

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

Injury No.: 01-095113

Employee: Jackie Stallings
Employer: Corbitt Manufacturing Company
Insurer: Hartford Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: May 1, 2001
Place and County of Accident: St. Louis City, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated September 22, 2006. The award and decision of Administrative Law Judge John Howard Percy, issued September 22, 2006, 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 5th day of April 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Jackie Stallings

Injury No. 01-095113

Dependents: N/A
Employer: Corbitt Manufacturing Company
Additional Party: Second Injury Fund
Insurer: Hartford Insurance Company
Hearing Date: June 8 and July 10, 2006

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

Checked by: JHP

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: May 1 & June 7, 2001
5. State location where accident occurred or occupational disease was contracted: St. Louis City, Mo.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Two episodes of lifting of heavy objects at work
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: Low back
14. Nature and extent of any permanent disability: 5% permanent partial disability of the body referable to the low back
15. Compensation paid to-date for temporary disability: \$6,076.84 + \$2,937.12 (per temporary award)
16. Value necessary medical aid paid to date by employer/insurer? \$2,161.93 + \$1,430.80 (per temporary award)

Employee: Jackie Stallings Injury No. 01-095113

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$379.80
19. Weekly compensation rate: \$253.20 PTD/TTD/PPD
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

For Medical Aid: per temporary award

\$1,430.00 (Paid)

11-3/5 weeks of temporary total disability per temporary award	\$2,937.12 (Paid)
20 weeks of permanent partial disability from Employer	\$5,064.00

22. Second Injury Fund liability: No

TOTAL: \$5,064.00

23. Future requirements awarded: None

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

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

Harry Nichols

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Jackie Stallings	Injury No. 01-095113
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	Corbitt Manufacturing Company	Department of Labor and Industrial Relations of Missouri
Additional Party:	Second Injury Fund	Jefferson City, Missouri
Insurer:	Hartford Insurance Company	Checked by: JHP

This case was originally heard on November 7, 2003. This claim was heard with two other related claims: Injury Nos. 01-095116 and 01-095117. A Temporary Award was issued in this claim on February 20, 2004. The parties now request that Final Awards be issued in this and the other two claims. The hearing of all three claims continued on June 8, 2006. The record was left open for 30 days for the submission of additional evidence. None was submitted. The record was closed on July 10, 2006.

All of the stipulations, findings of facts, conclusions of law, set forth in the Temporary Award of February 20, 2004 are restated and incorporated into this Final Award by this reference. The Temporary Award is an integral part of this Final Award. Many of the findings in this award are based on findings and conclusions made in the Temporary Award which have only been summarized in this Final Award. ^[1]

ADDITIONAL STIPULATIONS

The parties stipulated that:

1. additional compensation has been paid in compliance with the Temporary Award issued herein in the amount of \$2,937.12 representing 11-3/5 weeks of benefits covering the period from April 11, 2002 through July 2, 2002; and
2. employer/insurer have paid \$1,430.00 in additional medical expenses in compliance with the Temporary Award issued herein.

ADDITIONAL ISSUES

The additional issues to be resolved in this proceeding are:

1. whether employee is entitled pursuant to Section 287.140 Mo. Rev. Stat. (2000) to be reimbursed for any medical expenses, which he may have incurred in obtaining treatment for the injury;
2. whether employee should be provided with any future medical treatment for the injury;
3. whether and to what extent employee sustained any permanent disability which would entitle him to an award of compensation; and
4. whether and to what extent employee has sustained any additional permanent partial/total disability for which the Second Injury Fund would be liable as a result of the combination of any preexisting disabilities with the primary injury.

REIMBURSEMENT FOR ADDITIONAL MEDICAL EXPENSES

At the beginning of the hearing Claimant indicated that he was seeking reimbursement for additional medical bills not included in the temporary award. The record was left open 30 days for additional exhibits.

I previously found in the temporary award that claimant was entitled to reimbursement of medical bills from St. Mary's Hospital (Claimant's Exhibit A, Page 25), Barnes Hospital (Claimant's Exhibit D), and Washington University School of Medicine (Claimant's Exhibit E), totaling \$1,430.00. The parties stipulated at the final hearing that the foregoing amount was paid by employer/insurer in compliance with the temporary award.

As no additional medical bills were offered into evidence at the final hearing, I find that claimant is not entitled to reimbursement of any additional medical bills.

FUTURE MEDICAL CARE

Employee is requesting an award of future medical care for his low back.

Section 287.140 Mo. Rev. Stat. (2000) requires that the employer/insurer provide "such medical, surgical, chiropractic, and hospital treatment ... as may reasonably be required ... to cure and relieve [the employee] from the effects of the injury." Future medical care can be awarded even though claimant has reached maximum medical improvement. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 278 (Mo. App. 1996). It can be awarded even where permanent partial disability is determined. The employee must prove beyond speculation and by competent and substantial evidence that his or her work-related injury is in need of treatment. Williams v. A.B. Chance Co., 676 S.W.2d 1 (Mo. App. 1984). Conclusive evidence is not required. However, evidence which shows only a mere possibility of the need for future treatment will not support an award. It is sufficient if claimant shows by reasonable probability that he or she will need future medical treatment. Dean v. St. Luke's Hospital, 936 S.W.2d 601, 603 (Mo. App. 1997); Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 277 (Mo. App. 1996); Sifferman v. Sears, Roebuck and Co., 906 S.W.2d 823, 828 (Mo. App. 1995). "Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." Tate v. Southwestern Bell Telephone Co., 715 S.W.2d 326, 329 (Mo. App. 1986); Sifferman at 828.

Where the sole medical expert believes that it is "very likely" that the claimant will need future medical treatment, but is unable to say whether it is more likely than not that the claimant will need such treatment, that opinion, when combined with credible testimony from the claimant and the medical records in evidence, can be sufficient to support an award which leaves the future treatment issue open. This is particularly true where the medical expert states that the need for treatment will depend largely on the claimant's pain level in the future and how well the claimant tolerates that pain. Dean, supra at 604-06.

