossible for medical and psychiatric experts to make any such division of the disability, then it is even more impossible for me to attempt to determine the amount of permanent partial disability Claimant may have for these conditions, attributable to this injury, without any competent or credible medical evidence, upon which to rely.

Therefore, while I find that Claimant certainly has cervical spine and psychiatric conditions medically causally related to this June 16, 1999 work injury, I further find that Claimant has failed to prove an entitlement to any amount of permanent partial disability at the level of the body as a whole referable to the cervical spine and psychiatric conditions.

Accordingly, I find that Employer is responsible for the payment of 40 weeks of permanent partial disability benefits (25% of the left knee), on account of the June 16, 1999 injury, or \$11,789.20. I also find, pursuant to the stipulation of the parties, that Employer previously paid Claimant \$5,000.00 as an advance on his settlement or award in this case. Therefore, after taking a credit for the previously paid \$5,000.00, Employer owes Claimant the new amount of \$6,789.20, pursuant to this award.

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 partial disability based on the combination of his primary (June 16, 1999) injury and any pre-existing permanent partial disabilities. Having thoroughly considered all of the competent and credible evidence in the record, I find that Claimant has met his burden of proof to show an entitlement to a permanent partial disability award against the Second Injury Fund.

In cases such as this one where the Second Injury Fund is involved, we must look to **Mo. Rev. Stat. § 287.220 (1994)** 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. 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 (1994)**, the disabilities must also meet certain thresholds before liability against the Second Injury Fund is invoked, and they must have been 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). 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.

Claimant has alleged pre-existing disabilities to the left ankle, pelvis and body as a whole referable to the back and psychiatric conditions that potentially combine with the left knee injury to trigger Second Injury Fund liability. In order for these alleged pre-existing disabilities to actually trigger Second Injury Fund liability, they must meet the appropriate threshold of 12.5% permanent partial disability of the body as a whole (50 weeks) or 15% permanent partial disability of a major extremity and they must be found to be a hindrance or obstacle to employment or re-employment, should Claimant become unemployed.

With regard to Claimant's pre-existing conditions, I found medical treatment records and/or reports in evidence confirming the treatment, diagnoses and continued problems, complaints and limitations Claimant had as a result of these conditions/injuries, leading up to the time of the June 16, 1999 accidental injury. The record also contained credible testimony from

Claimant regarding the effect or impact these conditions had on him and on his continued ability to work.

Drs. Musich and Meyers credibly opined that the combination of the pre-existing and primary disabilities creates a substantially greater disability than the simple sum or total of each separate injury/illness. They, along with Dr. Bassett regarding the pre-existing psychiatric disabilities, also opined that the disabilities discussed constitute a hindrance or obstacle to employment or to obtaining re-employment.

Based on the evidence in the record, there can be no doubt that Claimant had pre-existing disabilities to the left ankle, pelvis and body as a whole referable to the back and psychiatric conditions. I also find Claimant's testimony and Drs. Musich, Meyers and Bassett's opinions credible that Claimant's pre-existing left ankle, pelvis and psychiatric disabilities would constitute a hindrance or obstacle to employment or to obtaining re-employment if Claimant would become unemployed, leading up to the time of the June 16, 1999 injury at work.

Based on the totality of the evidence in the record, as described above, I find that Claimant had pre-existing permanent partial disabilities of 30% of the left ankle and 12.5% of the body as a whole referable to the pelvis (related to the 1978 motorcycle accident), 25% of the body as a whole referable to his pre-existing psychiatric conditions, and 10% of the body as a whole referable to the low back (as awarded in the two prior Workers' Compensation cases). Given the applicable statutory thresholds of 15% of a major extremity or 12.5% of the body as a whole (50 weeks), I find that the primary left knee injury and the pre-existing left ankle, pelvis and psychiatric disabilities meet the statutory thresholds to trigger Second Injury Fund liability. I further find that the pre-existing left ankle, pelvis and psychiatric disabilities were of such seriousness so as to constitute a hindrance or obstacle to employment or re-employment, should Claimant become unemployed. Finally, consistent with Drs. Meyers and Musich's opinions on combination, I find that the pre-existing and primary injury disabilities combine to create disability that is significantly greater than the simple sum, and so a loading factor should be applied. I, therefore, find that Claimant is entitled to receive 29.5625 weeks of compensation from the Second Injury Fund.

In order to calculate the amount of this award from the Second Injury Fund, I added together all of the qualifying disabilities and assessed a loading factor of 12.5% [25% of the left knee (40 weeks) + 30% of the left ankle (46.5 weeks) + 12.5% of the body as a whole referable to the pelvis (50 weeks) + 25% of the body as a whole referable to psychiatric conditions (100 weeks) = 236.50 total weeks of compensation times the 12.5% loading factor = 29.5625 weeks from the Fund]. I arrived at the 12.5% loading factor by taking into account a number of factors, including the fact that the two leg injuries were to the same left lower extremity, the severity of the disabilities involved and the effect the disabilities had on Claimant's continued ability to work and function.

Accordingly, the Second Injury Fund is responsible for the payment of 29.5625 weeks of permanent partial disability pursuant to this award.

Issue 3: Whether or not there is a valid attorney's lien and to what extent, if any, the lien requires a division of attorney's fees in this case?

Mo. Rev. Stat. § 287.260.1 (1994) gives the Division jurisdiction to hear and determine all disputes regarding the attorney's fees allowable for services rendered in connection with proceedings for compensation. The statute mandates that the attorney's fees allowed shall be limited to charges that are "fair and reasonable." By custom, the amount allowed for attorney's fees in Workers' Compensation cases has been a maximum of 25% of any benefits awarded, unless the claimant and his attorney have agreed on a lesser amount for the attorney's fee. Under **Mo. Code Regs. 8 CSR 20-3.060 (2) (B)**, "The limitation as to fees shall apply to the combined charges of attorneys who knowingly combine their efforts towards the enforcement or collection of any compensation claim."

In this case, at the outset of the hearing, the parties stipulated to an attorney's fee of 25% of any benefits awarded. Given my prior findings on the nature and extent of permanent partial disability as described above, the total attorney's fee in this case is \$5,125.53 (25% of \$20,502.15). The question then becomes, how much of that total fee should properly be payable to his first attorney, Mr. Tanner, and how much should be payable to his current attorney, Ms. Morgan.

Mr. Tanner, at the time he withdrew from this case, filed an attorney's lien claiming entitlement to the total amount of \$10,550.00 for fees, and an additional total of \$1,285.00 in expenses for all four of Claimant's open Workers' Compensation injuries. The lien for the fees was based on 25% of the offer on the table from Employer in all four cases at the time that Claimant discharged Mr. Tanner and retained new counsel.

In evaluating the amount of that lien which is fair and reasonable and attributable to this case, I am mindful of the fact that while Mr. Tanner filed the initial Claim for Compensation on Claimant's behalf in this matter, and while he appeared at settings at the Division in this matter, including mediation settings, the medical proof that ultimately allowed Claimant to meet his burden of proof on the nature and extent of disability issue in this case, was obtained by Ms. Morgan. Additionally, Ms. Morgan was the one who took the case to trial to obtain Claimant's benefits, including all the preparation that goes along with that.

After considering the work actually done by each attorney on this file to move it forward to conclusion, as well as the other evidence in the record, I find that Mr. Gerald V. Tanner, Jr. is entitled to receive \$2,000.00 as his fair and reasonable attorney's fee out of the total attorney's fee awarded in this matter, and an additional \$642.50 for expenses (half of his claimed expenses), in full and final satisfaction of his filed attorney's lien in this case. Since Mr. Tanner is entitled to receive \$2,000.00, that leaves a balance of \$3,125.53 payable to Ms. Ellen E. Morgan for her fair and reasonable attorney's fee in this case.

CONCLUSION:

Claimant sustained a compensable injury to his left knee, neck and body as a whole on June 16, 1999, when he was down in a trench working on a water main, and the trench wall collapsed, partially burying him. Claimant was diagnosed with a microfracture of the patella and chondromalacia of the medial compartment, surgically treated, as well as chronic, severe cervical complaints that required epidural steroid injections, all medically causally related to the June 16, 1999 accident at work. He was also diagnosed with a depressive disorder not otherwise specified, medically causally related to this June 16, 1999 injury, as well as his subsequent August 2, 2000 accident. Claimant sustained permanent partial disability as a result of this June 16, 1999 injury in the amount of 25% of the left knee. Although Claimant certainly has cervical spine and psychiatric conditions medically causally related to this June 16, 1999 work injury, Claimant has failed to prove an entitlement to any amount of permanent partial disability at the level of the body as a whole referable to the cervical spine and psychiatric conditions, by failing to produce expert medical opinions that specifically attributed any amount of permanent partial disability for these conditions to this injury as opposed to his other injuries or pre-existing conditions.

Claimant had pre-existing permanent partial disabilities of 30% of the left ankle and 12.5% of the body as a whole referable to the pelvis (related to the 1978 motorcycle accident), 25% of the body as a whole referable to his pre-existing psychiatric conditions, and 10% of the body as a whole referable to the low back (as awarded in the two prior Workers' Compensation cases). Given the applicable statutory thresholds of 15% of a major extremity or 12.5% of the body as a whole (50 weeks), I find that the primary left knee injury and the pre-existing left ankle, pelvis and psychiatric disabilities meet the statutory thresholds to trigger Second Injury Fund liability. I further find that the pre-existing left ankle, pelvis and psychiatric disabilities were of such seriousness so as to constitute a hindrance or obstacle to employment or re-employment, should Claimant become unemployed. Accordingly, the Second Injury Fund is responsible for the payment of 29.5625 weeks of permanent partial disability pursuant to this award.

Compensation awarded is subject to a lien in the amount of 25% of all payments in favor of Ms. Ellen E. Morgan and Mr. Gerald V. Tanner, Jr., for necessary legal services. Mr. Tanner is entitled to receive \$2,000.00 as his fair and reasonable attorney's fee out of the total attorney's fee awarded in this matter, and an additional \$642.50 for expenses (half of his claimed expenses), in full and final satisfaction of his filed attorney's lien in this case. Since Mr. Tanner is entitled to receive \$2,000.00, that leaves a balance of \$3,125.53 payable to Ms. Ellen E. Morgan for her fair and reasonable attorney's fee in this case.

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

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

Injury No.: 00-120471

Employee: David Schmitt
Employer: City of St. Louis
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated June 20, 2012. The award and decision of Administrative Law Judge John K. Ottenad, issued June 20, 2012, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 26th day of March 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T
Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: David Schmitt

Injury No.: 00-120471

Dependents: N/A

Employer: City of St. Louis

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

Additional Party: Second Injury Fund

Insurer: Self-Insured C/O
Cannon Cochran Management Services

Hearing Dates: December 14, 2011, January 9, 2012
Record Closed on January 13, 2012

Checked by: JKO

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: August 2, 2000
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 utility and maintenance worker for Employer's Water Division and injured his left foot and body as a whole, when a co-worker lowered a commercial truck stabilizer bar onto his foot, crushing the foot behind the steel toe in his boot.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Left Foot and Body as a Whole—Psych
14. Nature and extent of any permanent disability: 30% of the Left Foot at the 150 week level
15. Compensation paid to-date for temporary disability: \$1,906.65
16. Value necessary medical aid paid to date by employer/insurer? \$24,104.40

Employee: David Schmitt

Injury No.: 00-120471

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$571.00
- 19. Weekly compensation rate: \$381.33 for TTD/ \$314.26 for PPD
- 20. Method wages computation: By agreement (stipulation) of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable:

| | |
|---|--------------|
| 45 weeks of permanent partial disability benefits | \$14,141.70* |
|---|--------------|

22. Second Injury Fund liability:

| | |
|--|------------|
| \$67.07 per week for 45 weeks from 06/11/04 until 04/22/05 | \$3,018.15 |
|--|------------|

\$381.33 per week for Claimant's lifetime starting 04/23/05, subject to review and modification by law

TOTAL: \$17,159.85 THROUGH 04/22/05 PLUS CONTINUING WEEKLY BENEFITS AS DESCRIBED

23. Future requirements awarded: As awarded

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 attorneys for necessary legal services rendered to the claimant: Ellen E. Morgan and Gerald V. Tanner, Jr. Pursuant to the terms of this award, Mr. Tanner is to receive \$7,500.00 in full and final satisfaction of his attorney's lien and Ms. Morgan will receive the balance of the 25% fee awarded. Mr. Tanner will also receive an additional \$642.50 for expenses from the proceeds of this case.

*Employer is entitled to a credit of \$5,000.00 for the advance on the settlement/award that they previously paid to Claimant and his attorney, leaving a balance owed to Claimant, pursuant to this award, of \$9,141.70.

FINDINGS OF FACT and RULINGS OF LAW:

| | | |
|-------------------|--|------------------------------------|
| Employee: | David Schmitt | Injury No.: 00-120471 |
| Dependents: | N/A | Before the |
| Employer: | City of St. Louis | Division of Workers' |
| Additional Party: | Second Injury Fund | Compensation |
| | | Department of Labor and Industrial |
| | | Relations of Missouri |
| | | Jefferson City, Missouri |
| Insurer: | Self-Insured C/O Cannon Cochran Management Services | Checked by: JKO |

On December 14, 2011, the employee, David Schmitt, appeared in person and by his attorney, Ms. Ellen E. Morgan, for a hearing for a final award on his claim against the employer, the City of St. Louis, which is duly self-insured under the statute C/O Cannon Cochran Management Services, and the Second Injury Fund. The employer, the City of St. Louis, which is duly self-insured under the statute C/O Cannon Cochran Management Services, was represented at the hearing by its attorney, Mr. Thomas J. Goeddel. The Second Injury Fund was represented at the hearing by Assistant Attorney General Carol L. Barnard.

Along with this Claim [Injury Number 00-120471, with a date of injury of August 2, 2000, alleging injury to the left foot], Claimant also tried his three other open companion claims at the same time. Injury Number 98-172753, with a date of injury of April 14, 1998, alleges injury to the back and body as a whole. Injury Number 99-044054, with a date of injury of April 10, 1999, alleges injury to the back and body as a whole. Injury Number 99-069654, with a date of injury of June 16, 1999, alleges injury to the left knee, neck, back and body as a whole. Separate awards have been issued for each of these other cases.

On the initial day of the hearing, it was determined that additional evidence and witnesses needed to be presented to deal with some of the issues raised in these matters. Therefore, the record of evidence was left open for up to 30 days to allow the parties to gather the evidence and to allow any additional witnesses to testify. The hearing was reconvened for the taking of additional evidence on January 9, 2012 and then the record formally closed on January 13, 2012.

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 August 2, 2000, David Schmitt (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 the City of St. Louis (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 \$571.00, resulting in applicable rates of compensation of \$381.33 for total disability benefits and \$314.26 for permanent partial disability (PPD) benefits.
- 7) Employer paid temporary total disability (TTD) benefits in the amount of \$1,906.65, representing a period of time of 5 weeks.
- 8) Employer paid medical benefits totaling \$24,104.40.
- 9) Employer previously paid Claimant an advance of \$5,000.00, which the parties agree is to serve as a credit against any award of disability in this matter.

ISSUES:

- 1) What is the nature and extent of Claimant’s permanent partial disability attributable to this injury?
- 2) What is the liability of the Second Injury Fund for permanent partial or permanent total disability benefits?
- 3) Whether or not there is a valid attorney’s lien and to what extent, if any, the lien requires a division of attorney’s fees in this case?

EXHIBITS:

The following exhibits were admitted into evidence:

Employee Exhibits:

- A. Deposition of Dr. Adam Sky, with attachments, dated June 30, 2011
- B. Deposition of Dr. Jeffrey Magrowski, with attachments, dated June 24, 2011
- C. Deposition of Dr. Jerry Meyers, with attachments, dated June 24, 2011
- D. Deposition of Dr. Thomas Musich, with attachments, dated June 21, 2010
- E. Certified medical treatment records of Orthopedic and Sports Medicine, Inc.
- F. Certified medical treatment records of Allen M. Jacobs & Associates
- G. Certified medical treatment records of Creve Coeur Pain Control
- H. ***Exhibit offered but not admitted***

- I. Certified medical treatment records of Dr. Daniel Schwarze/St. Louis Orthopedic Surgeons
- J. ***Exhibit offered but not admitted***
- K. Certified medical treatment records of Washington University Department of Orthopaedic Surgery
- L. Medical treatment records of HealthSouth Rehabilitation Center of St. Louis
- M. Medical treatment records of Forest Park Hospital
- N. Medical treatment records of St. Louis University Hospitals
- O. Certified medical treatment records of Dr. Collins Corder
- P. ***Exhibit offered but not admitted***
- Q. Medical report of HealthSouth Industrial Rehabilitation Program
- R. Certified medical treatment records of Forest Park Hospital
- S. Certified medical treatment records of SSM St. Clare Health Center of Fenton and St. Joseph Hospital of Kirkwood
- T. Medical (operative) report from St. Joseph Hospital dated March 31, 2000
- U. Certified medical treatment records of Dr. Christopher Maret
- V. Certified medical treatment records of Dr. Christopher Maret
- W. ***Exhibit marked but withdrawn by Employee***

Employer/Insurer Exhibits:

- 1. Deposition of Dr. Gregg Bassett, with attachments, dated November 4, 2011
- 2. Deposition of Dr. William C. Kostman, with attachments, dated August 4, 2010
- 3. Transaction details regarding Advance on Settlement paid to Employee on January 24, 2005
- 4. Transaction details regarding Advance on Settlement paid to Employee on September 27, 2007
- 5. Report of Injury for the June 16, 1999 accident

Second Injury Fund Exhibits:

Nothing offered or admitted at the time of hearing

Court's Exhibits:

- I. Memorandum signed by the parties and Administrative Law Judge Matthew Vacca regarding Attorney Gerald Tanner's withdrawal and assertion of an attorney's lien, dated March 12, 2002
- II. Attorney Gerald Tanner's Contingent Legal Fees agreement with Employee for the April 1998 and April 10, 1999 injuries
- III. Attorney Gerald Tanner's Contingent Legal Fees agreement with Employee for the June 16, 1999 injury
- IV. Attorney Gerald Tanner's Contingent Legal Fees agreement with Employee for the August 2, 2000 injury

- V. Correspondence from Mr. Gerald Tanner to Ms. Ellen Morgan dated October 7, 2009 regarding attorney's fees and expenses in these cases

Notes: 1) Unless otherwise specifically noted below, any objections contained in the exhibits are overruled and the testimony is fully admitted into evidence in this case.