The amount of the award for future medical expenses may be indefinite. Section 287.140.1 does not require that the medical evidence identify particular procedures or treatments to be performed or administered. Dean, supra at 604; Talley v. Runny Meade Estates, Ltd., 831 S.W.2d 692, 695 (Mo. App. 1992); Bradshaw v. Brown Shoe Co., 660 S.W.2d 390, 393-394 (Mo. App. 1983). The award may extend for the duration of an employee's life. P.M. v. Metromedia Steakhouses Co., Inc., 931 S.W.2d 846, 849 (Mo. App. 1996). The award may require the employer to provide future medical treatment which the claimant may require to relieve the effects of an injury or occupational disease. Polavarapu v. General Motors Corporation, 897 S.W.2d 63 (Mo. App. 1995). It is not necessary that such treatment has been prescribed or recommended as of the date of the hearing. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 277 (Mo. App. 1996). Where future medical care and treatment is awarded, such care and treatment "must flow from the accident before the employer is to be held responsible." Modlin v. Sun Mark, Inc., 699 S.W.2d 5, 7 (Mo. App. 1985); Talley v. Runny Meade Estates, Ltd. at 694. The employer/insurer may be ordered to provide medical and hospital treatment to cure and relieve the employee from the effects of the injury even though some of such treatment may also give relief from pain caused by a preexisting condition. Hall v.

Spot Martin, 304 S.W.2d 844, 854-55 (Mo. 1957). However, where preexisting conditions also require future medical care, the medical experts must testify to a reasonable medical certainty as to what treatment is required for the injuries attributable to the last accident. O'Donnell v. Guarantee Elec. Co., 690 S.W.2d 190, 191 (Mo. App. 1985).

Claimant's Testimony

Claimant testified at the final hearing that his back complaints were worse than they were in November of 2003. He complained of reduced inability to forward bend and increased giving way of his leg.

Additional Findings

I previously found in the temporary award that claimant had preexisting spondylolisthesis of L5 on S1, narrowing of the L5-S1 disk space, and degenerative spurring at L5 and S1, that he sustained an injury to his low back on May 1, 2001, and that he suffered a flare-up of low back pain in early June of 2001. The parties disagreed over claimant's low back symptoms presented a soft tissue injury or an injury to the L5-S1 intervertebral disk.^[2]

I previously in the temporary award found that the opinions of Dr. James Burke, Jr. were far more persuasive than those of Dr. Joseph Hanaway. Based on the credible opinions of Dr. Burke, I found that claimant suffered a small aggravation of his preexisting spondylolisthesis and degenerative disk disease as a result of his work-related injuries in May and June of 2001.^[3] I further find based on the credible opinion of Dr. Burke that if claimant had a compression fracture of the L1 vertebra, it was not caused by any work-related activity of Mr. Stallings. (Employer/Insurer's Exhibit 2, Pages 23 & 25)

I previously found in the temporary award that Dr. Burke's opinions were far more persuasive concerning the questions of whether claimant required more treatment or had reached maximum medical improvement than the opinions of Dr. Hanaway. Based on the credible opinions of Dr. Burke, I found that claimant did not need any further medical treatment for his work-related low back injury and that he had reached maximum medical improvement on October 4, 2002, the last day of medical treatment.^[4]

At the final hearing claimant did not offer into evidence any additional medical reports, treatment records or expert testimony suggesting that employee would require future treatment.

Dr. Hanaway did not testify during his prior depositions that claimant would require any long-term treatment for his back.

I find that claimant has failed to sustain his burden of proof with respect to the need for future medical treatment. While claimant may feel that his additional back complaints are related to the work-related accident, there is no expert medical opinion which states that is so. Nor is there any expert medical opinion that claimant will require future medical treatment as a result of his additional back complaints.

Accordingly, the request for future medical treatment is denied.

ALLEGED PERMANENT TOTAL DISABILITY

Employee claims that he is permanently and totally disabled as a result of the work-related injuries of May 1, 2001 to his low back, or, alternatively, as a result of the combination of the work-related injury with employee's alleged preexisting disabilities in his right lower extremity.^[5] The claim of total disability against the employer must be considered first. Where the disability caused solely by the primary injury is total disability, there can be no liability for the Second Injury Fund. Hughey v. Chrysler Corp., 34 S.W.3d 845, 847 (Mo. App. 2000); Vaught v. Vaughts, Inc., 938 S.W.2d 931, 939 (Mo. App. 1997); Roller v. Treasurer of State of Mo., 935 S.W.2d 739, 740 (Mo. App. 1996).

Section 287.020.7 Mo. Rev. Stat. (2000) defines total disability as the "inability to return to any employment and not merely...[the] inability to return to the employment in which the employee was engaged at the time of the accident." The words "inability to return to any employment" mean "that the employee is unable to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment." Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919, 922 (Mo. App. 1982). The words "any employment" mean "any reasonable or normal employment or occupation; it is not necessary that the employee be

completely inactive or inert in order to meet this statutory definition." Id. at 922; Brown v. Treasurer of Missouri, 795 S.W.2d 479, 483 (Mo. App. 1990); Crum v. Sachs Elec., 769 S.W.2d 131, 133 (Mo. App. 1989). "[W]orking very limited hours at rudimentary tasks [is not] reasonable or normal employment." Grgic v. P & G Const., 904 S.W.2d 464, 466 (Mo. App. 1995). The primary determination with respect to the issue of total disability is whether, in the ordinary course of business, any employer would reasonably be expected to employ the claimant in his or her present physical condition and reasonably expect him or her to perform the work for which he or she is hired. Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 367 (Mo. App. 1992); Talley v. Runny Mead Estates, Ltd., 831 S.W.2d 692, 694 (Mo. App. 1992); Brown v. Treasurer of Missouri, at 483; Fischer v. Archdiocese of St. Louis, 793 S.W.2d 195, 199 (Mo. App. 1990); Sellers v. Trans World Airlines, Inc., 776 S.W.2d 502, 504 (Mo. App. 1989). The test for permanent and total disability is whether given the employee's condition, he or she would be able to compete in the open labor market; the test measures the employee's prospects for obtaining employment. Reiner at 367; Brown at 483; Fischer at 199. A claimant who is "only able to work very limited hours at rudimentary tasks is a totally disabled worker." Grgic v. P & G Const., 904 S.W.2d 464, 466 (Mo. App. 1995).