2) 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 December 14, 2011 or January 9, 2012.

3) With regard to Exhibits H, J and P, the record will reflect that the Exhibits were offered and objections were raised by Employer and the Second Injury Fund regarding the admissibility of these Exhibits. Generally speaking, the Exhibits were expert opinion reports obtained by Claimant's former counsel in anticipation of litigation. However, the experts who wrote the reports and offered their opinions were never made available for deposition nor brought live at trial to testify regarding the opinions contained in those reports. They also were never made available to the opposing parties in these matters for cross-examination on their opinions and conclusions. Given these circumstances, the objections of Employer and the Second Injury Fund to the admissibility of these Exhibits are SUSTAINED and the Exhibits are not admitted into evidence in this case. Claimant made an offer of proof on the record regarding these excluded Exhibits and, given that, the Exhibits are maintained with the rest of the admissible evidence in the record, but I have not reviewed nor considered the Exhibits in reaching my conclusions in this case.

FINDINGS OF FACT:

Based on a comprehensive review of the substantial and competent evidence, including Claimant's testimony, the expert medical opinions and depositions, the vocational expert opinion and deposition, the medical records, the other records, and the testimony of Claimant's former attorney, Gerald Tanner, as well as based on my personal observations of Claimant at hearing, I find¹:

- 1) **Claimant** is a 52-year-old, currently unemployed individual, who worked for the City of St. Louis (Employer) in the Water Division from April 6, 1992 until he quit working for Employer on May 20, 2004, because of the pain and suffering he felt while performing his job duties. Claimant currently receives Social Security disability.
- 2) Claimant had difficulties in school, having to repeat the first grade. He began high school, but stopped attending high school in the ninth grade. He took classes at Jackson Welding School from 1979 to 1980 and also learned welding through the Jobs Corps in 1981. He eventually obtained his GED in 1983 after his recovery from a significant motorcycle accident that required over three years to reach the point where he was able to try to work again.

¹ Only those facts relevant to the determination of this case, and upon which I am basing my Rulings of Law in this matter, are included in this Findings of Fact.

- 3) In May of 1978, Claimant was involved in a serious motorcycle accident. He was riding his motorcycle and was struck by a car. Claimant testified that his left foot went through the car's radiator. He was in a coma for approximately a month and was in various hospitals for several months. In addition to his head injury, Claimant testified that he shattered his left ankle, fractured his hip and tailbone, ruptured his spleen and had a collapsed lung.
- 4) Medical treatment records from **St. Louis University Hospitals** (Exhibit N) document Claimant's hospitalization at that facility from May 14, 1978 through June 17, 1978, following his motorcycle accident. He was noted to have been found comatose when he was first taken to the hospital after the accident. During his hospitalization, he had his spleen removed. He was found to have fractures of the left pubis and ischium, as well as a trimalleolar fracture involving the medial, lateral and posterior malleolar regions of the left ankle and the mid-portion of the talus bone. His discharge diagnosis was the following: Cerebral concussion, hemothorax, left tibial fracture, and multiple abrasions, contusions and lacerations.
- 5) Claimant had another hospitalization from June 3, 1982 to June 5, 1982 at **Deaconess Hospital** (Exhibit R) as a result of the problems he continued to have as a result of the motorcycle accident. Claimant had broken sutures in the anterior abdominal wall which were causing discomfort when he moved, so the wire sutures were removed during this hospitalization. Notes from his hospitalization indicate that following the motorcycle accident, Claimant "forgets a lot of things in recent past and does not comprehend."
- 6) Claimant testified that he was out of work as a result of this accident for approximately three years. When he went back to work in 1982, he said that he was limited in that he could not climb ladders and was unable to perform heavy lifting with his left side. Claimant testified that his left ankle still bothers him up to the current time as a result of the motorcycle accident.
- 7) Claimant was admitted yet again to **Deaconess Hospital** (Exhibit R) from April 10, 1985 until May 3, 1985 to the alcohol rehabilitation unit as a result of his excessive drinking over the years following his motorcycle accident. The history noted that he was depressed after the accident, feeling that he was disabled and that he saw a psychiatrist. A neurology consultation failed to reveal any definite neurological deficit at that time. Claimant was diagnosed with alcohol abuse and adjustment disorder with depressed mood.
- 8) Prior to working for Employer's Water Division, Claimant had jobs that included working in the laundry room at the Jewish Center for the Aged, roofing, doing general construction work, and then as a temporary (seasonal) employee for the Forestry Department for Employer from March to October of 1991.
- 9) Claimant sustained his first injury on the job for Employer on May 2, 1996, when an air jack went through a conduit and he burned/singed his face. Claimant testified that

he went back to work full time. He settled the case and admitted that this injury did not affect his ability to perform his job duties for Employer.

- 10) On April 14, 1998, while performing his normal job duties for Employer, Claimant slipped and fell as he was climbing down a ladder into an excavation hole, in muddy and wet conditions. He landed, striking his shoulder, back and tailbone on a 12-inch valve for the 20-inch water main. Claimant reported some upper and lower back pain and discomfort as a result of the injury.
- 11) Claimant never sought any medical treatment for this injury. He was on light-duty work for a couple days and then returned to his regular full-duty work activities for Employer.
- 12) Claimant testified that he continued to have soreness in the back following this injury as he continued to work for Employer.
- 13) On April 10, 1999, while performing his normal job duties for Employer, Claimant was down in an excavation hole and was handling large, heavy pieces of pipe, when he noticed an increase in his back/torso pain. He reported the injury and sought medical treatment.
- 14) The first medical treatment record in evidence following this injury is the April 20, 1999 emergency department report from **Deaconess Health System** (Exhibit M). Claimant provided a consistent history of the injury at work on April 10, 1999 and complained of continued back pain. He was diagnosed with a lumbar strain.
- 15) Claimant was then examined by **Dr. Andrew Wayne** (Exhibit E) on April 28, 1999. In that report, Dr. Wayne confirms the history of the April 1998 fall off the ladder while repairing a water main. He notes that Claimant continued to work and had some improvement in his back pain, but he continued to have intermittent aching and stiffness in the back over the course of that year. Dr. Wayne also notes the history of the increased low back pain while handling pipe during the 15th hour of his 17-hour shift that day. Dr. Wayne noted that X-rays revealed significant degenerative disc disease at L5-S1 and mild disc degeneration at L4-5. Claimant reported burning pain primarily in the right lower back region, without radiation, made worse with prolonged standing, lifting or bending. The physical examination showed decreased range of motion, negative straight leg raising tests and negative Waddell's signs. Dr. Wayne diagnosed a lumbar sprain secondary to the April 10, 1999 work injury and lumbar spondylosis. He recommended physical therapy, medications and a return to work with restrictions.
- 16) Claimant followed up with Dr. Wayne through May 27, 1999, at which point he was reporting improvement with the physical therapy treatment he was receiving, but still some limitations regarding repeated lifting and bending activities. Although he was back to work full duty, with restrictions, Claimant reported having pain in the right low back while working. His physical examination showed improved, but still decreased, range of motion compared to normal. Dr. Wayne again diagnosed a

lumbar sprain secondary to the April 10, 1999 work injury. Claimant asked about perhaps being placed in a different department with less intense work, but Dr. Wayne did not think that was necessary given his current condition. Dr. Wayne placed Claimant at maximum medical improvement for this injury and released him from care at that time, with no restrictions.

- 17) On June 16, 1999, while performing his normal job duties for Employer, Claimant was down in a trench working on a water main, when the trench wall collapsed, partially burying him. He said that the debris came down on top of him and knocked him facedown to the ground in the trench. Claimant testified that he heard a “crunching” sound in his neck. He said that a co-worker pulled the dirt off of him and got him out. He said that he was scared, so he got out of there. He was able to climb the ladder to get out of the trench. Claimant testified that they wanted him to wait for the ambulance, but he did not want to wait. He indicated that he suffered injuries to his neck and knee, and he generally hurt all over his body. He noted that the injury also caused him a lot of stress, which continued to get worse over time and keeps getting worse.
- 18) The **Report of Injury** (Exhibit 5) confirmed the accident on June 16, 1999 when Claimant was complaining of left knee, neck and shoulder problems after he was pinned by falling debris, while he was working down in a trench on a water pipe for Employer.
- 19) Claimant received initial medical treatment following this injury at **Forest Park Hospital** (Exhibit M) on June 16, 1999. The record contains a consistent history of the trench collapse earlier that day with complaints of neck, low back and left knee problems. X-rays showed effusion in the left knee, but no interval change in the lumbar spine, and a negative cervical spine. He was diagnosed with post traumatic effusion of the left knee and musculoskeletal pain. Claimant was given crutches, medications, and an off-work slip and was told to follow up in a couple days with the doctor.
- 20) Claimant followed up with **Dr. Andrew Wayne** (Exhibit E) on June 18, 1999. Claimant provided a consistent history of the injury at work two days earlier, when the trench collapsed on him. He described initial pain in the low back, left knee and neck, but said that he was mainly having low back and left knee pain at the time of this examination. Dr. Wayne diagnosed a left knee contusion/sprain and a right lumbosacral contusion as a result of this injury. He prescribed medication and physical therapy at **HealthSouth** (Exhibit L). When Claimant continued to have left knee symptoms, Dr. Wayne ordered a left knee MRI, which was taken on June 30, 1999. It showed bone marrow edema consistent with a trabecular microfracture of the posterior aspect of the medial femoral condyle. Claimant was, then, referred to Dr. Schwarze for further evaluation and treatment on the left knee.
- 21) **Dr. Daniel Schwarze** (Exhibit E) first examined Claimant on July 7, 1999. He believed Claimant’s signs and symptoms were most compatible with a left knee strain and possible patellar subluxation or dislocation as a result of the June 16, 1999 work