The employee must prove the nature and extent of any disability by a reasonable degree of certainty. Downing v. Willamette Industries, Inc., 895 S.W.2d 650, 655 (Mo. App. 1995); Griggs v. A. B. Chance Company, 503 S.W.2d 697, 703 (Mo. App. 1974). Such proof is made only by competent and substantial evidence. It may not rest on speculation. Idem. Expert testimony may be required where there are complicated medical issues. Goleman v. MCI Transporters, 844 S.W.2d 463, 466 (Mo. App. 1993); Griggs at 704; Downs v. A.C.F. Industries, Incorporated, 460 S.W.2d 293, 295-96 (Mo. App. 1970). The fact finder may accept only part of the testimony of a medical expert and reject the remainder of it. Cole v. Best Motor Lines, 303 S.W.2d 170, 174 (Mo. App. 1957). Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. Hawkins v. Emerson Electric Co., 676 S.W.2d 872, 877 (Mo. App. 1984). Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. Webber v. Chrysler Corp., 826 S.W.2d 51, 54 (Mo. App. 1992); Hutchinson v. Tri-State Motor Transit Co., 721 S.W.2d 158, 163 (Mo. App. 1986).

However, where the facts are within the understanding of lay persons, the employee's testimony or that of other lay witnesses may constitute substantial and competent evidence. This is especially true where such testimony is supported by some medical evidence. Pruteanu v. Electro Core Inc., 847 S.W.2d 203 (Mo. App. 1993); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 367 (Mo. App. 1992); Fisher v. Archdiocese of St. Louis, 793 S.W.2d 195, 199 (Mo. App. 1990); Ford v. Bi-State Development Agency, 677 S.W.2d 899, 904 (Mo. App. 1984); Fogelsong v. Banquet Foods Corp, 526 S.W.2d 886, 892 (Mo. App. 1975). The trier of facts may even base its findings solely on the testimony of the employee. Fogelsong at 892. The trier of facts may also disbelieve the testimony of a witness even if no contradictory or impeaching testimony is given. Hutchinson v. Tri-State Motor Transit Co., *supra* at 161-2; Barrett v. Bentzinger Brothers, Inc., 595 S.W.2d 441, 443 (Mo. App. 1980). The uncontradicted testimony of the employee may even be disbelieved. Weeks v. Maple Lawn Nursing Home, 848 S.W.2d 515, 516 (Mo. App. 1993); Montgomery v. Dept. of Corr. & Human Res., 849 S.W.2d 267, 269 (Mo. App. 1993).

The determination of the degree of disability sustained by an injured employee is not strictly a medical question. While the nature of the injury and its severity and permanence are medical questions, the impact that the injury has upon the employee's ability to work involves factors which are both medical and nonmedical. Accordingly, the Courts have repeatedly held that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission. Sellers v. Trans World Airlines, Inc., 776 S.W.2d 502 (Mo. App. 1989); Quinlan v. Incarnate Word Hospital, 714 S.W.2d 237, 238 (Mo. App. 1986); Banner Iron Works v. Mordis, 663 S.W.2d 770, 773 (Mo. App. 1983); Barrett v. Bentzinger Brothers, Inc., 595 S.W.2d 441, 443 (Mo. App. 1980); McAdams v. Seven-Up Bottling Works, 429 S.W.2d 284, 289 (Mo. App. 1968). The fact finding body is not bound by or restricted to the specific percentages of disability suggested or stated by the medical experts. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences from such testimony. Fogelsong v. Banquet Foods Corporation, 526 S.W.2d 886, 892 (Mo. App. 1975). The finding of disability may exceed the percentage testified to by the medical experts. Quinlan v. Incarnate Word Hospital, at 238; Barrett v. Bentzinger Brothers, Inc., at 443; McAdams v. Seven-Up Bottling Works, at 289. The uncontradicted testimony of a medical expert concerning the extent of disability may even be disbelieved. Gilley v. Raskas Dairy, 903 S.W.2d 656, 658 (Mo. App. 1995); Jones v. Jefferson City School Dist, 801 S.W.2d 486 (Mo. App. 1990). The fact finding body may reject the uncontradicted opinion of a vocational expert. Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995).

CLAIM AGAINST EMPLOYER

An employer is liable for permanent total disability compensation under Section 287.200 Mo. Rev. Stat. (2000) only

where there is evidence in the record that the primary accident alone caused employee to be permanently and totally disabled. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 276 (Mo. App. 1996); Feldman v. Sterling Properties, 910 S.W.2d 808, 810 (Mo. App. 1995); Moorehead v. Lismark Distributing Co., 884 S.W.2d 416, 419 (Mo. App. 1994); Kern v. General Installation, 740 S.W.2d 691, 692 (Mo. App. 1987); accord, Terrell v. Board of Education, City of St. Louis, 871 S.W.2d 20, 23 (Mo. App. 1993); Roby v. Tarlton Corp., 728 S.W.2d 586, 589 (Mo. App. 1987).

Employer is liable for any aggravation of a preexisting symptomatic condition caused by a work-related accident. Rector v. City of Springfield, 820 S.W.2d 639 (Mo. App. 1991); see also Sansone v. Joseph Sansone Const. Co., 764 S.W.2d 751 (Mo. App. 1989); Plaster v. Dayco Corp., 760 S.W.2d 639 (Mo. App. 1988).

An employer is not liable for any post-accident worsening of an employee's preexisting disabilities which is not caused or aggravated by the last work-related injury. Kern v. General Installation, 740 S.W.2d 691, 692 (Mo. App. 1987).

Findings of Fact

Based on the evidence adduced at the hearing, some of which comes from the claimant's testimony and some of which is based on the medical records, I make the following findings of fact. Based on my observations of claimant's demeanor at the hearing, I find that he is only partially credible. In particular, I find that he exaggerated the extent of his pain.

Subsequent Injury

Employee sought treatment at St. Mary's Health Center on March 11, 2002. He reported that his low back began to hurt several days earlier while he was shoveling snow at his mother's house. A pain diagram indicates that the pain was in the center of the low back, at the waistline. (Employer/Insurer's Exhibit 5)

Educational and Employment History

Mr. Stallings has an associate's degree in fire science from the U.S. Naval Academy.

From 1979 to 1986 claimant worked as a firefighter in California. He was required to lift bags of sand weighing 200 pounds and climb 4 stories with an air pack and water hose. He was able to lift 220 pounds above his head.

He performed survey engineering for real estate companies in northern California. He drove light trucks.

He worked as an assistant chef at Stouffers and the Ritz Carlton hotels. He was employee by a temporary agency in 1999 as a parts washer. In 2000 he was hired by Employer on a part-time basis as a parts washer. He also drove a fork lift. Eventually he became a molder/grinder.

Claimant was 45 years old on October 4, 2002, when he reached maximum medical improvement with respect to his low back injury.

Claimant's Testimony

Claimant testified that since November of 2003 he had seen Dr. Hanaway about six times. Claimant offered no additional records of any such examinations into evidence. Claimant also testified that he had sought treatment at St. Mary's Hospital for three falls since November of 2003. Claimant offered no additional records of any such examinations into evidence.

Mr. Stallings testified at the final hearing that he continues to have ongoing back pain, which necessitates pain medication, particularly narcotics. He indicated that it had gotten worse. He has constant pain while sitting. He testified that he has to lie down four hours per day because of back pain. He complained of reduced inability to forward bend and increased giving way of his leg.

He testified that he is able to mow part of his mother's lawn. He can walk about 6 blocks without resting. He has not worked since June of 2001. He was able to kneel and bend his back prior to the work-related injury. Claimant testified that

since the back injury he has limited ability to bend and is unable to kneel.

Claimant testified that prior to his work-related injury, he could lift 180 pounds. He feels that he is now able to lift only 10 pounds.

Medical Opinions

Dr. Hanaway did not offer any opinions with respect to the issue of whether claimant sustained any permanent disability from the primary injury herein.

Dr. Riaz A. Naseer examined claimant on April 13, 2002. He noted that X-rays taken of the lumbar spine in August of 2001 showed degenerative disk disease at L5-S1, S-1 and L3-4. Despite identifying physical restrictions in bending, Dr. Naseer concluded that employee was able to sit, stand, walk, lift, carry and handle objects. Dr. Naseer did not attribute the work restrictions to the May 1, 2001 accident. (Employer/Insurer's Exhibit 17)

As the examination by Dr. Naseer was prior to claimant reaching maximum medial improvement, it has even less probative value on the issue of whether claimant sustained any permanent disability from the primary injury herein.

Dr. Burke opined that the alleged work injury was only a triggering event in bringing about symptoms from the underlying degenerative disc disease and spondylolisthesis. (Employer/Insurer's Exhibit 3, Page 37) He further opined that Employee had 5% permanent partial disability of the body as a whole in reference to the back, all of which was due to his preexisting condition. (Employer/Insurer's Exhibit 3, Page 20)

Vocational Opinions

Employee did not present any vocational testimony in support of his claim for permanent total disability.

Additional Findings

Though claimant's low back was largely symptom free before the May and June of 2001 incidents, Dr. Burke opined that claimant had 10% preexisting permanent disability in his low back. Dr. Burke was not asked whether that rating was for the claimant's current level of symptoms or whether it was for the preexisting spondylolisthesis and degenerative disk disease alone and without regard to symptoms or for a combination of the pathology and symptoms.

While I previously found in the temporary award that claimant exaggerated his symptoms to some of the treatment providers, I also found that he did suffer an increase of symptoms after the May and June of 2001 incidents.

Claimant presented no expert opinion to sort out which of claimant's current symptoms are from the work-related aggravation of his preexisting low back pathology and which symptoms are the result of the natural progression of that pathology without regard to the May and June of 2001 incidents. Employer/insurer contend that as the only expert opinion in evidence is that claimant sustained no permanent partial disability as a result of the May and June of 2001 incidents, claimant has failed to sustain his burden of proof.

The medical records document that claimant had low back symptoms following the work-related incidents. Both Drs. Burke and Hanaway diagnosed claimant with an injury. Dr. Burke believes that the injury was only a temporary aggravation of his underlying pathology. While the treatment records show that claimant exaggerated his symptoms, which casts doubt on the credibility of his testimony, I nevertheless find on the basis of claimant's testimony that he did sustain an increase in his low back pain following the work-related incidents and that while some of it subsided with treatment, some of it remained notwithstanding treatment.

Taking into account all of the evidence, I find that claimant sustained 5% permanent partial disability of the low back due to the aggravation of his preexisting spondylolisthesis and degenerative disk disease by the May 1 and June 7, 2001 work-related incidents.