- accident. He ordered more medication and physical therapy at HealthSouth (Exhibit L). Claimant seemed to make slow but steady progress in physical therapy for a time and was advanced to work hardening (Exhibit Q) by Dr. Schwarze on September 15, 1999. He was eventually released back to light-duty work and kept in physical therapy. Claimant still complained of knee problems and low back stiffness and symptoms that prevented some activities.
- 22) Although Dr. Schwarze changed offices (Exhibit I), he continued to treat Claimant on December 15, 1999 with reported continued complaints in the left knee, neck and low back associated with the June 16, 1999 injury. When Claimant was still complaining of knee problems despite the extensive course of physical therapy and medications he had been given, Dr. Schwarze performed a cortisone injection on January 18, 2000 and then ordered a new left knee MRI. Dr. Schwarze compared the new and old knee MRIs and felt that they showed a post traumatic fracture cyst of the patella, which accounted for his discomfort and symptoms. He recommended arthroscopic surgery for the left knee.
- 23) On March 31, 2000, **Dr. Daniel Schwarze** (Exhibit I) took Claimant to surgery at **St. Joseph Hospital** (Exhibits S & T). He performed a left knee arthroscopy, post fracture drilling of the patella cyst, and chondroplasty of the medial compartment through section of the medial plica, to treat Claimant's left knee distal patella fracture and chondromalacia of the medial compartment with medial shelf plica grooving on the medial femur. According to the follow-up notes from Dr. Schwarze, Claimant did very well following surgery with increased function and decreased complaints in the left knee. He was released back to regular-duty work as of June 19, 2000 and he was placed at maximum medical improvement and released from care for the left knee as of August 28, 2000. Dr. Schwarze rated Claimant as having 5% permanent partial disability of the left knee attributable to the June 16, 1999 work injury.
- 24) Claimant testified that following his release from the left knee treatment, he continued to have problems and pain with walking and using steps.
- 25) Prior to his actual release from Dr. Schwarze for the left knee injury, after Claimant had returned back to work for Employer, he sustained his final injury on the job for Employer on August 2, 2000. On that date, Claimant brought a welding truck down to a work site on 14th Street and Tucker, where they were laying a water main. He was retrieving a box of mechanical rings and bolts off the pipe truck, when a co-worker, who was not paying attention, was lowering the commercial truck stabilizers down to the ground to keep the truck from tipping over when it lifts something heavy. The co-worker lowered the heavy, one-foot square, metal stabilizer onto his left foot, crushing the foot just behind the steel toe of his boot. Claimant brought the welding truck back to the yard and then sought medical treatment for his left foot.
- 26) Claimant received initial medical treatment following this injury at **Forest Park Hospital** (Exhibit R) on August 2, 2000. He provided a consistent history of the injury at work earlier that day. He was diagnosed with a crush injury to the left foot

- and a comminuted fracture of the first distal metatarsal with inferior angulation. He was given pain medication and directed to follow-up with an orthopedic physician.
- 27) Claimant was then examined by **Dr. W. Chris Kostman** (Exhibit E) on August 8, 2000. Claimant provided a consistent history of the accident at work on August 2, 2000. Dr. Kostman diagnosed a contusion to the left ankle and fracture involving the first metatarsal with approximately 45 degrees of angulation. He recommended surgery for reduction and pinning of the fracture.
- 28) Dr. Kostman (Exhibit E) took Claimant to surgery on August 11, 2000. He performed a closed reduction and secondary percutaneous pin fixation of the distal comminuted fracture of the first metatarsal of the left foot. Claimant followed up with Dr. Kostman after the surgery. The notes indicate that the doctor cleaned and redressed a fracture blister on the foot a couple of times. On September 6, 2000, Dr. Kostman removed the pins, since the fracture showed good position and evidence of healing. However, he had dysesthetic changes in the foot, with erythema, a degree of purulence and swelling. Dr. Kostman recommended admission to the hospital for IV antibiotics, dressing changes and whirlpool treatment for the foot.
- 29) Claimant was admitted to **St. Joseph Hospital** (Exhibit S) on September 6, 2000 for the above-described treatment for his left foot. He was found to have full thickness skin loss on the dorsum of the left foot at the second metatarsal. During his 10-day hospital admission, he underwent wound irrigation and debridement, was administered IV antibiotics and had split thickness skin grafting performed by **Dr. Brent Stromberg** on September 12, 2000.
- 30) Claimant continued to follow up with Dr. Kostman (Exhibit E) for his left foot injury after this hospital admission. By September 27, 2000, X-rays demonstrated some diffuse osteopenia and some evidence of callus at the fracture site. He was released to full weight bearing in a cast boot, and sent back to work for dispatching duty with the foot elevated. Although he still had swelling in the left foot, he showed progressive improvement and was released to regular-duty work in the hydrant shop on October 18, 2000. This restriction to work in the hydrant shop, as opposed to regular work out in the field, was the result of Claimant telling the doctor that he did not believe he could perform his full regular duties. Obviously, Dr. Kostman agreed with Claimant in that regard and restricted his work to the hydrant shop.
- 31) When he next saw Dr. Kostman (Exhibit E) on November 21, 2000, Claimant was having additional problems with discomfort, swelling and erythema in the left foot, especially with increased standing and walking. He was once again restricted to desk work or dispatching to allow for further healing. On December 19, 2000, Dr. Kostman released Claimant at maximum medical improvement for this injury and indicated that he could return to regular work duties. He rated Claimant as having 15% permanent partial disability of the left foot, as a result of this injury and the medical treatment.

- 32) Claimant testified that after he was released by Dr. Kostman, he returned to the hydrant shop in 2001, but he never returned to work in the streets. He said that he did lighter work in the shop, such as dispatching, janitor work or rebuilding hydrants, from 2001 until he left the job on May 20, 2004, because he just could not take the increasing pain and complaints anymore that came with trying to perform his job duties. He said that the people at work were good about trying to accommodate him but the “suffering” just caught up with him.
- 33) Medical treatment records from his personal care physician, **Dr. Christopher Maret** (Exhibits U & V) document continued complaints Claimant had with his left foot on February 22, 2001 and January 15, 2002, after he was released back to work. He was also complaining of ongoing back and neck pain which had been there off and on for many years. By April 16, 2002, Dr. Maret wrote in his note that he thought Claimant should be in a work setting that is sedentary in nature, given the continued problems and pain complaints he had. The records up through 2003 contain repeated references to left foot, neck and back pain, as well as indications that he wants to be more active but is unable to do that as a result of his pain. Also in 2003, Dr. Maret begins to make references to depression.
- 34) Dr. Maret referred Claimant for further evaluation and treatment on the foot to **Dr. Jeffrey Johnson** (Exhibit K), who first examined Claimant on February 25, 2002. Claimant provided the doctor with a history of his various foot injuries, including the last one from August 2, 2000. Dr. Johnson diagnosed an exostosis of the medial aspect of the left first metatarsophalangeal joint, second metatarsophalangeal joint articular surface damage, global metatarsalgia of the left foot and global neuropathic type pain of the left foot especially with footwear. He did not believe there was any surgery or injections that would help his complaints, because his pain was so global without localizing areas. He was given a foot orthosis prescription to be made with trilayer material for his metatarsalgia relief. When he next saw Dr. Johnson on September 16, 2002, Dr. Johnson told Claimant that he could perform an excision of the exostosis on the left great toe, but Claimant did not want further surgery at that time. A similar discussion occurred at the follow-up appointment on March 21, 2003, but Claimant was still trying to deal with the foot complaints with the foot orthosis, as opposed to surgery.
- 35) Although the treatment records following the June 16, 1999 injury occasionally referenced neck complaints following that accidental injury, it did not appear that Claimant received any significant neck treatment until February 18, 2002, when he saw **Dr. Heidi Prather** (Exhibit K). He complained of progressively worsening neck pain and numbness and tingling in both hands that he related back to the wall collapsing on him in June 1999 at work. Dr. Prather ordered a cervical spine MRI taken on March 2, 2002, which showed degenerative disc disease at C5-6 and C6-7, with mild disc bulge, but no evidence of herniation or canal compression. Claimant had two cervical nerve root injections, which provided only temporary relief of his complaints. An EMG and nerve conduction study taken on September 11, 2002 revealed no electrodiagnostic evidence of cervical radiculopathy. Dr. Prather suggested follow up with Dr. Daniel Riew.