Claim against Second Injury Fund

Employee claims in the alternative that he is permanently and totally disabled as a result of the combination of the May 1 and June 7, 2001 injuries with employee's alleged preexisting disabilities to his right lower extremity. ^[6]

Under Section 287.220.1 Mo. Rev. Stat. (2000) where a previous partial disability or disabilities, whether from a compensable injury or otherwise, and the last injury combine to result in total and permanent disability, the employer at the time of the last injury is liable only for the disability which results from the last injury considered by itself^[7] and the Second Injury Fund shall pay the remainder of the compensation that would be due for permanent total disability under Section 287.200. Grant v. Neal, 381 S.W.2d 838, 840 (Mo. 1964); Wuebbeling v. West County Drywall, 898 S.W.2d 615, 617-18 (Mo. App. 1995); Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 366 (Mo. App. 1992); Brown v. Treasurer of Missouri, 795 S.W.2d 479, 482 (Mo. App. 1990). The employee must prove that a prior permanent partial disability, whether from a compensable injury or not, combined with the subsequent compensable injury to result in total and permanent disability.

Combination of Preexisting and Primary Disabilities

Claimant alleged preexisting disability in his right lower extremity.

It is not necessary to make any findings with respect to claimant's preexisting disability^[8] as he failed to present any expert medical opinion or vocational opinion that the combination of his preexisting disability with the disability in his low back from the primary injury herein rendered claimant permanently and totally disabled. While the claimant may think that he is permanently and totally disabled, his personal opinion is not sufficient to sustain his burden of proof. See Minies v. Meadowbrook Manor, 105 S.W.3d 529, 538-39 (Mo. App. 2003).

Additional Permanent Partial Disability

Having found that employee was not permanently and totally disabled as a result of the combination of the primary injury sustained on May 1 and June 7, 2001 with the preexisting disabilities to his right lower extremity and low back, it is next necessary to determine whether employee is entitled to an award of additional permanent partial disability from the Second Injury Fund pursuant to Section 287.220.1 Mo. Rev. Stat. (2000). Under that Section an employee who has a permanent partial disability and who subsequently sustains a compensable injury may recover from the Second Injury Fund any additional permanent disability caused by the combination of the preexisting disability and the disability from the subsequent injury. The employer is liable only for the disability caused by the work-related accident. The Second Injury Fund is liable for the difference between the sum of the two disabilities considered separately and independently and the disability resulting from their combination. Cartwright v. Wells Fargo Armored Serv., 921 S.W.2d 165, 167 (Mo. App. 1996); Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995); Brown v. Treasurer of Missouri, 795 S.W.2d 479 (Mo. App. 1990); Anderson v. Emerson Elec. Co., 698 S.W.2d 574, 576-77 (Mo. App. 1985). In order to recover from the Second Injury Fund the employee must prove a prior permanent partial disability, whether from a compensable injury or not, a subsequent compensable injury, and a synergistic combination of the preexisting and subsequent disabilities.

I have previously determined the extent of claimant's disability from the primary injury.

Thresholds

The 1993 amendment to Section 287.220.1 also established minimum threshold requirements with respect to both the preexisting disability and the subsequent compensable injury of 50 weeks for a body as a whole injury or 15% of a major extremity.

Findings

As I have previously found that claimant sustained 5% permanent partial disability of the low back due to the work-related injuries of May 1 and June 7, 2001, I find that the primary injury herein does not meet the statutory threshold requirement of Section 287.120.1. Mo. Rev. Stat. (2000). The claim against the Second Injury Fund is denied.

ATTORNEY'S FEES

This award is subject to a lien in the amount of 25% of the additional payments hereunder in favor of the employee's attorney, Harry Nichols, for necessary legal services rendered to the employee.

Date: _____

Made by: _____

JOHN HOWARD PERCY

*Administrative Law Judge
Division of Workers' Compensation*

A true copy: Attest:

Patricia "Pat" Secrest

Director

Division of Workers' Compensation

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 01-095116

Employee: Jackie Stallings

Employer: Corbitt Manufacturing Company

Insurer: Hartford Insurance Company

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

Date of Accident: June 7, 2001

Place and County of Accident: St. Louis City, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated September 22, 2006, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge John Howard Percy, issued September 22, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 5th day of April 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee:	Jackie Stallings	Injury No. 01-095116
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	Corbitt Manufacturing Company	Department of Labor and Industrial Relations of Missouri
Additional Party:	Second Injury Fund	Jefferson City, Missouri
Insurer:	Hartford Insurance Company	
Hearing Date:	June 8 and July 10, 2006	Checked by: JHP

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
3. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
6. Date of accident or onset of occupational disease: alleged through June 7, 2001
7. State location where accident occurred or occupational disease was contracted: N/A
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? No
10. 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:
Alleged repetitive lifting and holding of heavy objects while grinding and polishing
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: N/A
15. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: None

16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Jackie Stallings

Injury No. 01-095116

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

19. Employee's average weekly wages: \$379.80

19. Weekly compensation rate: \$253.20 PTD/TTD/PPD

20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: None

22. Second Injury Fund liability: No

TOTAL: None

23. Future requirements awarded: None

Said payments to begin 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 n/a of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jackie Stallings

Injury No. 01-095116

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Corbitt Manufacturing Company

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Hartford Insurance Company

Checked by: JHP

This case was originally heard on November 7, 2003. This claim was heard with two other related claims: Injury Nos. 01-095113 and 01-095117. A Final Award denying this claim for occupational disease affecting the low back was issued on February 20, 2004. Claimant sought review of the Final Award by the Labor and Industrial Relations Commission. On July 19, 2004 the Commission issued a Temporary Award modifying that award by finding that claimant sustained an accidental injury on June 7, 2001 (even though a specific accident was not pled in the claim) and holding that consideration of the occupational disease claim to be moot. The parties now request that Final Awards be issued in this and the other two claims. The hearing of all three claims continued on June 8, 2006. The record was left open for 30 days for the submission of

additional evidence. None was submitted. The record was closed on July 10, 2006.

The evidence introduced at the time of hearing on November 7, 2003 remains a part of the record.

STIPULATIONS

The parties stipulated that on or about June 7, 2001:

1. the employer and employee were operating under and subject to the provisions of the Missouri Workers' Compensation Law;
2. the employer's liability was insured by Hartford Insurance Company;
3. the employee's average weekly wage was \$379.80; and
4. the rate of compensation for temporary total disability and permanent total disability was \$253.20 and the rate of compensation for permanent partial disability was \$253.20.

The parties further stipulated that:

1. the employer had notice of the alleged injury and a claim for compensation was filed within the time prescribed by law;
2. no compensation has been paid; and
3. employer/insurer have not paid any medical expenses.

ISSUES

The issues to be resolved in this proceeding are:

1. whether employee was exposed to an occupational disease due to repetitive trauma affecting his back which arose out of and in the course of his employment;
2. if the employee was exposed to an occupational disease by his work-related activities, whether he sustained an injury as a result of the occupational disease exposure;
3. if the employee sustained a compensable injury, whether employee is entitled pursuant to Section 287.140 Mo. Rev. Stat. (2000) to be reimbursed for any medical expenses, which he may have incurred in obtaining treatment for the injury;
4. if the employee sustained a compensable injury, whether he should be provided with any future medical treatment for the injury;
5. if the employee sustained a compensable injury, whether and to what extent employee sustained any permanent disability which would entitle him to an award of compensation; and
6. if the employee sustained a compensable injury, whether and to what extent employee has sustained any additional permanent partial/total disability for which the Second Injury Fund would be liable as a result of the combination of any preexisting disabilities with the primary injury.

OCCUPATIONAL DISEASE MEDICAL CAUSATION

Jackie Stallings, employee herein, claims that he developed an occupational disease due to repetitive trauma affecting his back.

An employee's claim for compensation due to an occupational disease is to be determined under Section 287.067 Mo. Rev. Stat. (2000). It defines occupational disease as:

an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence. (1993 additions underlined)

Section 287.067.2, which was added in 1993, provides that an occupational disease is compensable "if it is clearly work related and meets the requirements of an injury which is compensable as provided in subsections 2 and 3 of section 287.020. An occupational disease is not compensable merely because work was a triggering or precipitating factor." Subsection 2 of section 287.020 provides that an injury is clearly work related "if work was a substantial factor in the cause

of the resulting medical condition or disability." ^[9]

Subsection 3(1) of section 287.020 provides that an injury must arise out of and in the course of the employment and be incidental to and not independent of the employment relationship and that "ordinary, gradual deterioration or progressive degeneration of the body caused by aging" is not compensable unless it "follows as an incident of employment."

Subsection 3(2) of section 287.020 provides that an injury arises out of and in the course of the employment "only if (a) It is reasonably apparent, upon consideration of all the circumstances, that the employment is a substantial factor in causing the injury; and (b) It can be seen to have followed as a natural incident of the work; and (c) It can be fairly traced to the employment as a proximate cause; and (d) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life[.]"

Much of new subsection 3(2) of section 287.020 was contained in the prior definition of an occupational disease set forth in Section 287.067. Section 287.020.3(2)(b), (c), and (d) were part of the former occupational disease statute. Section 287.020.3(2)(a) is a revision of the prior requirement of a direct causal connection between the conditions under which the work was performed and the occupational disease. Direct causal connection is now defined as "a substantial factor in causing the injury." The Supreme Court held in Kasl v. Bristol Care, Inc., 984 S.W.2d 501 (Mo. 1999) that the foregoing language overruled the holdings in Wynn v. Navajo Freight Lines, Inc., 654 S.W.2d 87 (Mo. 1983), Bone v. Daniel Hamm Drayage Company, 449 S.W.2d 169 (Mo. 1970), and many other cases which had allowed an injury to be compensable so long as it was "triggered or precipitated" by work. A substantial factor does not have to be the primary or most significant causative factor. Bloss v. Plastic Enterprises, 32 S.W.3d 666, 671 (Mo. App. 2000); Cahall v. Cahall, 963 S.W.2d 368, 372 (Mo. App. 1998). The additional language in section 287.020.3(1) concerning deterioration or degeneration of the body due to aging probably does not overturn any prior court decisions.

Since the 1993 amendments pertaining to occupational diseases have largely readopted the prior statute, caselaw interpreting the prior statute is of some significance. In repetitive motion cases, ^[10] as practically all movements of the human body done during the course of employment are also replicated in nonworking environments and as most occupationally induced diseases also sometimes occur in the public at large, the courts have focused on a particular risk or hazard to which an employee's exposure is greater or different than the public at large. Collins v. Neevel Luggage Manufacturing Co., 481 S.W.2d 548, 552-54 (Mo. App. 1972); Prater v. Thorngate, Ltd., 761 S.W.2d 226, 230 (Mo. App. 1988); Hayes v. Hudson Foods, Inc., 818 S.W.2d 296, 299-300 (Mo. App. 1991). Claimant must present substantial and competent evidence that he or she has contracted an occupationally induced disease rather than an ordinary disease of life. The Courts have stated that the determinative inquiry involves two considerations: "(1) whether there was an exposure to the disease which was greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee's job which is common to all jobs of that sort". Id. at 300; Dawson v. Associated Elec., 885 S.W.2d 712, 716 (Mo. App. 1994); Prater at 230; Jackson v. Risby Pallet and Lumber Co., 736 S.W.2d 575, 578 (Mo. App. 1987); Polavarapu v. General Motors Corp., 897 S.W.2d 63, 65 (Mo. App. 1995); Sellers v. Trans World Airlines, Inc., 752 S.W.2d 413, 415 (Mo. App. 1988).