- 36) Claimant came under the care of **Dr. Daniel Riew** (Exhibit K) on September 12, 2002. He gave Dr. Riew the same history of his neck complaints starting with the work injury in June 1999, when the wall collapsed on him. Dr. Riew ordered X-rays that showed degenerative disc disease at C6 to C7. He did not think surgery was a good option for Claimant given his findings and complaints, so he recommended continued, conservative, non-operative management of his cervical pain. He repeated these same recommendations through the time of his last examination of Claimant on December 2, 2003.
- 37) Claimant testified that he continued to have pain in his neck. He said that he has to support his neck at times and he has headaches from the disc problems in his neck. He has soreness and popping in the neck with movement and it affects his ability to sleep. Claimant noted that he takes Percocet for this and all of his other pain. He also takes anxiety medications.
- 38) Claimant sought additional treatment for his left foot with **Dr. Allen Jacobs** (Exhibit F) on August 8, 2003. Claimant complained that his entire body was painful and he believed he was qualified for total disability, but he continued to work through the pain. Claimant provided Dr. Jacobs with the history of various injuries to his left foot and the surgery he received for the first metatarsal fracture. Dr. Jacobs diagnosed post traumatic changes in the painful left foot with nerve compression syndrome, tarsal tunnel syndrome, posterior tibial tendinitis and old fractures of the great toe first and second metatarsals. He recommended surgery to try to address the continued left foot problems and complaints.
- 39) Dr. Jacobs took Claimant to surgery for the left foot at **Forest Park Hospital** (Exhibits F & M) on August 20, 2003. He performed an exostectomy of the left hallux interphalangeal joint and left first metatarsal phalangeal joint, to treat Claimant's osteoarthritis in those joints. When Claimant followed up with Dr. Jacobs on September 5, 2003, he was noted to be doing well since the surgery.
- 40) Claimant continued to see **Dr. Christopher Maret** (Exhibit U) into 2004 for complaints related to his left foot and neck. The last note to specifically mention the left foot pain from Dr. Maret was dated March 31, 2004. By June 10, 2004, there was no mention of specific treatment to the left foot for complaints related to the August 2, 2000 injury. It was also in that note that Dr. Maret noted Claimant was off work.
- 41) On December 10, 2004, **Dr. Andrew Wayne** (Exhibit E) performed an independent medical examination for the Missouri Section of Disability Determinations. Claimant complained of multiple somatic complaints, including back, left knee, neck, ankle, shoulder and left foot pain. Dr. Wayne had the history of the August 2000 foot injury and the significant treatment Claimant had received since that accident, as well as his other prior injuries and treatment. Dr. Wayne noted that Claimant had a very depressed mood with a flat affect and angry disposition. He diagnosed left worse than right knee pain, status post crush injury to the left foot with surgery and skin grafting, and chronic low back and neck pain with degenerative abnormalities. He limited

Claimant to standing or walking no more than two hours in an eight-hour workday, and no lifting more than 10 pounds frequently or 20 pounds occasionally, due to the combination of his symptoms in his left knee, left foot and low back. He also recommended that Claimant treat his depression as soon as possible, because "it is impacting greatly on his current functional status."

- 42) Employer paid \$24,104.40 for medical treatment connected to this accident and also paid \$1,906.65 for 5 weeks of temporary total disability connected to this August 2, 2000 accidental injury.
- 43) Medical treatment records from Claimant's personal care physician, **Dr. Collins Corder** (Exhibit O) document visits between May 4, 2005 and August 23, 2006. In these records there are numerous references to chronic pain syndrome, chronic leg pain and depression.
- 44) The deposition of **Dr. Thomas Musich** (Exhibit D) was taken by Claimant on June 21, 2010 to make his opinions in this case admissible at trial. Dr. Musich is board certified in family practice. He examined Claimant on one occasion, December 7, 2009, at the request of Claimant's attorney and provided no medical treatment. Dr. Musich took an extensive history from Claimant of his pre-existing problems and complaints, as well as of his various work injuries. He reviewed extensive medical records regarding treatment he received for his various injuries. He also performed a physical examination of Claimant. Referable to the April 14, 1998 injury, Dr. Musich diagnosed chronic mid and low back pain. Referable to the April 10, 1999 injury, Dr. Musich diagnosed additional low back pain. Referable to the June 16, 1999 injury, Dr. Musich diagnosed severe trauma adversely affecting the neck, low back and left knee, which resulted in severe chronic neck, low back and left knee pain, and which eventually required epidural steroid injections into the spine and arthroscopic surgery to the left knee. Referable to the August 2, 2000 injury, Dr. Musich diagnosed acute foot pain, which occurred when the stabilizer crushed his left forefoot between the stabilizer and the street pavement.
- 45) He opined that Claimant had permanent partial disability referable to these accidental injuries at work at the levels of the head, neck and low back, but he was unable to divide out what specific amount of disability Claimant sustained to the head, neck and low back referable to each of these specific accidents. With respect to the left knee injury and surgery from the June 16, 1999 accident, he rated Claimant as having 40% permanent partial disability at the level of the left knee. With respect to the August 2, 2000 injury, he rated Claimant as having 40% permanent partial disability of the left forefoot. As a result of the 1978 motorcycle accident, he opined that Claimant had permanent partial disabilities of 15% of the body as a whole referable to the pelvis for the pelvic fractures and 30% of the left ankle for the trimalleolar fracture. Dr. Musich opined that the combination of the past and present disabilities is significantly greater than the simple sum and will continue to produce a chronic hindrance to his routine activities of daily living. He restricted Claimant from any activities that require squatting, kneeling, climbing or operating commercial tools or vehicles. Finally, he opined that as a result of Claimant's restrictions, multiple chronic disabilities (from

his multiple work injuries and pre-existing conditions/injuries) and ongoing need for pain medication, he believed Claimant was permanently and totally disabled and unable to obtain or maintain employment in the open labor market.

- 46) The deposition of **Dr. W. Christopher Kostman** (Exhibit 2) was taken by Employer on August 4, 2010 to make his opinions in this case admissible at trial. Dr. Kostman is board certified in orthopedic surgery. He treated Claimant for his left foot injury following the August 2, 2000 work accident. Dr. Kostman testified consistent with the opinions and conclusions set forth in his records, as detailed above.
- 47) The deposition of **Dr. Jerry Meyers** (Exhibit C) was taken by Claimant on June 24, 2011 to make his opinions in this case admissible at trial. Dr. Meyers was a board certified surgeon, now retired from performing active surgery, who still works as a treating physician at a pain clinic. He examined Claimant on one occasion, April 12, 2011, at the request of Claimant's attorney and provided no medical treatment. Dr. Meyers took an extensive history from Claimant of his pre-existing problems and complaints, as well as of his various work injuries. He reviewed extensive medical records regarding treatment he received for his various injuries. He also performed a physical examination of Claimant. In his initial report dated May 26, 2011, Dr. Meyers opined that Claimant sustained multiple injuries involving his neck, lumbar spine, left knee and left foot, secondary to his four work-related accidents between 1998 and 2000. He also noted that Claimant had depression secondary to his persisting symptoms of pain and inability to work. He opined that Claimant is 100% totally and completely disabled due to the combined disabilities, such that he is unable to compete in the open labor market.
- 48) Dr. Meyers was subsequently asked to divide the disability between the various work injuries, and, therefore, issued his supplemental report dated June 8, 2011. Referable to the April 14, 1998 injury, Dr. Meyers diagnosed soft tissue injuries with continuing symptoms and functional impairment, for which he rated Claimant as having 10% permanent partial disability of the body as a whole referable to the back. Referable to the April 10, 1999 injury, Dr. Meyers diagnosed a recurrent back injury with continuing symptoms and functional impairment. He opined that Claimant had an additional 15% permanent partial disability of the body as a whole referable to the back attributable to the April 10, 1999 injury, or a total of 25% permanent partial disability of the body as a whole referable to the back, when considering both injuries together. Referable to the June 16, 1999 injury, Dr. Meyers diagnosed a microfracture of the patella, surgically treated, for which he rated Claimant as having 35% permanent partial disability of the left knee. Referable to the August 2, 2000 injury, Dr. Meyers diagnosed a crush injury with metacarpal fracture, which required an open reduction and internal fixation, and then a wound problem requiring a skin graft. He rated Claimant as having 35% permanent partial disability of the left foot referable to this August 2000 accidental injury. Dr. Meyers further opined that the disabilities combined synergistically to produce overall disability greater than the simple sum of the disabilities added together.