Claimant must also establish, generally through expert testimony, the probability that the claimed occupational disease was caused by conditions in the work place. Dawson at 716; Selby v. Trans World Airlines, Inc., 831 S.W.2d 221, 223 (Mo. App. 1992); Brundige v. Boehringer, 812 S.W.2d 200, 202 (Mo. App. 1991). Claimant must prove that work was "a substantial factor" in causing "the resulting medical condition or disability." Section 287.020.2. Moreover, "an occupational disease is not compensable merely because work was a triggering or precipitating factor." Section 287.067.2 Mo. Rev. Stat. (1994). The Supreme Court held in Kasl v. Bristol Care, Inc., 984 S.W.2d 501 (Mo. 1999) that the foregoing language overruled the holdings in Wynn v. Navajo Freight Lines, Inc., 654 S.W.2d 87 (Mo. 1983), Bone v. Daniel Hamm Drayage Company, 449 S.W.2d 169 (Mo. 1970), and many other cases which had allowed an injury to be compensable so long as it was "triggered or precipitated" by work. On the other hand, injuries which are triggered or precipitated by work may nevertheless be compensable if the work is found to be the "substantial factor" in causing the injury. Kasl, supra.

A single medical opinion will support a finding of compensability even where the causes of the disease are indeterminate. Dawson at 716; Sellers v. Trans World Airlines, Inc., 776 S.W.2d 502, 504 (Mo. App. 1989); Sheehan at 797. The opinion may be based on a doctor's written report alone. Prater v. Thorngate, Ltd., 761 S.W.2d 226, 230 (Mo. App. 1988). "A medical expert's opinion must be supported by facts and reasons proven by competent evidence that will give the opinion sufficient probative force to be substantial evidence." Silman v. Montgomery & Associates, 891 S.W.2d 173, 176 (Mo. App. 1995); Pippin v. St. Joe Minerals Corp., 799 S.W.2d 898, 903 (Mo. App. 1990). Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. Hawkins v. Emerson Electric Co., 676 S.W.2d 872, 877 (Mo. App. 1984). Where there are conflicting medical opinions, the fact finder may reject all or

part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. George v. Shop 'N Save Warehouse Foods, 855 S.W.2d 460 (Mo. App. 1993); Webber v. Chrysler Corp., 826 S.W.2d 51, 54 (Mo. App. 1992); Hutchinson v. Tri-State Motor Transit Co., 721 S.W.2d 158, 163 (Mo. App. 1986). An administrative law judge may not constitute himself or herself as an expert witness and substitute his or her personal opinion of medical causation of a complicated medical question for the uncontradicted testimony of a qualified medical expert. Wright v. Sports Associated, Inc., 887 S.W.2d 596 (Mo. 1994); Brufat v. Mister Guy, Inc., 933 S.W.2d 829, 835 (Mo. App. 1996); Eubanks v. Poindexter Mechanical, 901 S.W.2d 246, 249-50 (Mo. App. 1995). However, even uncontradicted medical evidence may be disbelieved. Massey v. Missouri Butcher & Cafe Supply, 890 S.W.2d 761, 763 (Mo. App. 1995); Jones v. Jefferson City School Dist., 801 S.W.2d 486, 490 (Mo. App. 1990).

The work-related aggravation of a preexisting disease or infirmity caused by repetitive trauma is compensable as either an accident or as an occupational disease. Smith v. Climate Engineering, 939 S.W.2d 429, 433-34 (Mo. App. 1996).

Claimant's Testimony

Claimant testified at the final hearing that the hatch covers weighed approximately 100 to 120 pounds and that the cross manifold weighed 120 pounds.

Testimony of Lindell Bast

Lindell Bast, a highly accredited and experienced individual in the field of foundry work, testified at the final hearing on behalf of Employer/Insurer. Mr. Bast has been employed by Employer since 1994. For his first eight years, he was a foundry engineer. In approximately 2000, he became the "Facility and Plant Engineer." Since January of 2006, he has been special projects coordinator.

Mr. Bast testified that the hatch covers were aluminum, 24 inches in diameter, less than two inches thick, and weighed 23 pounds. He supported this testimony with photographs illustrating a hatch cover. (Employer/Insurer's Exhibit 16) He further testified that the cross manifolds are 34 ½ inches long, 33 inches wide, and weigh 43 pounds. before they are grinded by machine. The casting consists of aluminum tubes of which the holes are five inches wide. After they leave the foundry, two of these get affixed to railroad cars. The hatch covers are likewise affixed to railroad cars.

Findings of Fact

Based on my observations of claimant's demeanor at the hearing and the inconsistencies between his October 22, 2001 deposition testimony (Employer/Insurer's Exhibit 11) and his testimony at the hearing, I find that he is only partially credible. I find the testimony of Lindell Bast is entirely credible. Based on the evidence adduced at the hearing, some of which comes from the claimant's testimony, some of which comes from the testimony of Lindell Blast and some of which is based on the medical records, I make the following findings of fact.

Description of Accident/Work Activities

Jackie Stallings, employee herein, began working for employer, Corbitt Manufacturing Company, a metal foundry, in late 1999 as a temporary worker from Southside Temporary Services. He initially worked as a parts washer for 90 days and was hired by Corbitt Manufacturing Company on April 28, 2000. Claimant worked primarily as a molder/grinder. He also drove a forklift truck.

As a molder he used a cup with a handle to pour liquid aluminum into molds. The molds were then carried by a crane to a cooling area. His main job was grinding parts such as handles, cores, gear boxes, cross manifolds and hatch covers with grinding wheels. The parts were delivered to his station in a basket. Cross manifolds weighed 43 pounds. Hatch covers weighed 23 pounds. ^[11] He picked up a hatch cover out of the container, held one side against his abdomen and the opposite side against a grinding machine, which grinded off about 10 pounds of excess material while he rotated the cover. He then carried the hatch cover 5 to 10 feet and placed it in another container. As a finisher he used hand tools to smooth the edges of the cover. He apparently spent 65% of his time grinding, 10% driving a fork lift, and 25% fine polishing. (Claimant's Testimony & Employer/Insurer's Exhibit 11)

On or about May 1, 2001, employee was working on aluminum hatch covers when he bent over and picked one up and heard something pop in his back. He stopped working for about an hour and then returned to work. (Claimant's Testimony)

On June 7, 2001 while lifting a manifold, claimant slipped and fell into a cardboard box and hurt his back. He went home early and has not returned to work since then. (Employer/Insurer's Exhibit 11)