- 49) The deposition of **Dr. Adam Sky** (Exhibit A) was taken by Claimant on June 30, 2011 to make his opinions in this case admissible at trial. Dr. Sky is a board certified psychiatrist. He examined Claimant on one occasion, January 6, 2011, at the request of Claimant's attorney and provided no medical/psychiatric treatment. Dr. Sky took an extensive history from Claimant of his pre-existing problems and complaints, as well as of his various work injuries. He reviewed extensive medical records regarding treatment Claimant received for his various injuries. He also performed a psychiatric evaluation of Claimant. Claimant reported a long history of mood symptoms associated with progressively worsening chronic pain, which he estimated began ten years prior (subsequent to the 2000 injury). He felt anxious and upset, had poor memory and concentration, and constantly lost his "train of thought." In addition to his work injuries, Dr. Sky also had the history of the motorcycle accident, from which he found that Claimant had suffered a significant traumatic brain injury with decreased psychomotor functioning, fatigue, altered speech and short term cognitive dysfunction.
- 50) Dr. Sky diagnosed dementia, most likely secondary to closed head injury from the motorcycle accident, with depression and anxiety. Dr. Sky opined that Claimant had 75% permanent partial psychiatric disability. He opined that Claimant had a pre-existing permanent partial psychiatric disability, whose symptoms were exacerbated by the work-related injuries, particularly the 2000 injury, to the point that he is no longer employable in the open labor market. Dr. Sky explained that individuals with head injuries, like Claimant, are not near as able to handle stressful situations, be it physically or emotionally, as someone without a previous head injury. However, he admitted that between 1978 and 1998, he found no records confirming a diagnosis of dementia following the motorcycle accident.
- 51) The deposition of **Dr. Gregg Bassett** (Exhibit 1) was taken by Employer on November 4, 2011 to make his opinions in this case admissible at trial. Dr. Bassett is a board certified psychiatrist. He examined Claimant on one occasion, July 8, 2011, at Employer's request and provided no medical/psychiatric treatment. He issued his report dated July 17, 2011. Dr. Bassett took an extensive history from Claimant of his pre-existing problems and complaints, as well as of his various work injuries. He reviewed extensive medical records regarding treatment Claimant received for his various injuries. He also performed a psychiatric evaluation of Claimant. Dr. Bassett diagnosed pre-existing conditions of learning disorder not otherwise specified and cognitive disorder not otherwise specified from the 1978 motorcycle accident, for which he opined that Claimant had 15% permanent partial psychiatric disability. He also diagnosed pre-existing alcohol dependence (substance dependence/abuse), for which he rated Claimant as having 10% permanent partial psychiatric disability. He opined that these conditions did not keep Claimant from being employed as a laborer, but they did limit him to relatively unskilled occupations.
- 52) Finally, Dr. Bassett opined that the pain and decreased physical functioning from the June 16, 1999 and August 2, 2000 injuries represent a substantial factor in causing Claimant to develop a constellation of symptoms (irritability, sadness, poor motivation, and possibly sleep problems), which he diagnosed as depressive disorder

not otherwise specified. He rated Claimant as having 15% permanent partial psychiatric disability from the depressive symptoms caused by the pain and decreased physical functioning attributable to those two work injuries. Dr. Bassett also opined that the combination of the pre-existing and primary psychiatric disabilities is such that it is hard to imagine Claimant being able (from a psychiatric perspective) to work in a manner commensurate with his physical abilities. He noted that Claimant's inadvertent abrasiveness and inability to keep up the pace as he becomes mentally fatigued, would not work well in an office setting.

- 53) The deposition of **Dr. Jeffrey Magrowski** (Exhibit B) was taken by Claimant on June 24, 2011 to make his opinions in this case admissible at trial. Dr. Magrowski is a certified vocational rehabilitation counselor, with a Ph.D. in vocational rehabilitation services. He met with Claimant by phone, because Claimant was very hostile about his situation, to perform a vocational rehabilitation assessment on April 10, 2010, at the request of Claimant's attorney. He issued his report dated May 10, 2010. In addition to Claimant's interview, Dr. Magrowski reviewed extensive medical treatment records in reaching his conclusions in this matter. Based on Claimant's background information, education, training, employment history, transferrable skills, medical conditions/diagnoses and work restrictions from the various physicians, Dr. Magrowski concluded that as of 2004, when Claimant left Employer, he is unable to compete for, obtain or maintain employment in the open labor market. Based on the combination of his various limitations, including his psychiatric restrictions, he did not think Claimant could realistically be hired for any job. He did testify that he thought that the work Claimant performed for almost four years after his August 2000 injury, was basically light-duty work, with Employer providing a number of accommodations that allowed Claimant to hang on to his job as long as he did.
- 54) In terms of his current complaints, Claimant testified that he continues to experience neck, shoulder, knee and especially left foot pain. He said that he needs more surgery on the left foot for a couple of his toes. He also has migraines all the time, and the more he does, the worse they become. Claimant noted that stress is a major problem for him as well. He said that everything he does is a burden for him. He is very impatient and gets angry and aggravated by things very easily. He noted that stress causes problems with his memory. Claimant testified that he currently takes Percocet for pain and an anti-anxiety medication too. He said that he is trying to wean himself off the medications.
- 55) Claimant testified that on an average day, he watches television and tries to clean the house or wash dishes. He is able to take care of the dog, but he noted that he often falls asleep when he sits down. He can do yard work, but he has to spread it out because he is unable to do it all at once. Claimant testified that he did not know of an employer that would want him because of having to take off periodically for his pain and complaints, as well as the stress that would come with that.
- 56) According to the transaction details contained in Exhibit 4, Employer paid Claimant, and his attorney at the time, \$5,000.00 as an **advance on his settlement** in this case

(Exhibit 4). The check for \$5,000.00 was printed and sent to Claimant, via his attorney, on September 27, 2007.

57) Claimant's former attorney, **Mr. Gerald V. Tanner, Jr.**, testified that at the time he withdrew from representing Claimant in this matter, March 12, 2002, Administrative Law Judge Matthew Vacca signed a memorandum (Court's Exhibit I) confirming Mr. Tanner's assertion of an attorney's lien in the total amount of \$10,550.00 for fees, and an additional total of \$1,285.00 in expenses for all four of Claimant's open Workers' Compensation injuries. Mr. Tanner confirmed that he had a Contingent Legal Fees agreement (Court's Exhibit IV) with Claimant that provided for the payment of 25% of any amount collected, plus expenses, to be paid by Claimant as his attorney's fee for this case.

RULINGS OF LAW:

Based on a comprehensive review of the substantial and competent evidence described above and based on the applicable statutes of the State of Missouri, I find:

Claimant sustained a compensable injury to his left foot and body as a whole on August 2, 2000, when he was retrieving a box of mechanical rings and bolts off the pipe truck, and a co-worker, who was not paying attention, lowered the heavy, one-foot square, metal stabilizer onto his left foot, crushing the foot just behind the steel toe of his boot. I find that Claimant was diagnosed with a crush injury with metacarpal fracture, which required an open reduction and internal fixation, and then a wound problem requiring a skin graft, medically causally related to the August 2, 2000 accident at work. I further find that he was diagnosed with a depressive disorder not otherwise specified, medically causally related to the June 16, 1999 injury, as well as this August 2, 2000 accident. Claimant credibly testified, and the medical treatment records confirm, that he had continued pain, soreness and functional difficulties with his left foot and psychiatric condition. These findings on Claimant's condition are supported by the medical treatment records of Dr. Kostman, Dr. Stromberg, Dr. Jacobs, Dr. Maret, and Dr. Johnson, as well as the reports and testimony of Dr. Meyers, Dr. Musich, Dr. Sky and Dr. Bassett.

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

Issue 2: What is the liability of the Second Injury Fund for permanent partial or permanent total disability benefits?

Given that these two issues are so interrelated in this claim, I will address these two issues together.

In reviewing and weighing the evidence in this case, it is important to remember that according to **Mo. Rev. Stat. § 287.800 (1994)**, "All of the provisions of this chapter shall be liberally construed with a view to the public welfare..." All reasonable doubts as to an

employee's right to compensation should be resolved in favor of the employee. *Wolfgeher v. Wagner Cartage Service, Inc.*, 646 S.W.2d 781, 783 (Mo. 1983).

Under **Mo. Rev. Stat. § 287.020.7 (1994)**, "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)

In cases such as this one where the Second Injury Fund is involved, we must also look to **Mo. Rev. Stat. § 287.220 (1994)** 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. 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 (1994)**, the disabilities must also meet certain thresholds before liability against the Second Injury Fund is invoked, and they must have been 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). 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.

Where the Second Injury Fund is involved and there is an allegation of permanent total disability, the analysis of the case essentially takes on a three-step process:

First, is Claimant permanently and totally disabled?;

Second, what is the extent of Employer's liability for that disability from the last injury alone?; and

Finally, is the permanent total disability caused by a combination of the disability from the last injury and any pre-existing disabilities?

In determining this case, I will follow this three-step approach to award all appropriate benefits under the Statute.

Claimant bears the burden of proof on all essential elements of his Workers' Compensation case. *Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute*, 793 S.W.2d 195 (Mo. App. E.D. 1990) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). The fact finder is charged with passing on the credibility of all witnesses and may disbelieve testimony absent contradictory evidence. *Id.* at 199.

Considering the competent and substantial evidence listed above, I find that Claimant is permanently and totally disabled. Claimant credibly described the continuing symptoms and problems he has on account of his various physical conditions (left foot, left ankle, left knee, pelvis, low back and neck), as well as his psychiatric conditions (depressive disorder, cognitive disorder and learning disorder), which keep him from functioning normally on a daily basis. He is continuing to take medications to help him deal with the mental and physical complaints he has as a result of his various conditions.

In addition to Claimant's credible testimony, the record of evidence also contains a number of medical opinions and a vocational opinion that all support the finding that Claimant is permanently and totally disabled and unable to compete for work in the open labor market. Dr. Musich, Dr. Meyers and Dr. Sky each have clearly testified that they found Claimant to be permanently and totally disabled and not employable in the open labor market in their expert medical or psychiatric opinions. Although Dr. Bassett did not expressly state such an opinion, even he stated from a psychiatric perspective that it was hard to imagine how Claimant would be able to work given the extent of his problems. These medical/psychiatric opinions are bolstered by the vocational opinion of Dr. Magrowski, who agreed that Claimant was unable to compete for, obtain or maintain work in the open labor market.

While Employer and the Second Injury Fund point to opinions from Dr. Schwarze and Dr. Kostman to support the contention that Claimant is not permanently and totally disabled, I find that these opinions are not as competent, credible and reliable on this issue as those from the physicians listed above, because Drs. Schwarze and Kostman only focused on one specific body part each in providing their opinions that Claimant was able to return to work without restrictions. Unlike those physicians listed above, neither of them looked at the totality of Claimant's mental and physical conditions in reaching their opinions on Claimant's ability to work. In that respect, I find the opinions of Drs. Kostman and Schwarze on this issue are not as comprehensive as the physicians listed above, who looked at all of Claimant's problems, complaints, disabilities and limitations in reaching their conclusions in this case.

Having found that Claimant is permanently and totally disabled, it is now appropriate to determine the extent of Employer's liability and if the permanent total disability is the result of the combination of pre-existing and last injury disabilities, such that the Second Injury Fund would have responsibility for the permanent total disability.

At the outset, I find based on Claimant's testimony and the competent, credible and reliable medical evidence in the record, that Claimant is not permanently and totally disabled as a result of the last (August 2, 2000) injury standing alone. Quite simply, there is no medical or vocational evidence in the record to support the proposition that the effects of the August 2, 2000 injury standing alone are enough to render Claimant permanently and totally disabled. Without such medical or vocational evidence, I find that Employer is not responsible for any permanent total disability benefits in this case.

That leaves, then, the determination of the nature and extent of the permanent partial disability benefits for which Employer would be responsible in connection with this accidental injury on August 2, 2000.

Under **Mo. Rev. Stat. § 287.190.6 (1994)**, “‘permanent partial disability’ means a disability that is permanent in nature and partial in degree...” The claimant bears the burden of proving the nature and extent of any disability by a reasonable degree of certainty. *Elrod v. Treasurer of Missouri as Custodian of Second Injury Fund*, 138 S.W.3d 714, 717 (Mo. banc 2004). Proof is made only by competent substantial evidence and may not rest on surmise or speculation. *Griggs v. A.B. Chance Co.*, 503 S.W.2d 697, 703 (Mo. App. 1973). Expert testimony may be required when there are complicated medical issues. *Id.* at 704. Extent and percentage of disability is a finding of fact within the special province of the [fact finding body, which] is not bound by the medical testimony but may consider all the evidence, including the testimony of the claimant, and draw all reasonable inferences from other testimony in arriving at the percentage of disability. *Fogelson v. Banquet Foods Corp.*, 526 S.W.2d 886, 892 (Mo. App. 1975) (citations omitted).

While there is no dispute that Claimant sustained an accident on August 2, 2000 while working for Employer, Employer does dispute the amount of permanent partial disability that Claimant may have sustained as a result of that accident.

I found credible testimony from Claimant, as well as entries in the medical treatment records, documenting the continued complaints and problems Claimant had with his left foot on account of the August 2, 2000 accidental injury and the subsequent medical treatment. I further find that he suffered from a depressive disorder that became progressively worse over time as his pain complaints and functional limitations continued, following both the June 16, 1999 and August 2, 2000 accidents. While he was able to return to work after his foot surgery and treatment, it was only for accommodated, lighter-duty work in the hydrant shop, not the full range of full-duty work he previously performed in the streets as a part of his job for Employer.

I also find in the record that there are medical/psychiatric opinions from Dr. Kostman, Dr. Musich, Dr. Meyers, Dr. Sky and Dr. Bassett, who opine that Claimant sustained some amount of permanent partial disability on account of his accident at work on August 2, 2000.

Based on all of the competent, credible and reliable evidence in the record, as described above, I find that Claimant sustained 30% permanent partial disability of the left foot at the 150 week level, referable to his left foot crush injury with metacarpal fracture, which required an open reduction and internal fixation, and then a wound problem requiring a skin graft, on account of the August 2, 2000 work injury. This finding accounts for, not only the medical findings and treatment, but also his continued complaints of pain and functional difficulties with the foot.

While both Drs. Sky and Bassett opine that Claimant sustained a psychiatric injury on account of the August 2, 2000 accident, neither of these physicians was specifically able to divide out what amount of this disability was related to the August 2, 2000 injury, as opposed to his other pre-existing injuries/conditions.

Because these physicians were unable to divide out a specific amount of psychiatric disability for this particular injury, as opposed to his other injuries or conditions, even though the injuries all occurred with the same Employer, I find that Claimant has failed to meet his burden of proving permanent partial disability for the psychiatric conditions specifically attributable to this accident on August 2, 2000. *Goleman v. MCI Transporters*, 844 S.W.2d 463 (Mo. App.

W.D. 1992) *overruled on other grounds by Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. 2003)*. As Claimant has the burden of proving the nature and extent of permanent partial disability for this injury, it is incumbent upon Claimant to have medical evidence that attributes permanent partial disability for this condition attributable to this accident, separate and apart from the disability he may have for similar conditions attributable to other causes. In this case the record is devoid of any expert medical or psychiatric opinion that attributes any specific amount of psychiatric disability to the August 2, 2000 injury, as opposed to any other injury or pre-existing condition. If it is impossible for medical and psychiatric experts to make any such division of the disability, then it is even more impossible for me to attempt to determine the amount of permanent partial disability Claimant may have for this psychiatric condition, attributable to this injury, without any competent or credible medical evidence, upon which to rely.

Therefore, while I find that Claimant certainly has a psychiatric condition medically causally related to this August 2, 2000 work injury, I further find that Claimant has failed to prove an entitlement to any amount of permanent partial disability at the level of the body as a whole referable to the psychiatric condition.

Accordingly, I find that Employer is responsible for the payment of 45 weeks of permanent partial disability benefits (30% of the left foot at the 150 week level), on account of the August 2, 2000 injury, or \$14,141.70. I also find, pursuant to the stipulation of the parties, that Employer previously paid Claimant \$5,000.00 as an advance on his settlement or award in this case. Therefore, after taking a credit for the previously paid \$5,000.00, Employer owes Claimant the new amount of \$9,141.70, pursuant to this award.

The final step of the inquiry then is whether the permanent total disability is the result of the combination of the primary (last) injury and pre-existing disabilities so that the Second Injury Fund would have liability for the permanent total disability. As alluded to above, the medical/psychiatric opinions of Dr. Musich, Dr. Meyers, Dr. Sky and even Dr. Bassett, the vocational opinion of Dr. Magrowski, as well as the credible testimony of Claimant, all support the finding that Claimant is permanently and totally disabled as a result of the combination of his primary and pre-existing disabilities, and, thus, the Second Injury Fund has liability for that disability.

With regard to the pre-existing injuries and disabilities Claimant has alleged, I find Claimant has provided credible testimony and/or evidence to explain the nature of the injuries/disabilities to his low back, neck, left ankle, pelvis, left knee and psychiatric condition. He also credibly explained the various ways in which these disabilities impacted his ability to work. In reviewing the medical records/reports submitted into evidence, I did find notes regarding the low back, neck, left ankle, pelvis, left knee and psychiatric condition to substantiate that those injuries/conditions were all disabling to some extent prior to the August 2, 2000 injury. Then, of course, there are the competent, credible and reliable medical opinions from Dr. Musich, Dr. Meyers, Dr. Sky and even Dr. Bassett, as well as the vocational opinion of Dr. Magrowski, all of whom opine Claimant is permanently and totally disabled as a result of the combination of his primary and pre-existing disabilities to multiple parts of his body.

The Second Injury Fund questions whether Claimant's permanent total disability truly came from a combination of his pre-existing disabilities and his last injury disability, by pointing to the fact that Claimant continued to work in some capacity for Employer through May 20, 2004, at which point he left because the pain and problems became too much for him to keep working. The Fund argues that either his conditions subsequently deteriorated over that four-year period, or at least his ability to work for the four years suggests an ability to continue working, if he so chose.

While it is true that he continued to work in some capacity until May 20, 2004, I find that it was a markedly altered and accommodated capacity based on the fact that he stayed in the hydrant shop, and only performed dispatch, janitor or hydrant repair work, as opposed to the heavy street work he was originally performing for Employer prior to the last injury. By all accounts, Employer accommodated his problems and complaints for four years, until such time as Claimant was simply physically and mentally unable to keep performing even the accommodated job duties. This finding is not only supported by Claimant's testimony, but also the medical records of Dr. Kostman and Dr. Maret who agreed that Claimant needed lighter work than he had previously been performing, and the vocational opinion of Dr. Magrowski, who also agreed that this was a markedly accommodated job from Employer. I find that Claimant's ability to work in a markedly accommodated position, even for almost four years, does not necessarily equate to his ability to compete for, obtain or maintain work in the open labor market, especially in light of the medical and vocational opinions in evidence in this case.

I also do not find any credible evidence to support the proposition that a subsequent deterioration of his condition, unrelated to the primary injury, is responsible for the permanent total disability. Based on the expert testimony regarding his psychiatric condition, that is certainly not the case, even though his frank treatment for the psychiatric conditions did not occur until after the August 2, 2000 injury. Further, even though he received treatment for his cervical spine condition after the August 2, 2000 accident, all of that treatment was related back to the June 16, 1999 injury by Drs. Musich and Meyers.

Finally, the Second Injury Fund suggests that because Claimant could not establish specific amounts of permanent partial disability referable to some of his conditions, by virtue of not having expert opinions that divide out the disability, then the case against the Fund must also fail. If Claimant was unable to establish any amount of permanent partial disability referable to the primary injury, then the Fund might be correct, but that is not the case here. Claimant was able to establish an amount of permanent partial disability referable to the August 2, 2000 injury and further establish that it was the combination of that disability and his pre-existing disabilities (which need not reach any specific minimum thresholds) that resulted in his permanent total disability. For that reason, I believe he met his burden of proof entitling him to an award of permanent total disability benefits.

Accordingly, based on all of this evidence, I find that Claimant has met his burden of proof to show that he is permanently and totally disabled as a result of his primary (August 2, 2000) injury disability combined with his pre-existing disabilities to multiple parts of his body. Since the permanent total disability is the result of the combination of his disabilities, the Second Injury Fund has liability for this disability.

Having established the responsibility of the Second Injury Fund for the permanent total disability exposure in this Claim, there is yet one issue left regarding the amount and timing of the payments under the statute. It is necessary to determine a date of maximum medical improvement, before which Employer would have been responsible for temporary total disability payments, and after which the payment of permanent total disability benefits would commence.

Although Claimant was initially placed at maximum medical improvement by Dr. Kostman on December 19, 2000, I do not believe he had reached the point of permanent total disability on that date, because Dr. Kostman indicated that he was able to work at that time, and, in fact, he did continue working, albeit in a very accommodated position through May 20, 2004. He also subsequently continued to receive treatment from Dr. Johnson and Dr. Jacobs for his left foot, related to the August 2, 2000 injury at work, through at least September 5, 2003. Additionally, he was receiving treatment for his work-related neck condition from Dr. Prather and Dr. Riew through at least December 2, 2003. After the notes from Dr. Maret referenced ongoing treatment for the left foot for complaints related to the August 2, 2000 injury throughout 2003 and early 2004, the first note where the foot is no longer mentioned as needing treatment is dated June 10, 2004. Therefore, I find that Claimant's point of maximum medical improvement and his date of permanent total disability must fall after the treatment for the foot concluded, as that was properly to be considered part of the last injury by virtue of the various doctors' opinions in this case. When Claimant was examined by Dr. Maret on June 10, 2004 and the foot was no longer mentioned as needing more treatment, I find that he was at maximum medical improvement for the August 2, 2000 injury, based on the treatment that had been provided to date.

Given the facts and circumstances described above, and in the absence of any more compelling date in the medical treatment records in evidence in this case, I find that Claimant reached the point of maximum medical improvement for his August 2, 2000 injury on June 10, 2004. Between his injury on August 2, 2000 and his date of maximum medical improvement on June 10, 2004, Employer had responsibility to pay temporary total disability benefits for any periods of time that Claimant was unable to work while he was receiving medical treatment related to the work injury on August 2, 2000. As any potential liability for temporary total disability was not made an issue in this case at the time of trial, and as Claimant essentially continued working anyway through May 20, 2004, no further findings in that regard will be made. Therefore, this date of maximum medical improvement is relevant only for the purpose of calculating Second Injury Fund liability.

Since Claimant reached maximum medical improvement on June 10, 2004, I find that Claimant is permanently and totally disabled as of June 11, 2004.

By the terms of this award, Employer was responsible for 45 weeks of permanent partial disability at a rate of \$314.26. Therefore, from June 11, 2004 until April 22, 2005 (45 weeks), Employer had liability for \$314.26 per week.

Because the PTD and PPD rates are different, there is a differential due from the Second Injury Fund. Therefore, from June 11, 2004 until April 22, 2005 (45 weeks), Claimant is to receive \$67.07 per week, or the difference between the permanent partial and permanent total disability rates ($\$381.33 - \$314.26 = \$67.07$), from the Second Injury Fund.

Starting then on April 23, 2005, the Second Injury Fund is to pay \$381.33 per week for Claimant's lifetime, subject to review and modification by law.

Issue 3: Whether or not there is a valid attorney's lien and to what extent, if any, the lien requires a division of attorney's fees in this case?

Mo. Rev. Stat. § 287.260.1 (1994) gives the Division jurisdiction to hear and determine all disputes regarding the attorney's fees allowable for services rendered in connection with proceedings for compensation. The statute mandates that the attorney's fees allowed shall be limited to charges that are "fair and reasonable." By custom, the amount allowed for attorney's fees in Workers' Compensation cases has been a maximum of 25% of any benefits awarded, unless the claimant and his attorney have agreed on a lesser amount for the attorney's fee. Under **Mo. Code Regs. 8 CSR 20-3.060 (2) (B)**, "The limitation as to fees shall apply to the combined charges of attorneys who knowingly combine their efforts towards the enforcement or collection of any compensation claim."

In this case, at the outset of the hearing, the parties stipulated to an attorney's fee of 25% of any benefits awarded. Given my prior findings on the nature and extent of permanent disability as described above, the total attorney's fee in this case is \$4,289.96 (25% of \$17,159.85) on the calculated benefits and a continuing additional 25% of the ongoing permanent total disability benefits starting on April 23, 2005. The question then becomes, how much of that total fee should properly be payable to his first attorney, Mr. Tanner, and how much should be payable to his current attorney, Ms. Morgan.

Mr. Tanner, at the time he withdrew from this case, filed an attorney's lien claiming entitlement to the total amount of \$10,550.00 for fees, and an additional total of \$1,285.00 in expenses for all four of Claimant's open Workers' Compensation injuries. The lien for the fees was based on 25% of the offer on the table from Employer in all four cases at the time that Claimant discharged Mr. Tanner and retained new counsel.

In evaluating the amount of that lien which is fair and reasonable and attributable to this case, I am mindful of the fact that while Mr. Tanner filed the initial Claim for Compensation on Claimant's behalf in this matter, and while he appeared at settings at the Division in this matter, including mediation settings, the medical proof that ultimately allowed Claimant to meet his burden of proof on the nature and extent of disability issue in this case, was obtained by Ms. Morgan. Additionally, Ms. Morgan was the one who took the case to trial to obtain Claimant's benefits, including all the preparation that goes along with that.

After considering the work actually done by each attorney on this file to move it forward to conclusion, as well as the other evidence in the record, I find that Mr. Gerald V. Tanner, Jr. is entitled to receive \$7,500.00 as his fair and reasonable attorney's fee out of the total attorney's fee awarded in this matter, and an additional \$642.50 for expenses (half of his claimed expenses), in full and final satisfaction of his filed attorney's lien in this case. Since Mr. Tanner is entitled

to receive \$7,500.00, that leaves the balance of the attorney's fees payable to Ms. Ellen E. Morgan for her fair and reasonable attorney's fee in this case.

CONCLUSION:

Claimant sustained a compensable injury to his left foot and body as a whole on August 2, 2000, when he was retrieving a box of mechanical rings and bolts off the pipe truck, and a co-worker, who was not paying attention, lowered the heavy, one-foot square, metal stabilizer onto his left foot, crushing the foot just behind the steel toe of his boot. Claimant was diagnosed with a crush injury with metacarpal fracture, which required an open reduction and internal fixation, and then a wound problem requiring a skin graft, medically causally related to the August 2, 2000 accident at work. He was also diagnosed with a depressive disorder not otherwise specified, medically causally related to the June 16, 1999 injury, as well as this August 2, 2000 accident. Claimant sustained permanent partial disability as a result of this August 2, 2000 injury in the amount of 30% of the left foot at the 150 week level. Although Claimant certainly has a psychiatric condition medically causally related to this August 2, 2000 work injury, Claimant has failed to prove an entitlement to any amount of permanent partial disability at the level of the body as a whole referable to the psychiatric condition, by failing to produce expert medical opinions that specifically attributed any amount of permanent partial disability for this condition to this injury as opposed to his other injuries or pre-existing conditions.

Claimant is permanently and totally disabled as a result of the combination of the primary injury and his multiple pre-existing disabilities. Claimant reached maximum medical improvement for the August 2, 2000 injury on June 10, 2004 and became permanently and totally disabled as of June 11, 2004. Compensation from the Second Injury Fund is payable in the amount of \$67.07 per week from June 11, 2004 until April 22, 2005 (45 weeks), of \$3,018.15. Compensation from the Second Injury Fund is then payable from April 23, 2005 for the rest of Claimant's life in the amount of \$381.33 per week, subject to review and modification by law.

Compensation awarded is subject to a lien in the amount of 25% of all payments in favor of Ms. Ellen E. Morgan and Mr. Gerald V. Tanner, Jr., for necessary legal services. Mr. Tanner is entitled to receive \$7,500.00 as his fair and reasonable attorney's fee out of the total attorney's fee awarded in this matter, and an additional \$642.50 for expenses (half of his claimed expenses), in full and final satisfaction of his filed attorney's lien in this case. Since Mr. Tanner is entitled to receive \$7,500.00, that leaves the balance of the attorney's fees payable to Ms. Ellen E. Morgan for her fair and reasonable attorney's fee in this case.

Made by: _____

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