Medical Treatment

Claimant first sought medical treatment for his back on Wednesday, June 13, 2001 at 3:15 p.m. at St. Mary's Health Center. He told Dr. John Fuller that had been experiencing stiffness and soreness in his low back, off and on, for 1 to 2 years, that he periodically lifted heavy objects at work, that he had recently been lifting heavy objects and that since June 7 he had experienced a flair-up of back pain without radiation. On examination of his back and lower extremities, his straight leg raising was negative, his neurological and sensory exam was within normal limits, his deep tendon reflexes were 2+, and his gait was normal. (Claimant's Exhibit A & Employer/Insurer's Exhibit 5)

Dr. Fuller diagnosed claimant with an acute lumbar strain and prescribed Naprosyn, a nonsteroidal anti-inflammatory, and Skelaxin, a muscle relaxant, and no lifting greater than 15 pounds for two days. (Claimant's Exhibit A & Employer/Insurer's Exhibit 5)

Employer sent claimant to Concentra Medical Centers for evaluation of his back. Dr. Dennis McGraw examined him on June 15, 2001. Claimant told Dr. McGraw that he had been experiencing low back pain for about a month following one and one-half days of lifting numerous parts weighing 70 pounds at work. He denied any leg radiation. He denied any chronic back problems. On examination claimant had positive tenderness of the entire lumbar spine. He flexed slowly to 90 degrees, but extended to only 10 degrees. Straight leg raising to 45 degrees caused only low back pain. X-rays were taken. He was diagnosed with a chronic lumbar strain. Dr. McGraw recommended that employee continue taking Naprosyn and Skelaxin and prescribed physical therapy. He continued the lifting restrictions of no greater than 15 pounds. Claimant was told to return in five days. (Claimant's Exhibit B & Employer/Insurer's Exhibit 6)

Mr. Stallings returned to Dr. McGraw on June 20, 2001. He reported minimal improvement with the medication. He stated that his left elbow had been hurting every since he lifted those parts weighing 70 pounds at work. Dr. McGraw noted that the x-rays taken on June 15 of his lumbar spine showed spondylolisthesis of L5 on S1 with severe disk space narrowing. On examination claimant's back flexion and extension were unchanged. However, his straight leg raising was negative. On examination of the left elbow, claimant had point tenderness at the insertion of the biceps tendon; however, there was no tenderness of the epicondyles or the olecranon and no cubital tunnel tenderness. He was diagnosed with tendonitis of the left elbow and a lumbar strain. Dr. McGraw recommended mild heat for the left elbow and again prescribed physical therapy for his back. He was told to return in one week. Employer/insurer failed to provided physical therapy. (Claimant's Exhibit B & Employer/Insurer's Exhibit 6)

As employer/insurer discontinued medical treatment, claimant's counsel asked Dr. Joseph Hanaway, a neurologist, to examine claimant. He examined employee on August 8, 2001. Claimant described his work activities at Corbitt Manufacturing Company to Dr. Hanaway. He then described two accidents at Corbitt, the first being on April 28, 1999 (prior to even working at Corbitt).^[12] He described conservative treatment and being on light duty. He continued working with intermittent back pain. Claimant described a second accident on June 1, 2001. He had returned to grinding hatch covers on May 28. After three days, he developed pain in the antecubital fossa of the left elbow which made it difficult to flex, extend, or grip. On June 1 left elbow pain caused him to drop a hatch cover. When he bent over to pick it up, he felt immediate pain in his low back. (Claimant's Exhibit C, depo ex 2)

Dr. Hanaway reviewed the x-rays taken on June 15 and noted that they showed spondylolisthesis of L5 on S1 and narrowing of the L5-S1 disk space, suggesting a protruding disk. Claimant told him that he had been off work since June 8, 2001 because of low back and left elbow pain for which he was taking Aleve and Tylenol. He indicated that his low back pain was in a large circle on both sides from the belt line down to the sacrum. (Claimant's Exhibit C, depo ex 2)

Dr. Hanaway ordered a CT scan of the lumbar spine to evaluate the L5-S1 disk space. (Claimant's Exhibit C, depo ex 2)

A CT scan of the lumbar spine was performed at Barnes Jewish Hospital North on August 14, 2001. According to the radiologist it showed a mild disk bulge at L3-4, facet disease at L4-5, a disk protrusion at L5-S1, and a slight compression fracture of L1. It did not show any spondylolisthesis of L5 on S1. (Claimant's Exhibits C2, Page 7 & D)

Claimant returned to Dr. Hanaway on September 6, 2001. Claimant reported chronic back pain. On examination he was able to flex his back only 20 degrees and was not able to extend his back at all. Straight leg raising while sitting produced only low back pain at 90 degrees. Dr. Hanaway recommended further evaluation of his back. (Claimant's Exhibit

C, depo ex 6)

On October 9, 2001 claimant filed an Application for Hardship Setting for additional medical treatment as recommended by Dr. Hanaway. (Court Exhibit 1)

Six months passed before Employer/Insurer requested Dr. James S. Burke, Jr., an orthopedic surgeon, to examine claimant's back. Employee failed to show up for his February 14, 2002 appointment. (Employer/Insurer's Exhibit 3, depo ex 2) Dr. Burke examined Mr. Stallings on March 21, 2002. Employee described his job as a molder and grinder where he held 70 pounds of metal and grinded off the edges. He described specific injuries in March of 2000, March of 2001 and on June 6, 2001. His third injury occurred while lifting a heavy object; he felt a small pop in his back. He told Dr. Burke that he had only been treated with Celebrex and had not undergone physical therapy. (Employer/Insurer's Exhibit 2, depo ex 2)

Mr. Stallings complained of low back pain, but no buttock or radiating leg pain. On examination Dr. Burke noted that he had 0 degrees of extension and only 60 degrees of flexion. He grunted excessively when going from a lying to a sitting position. He had exquisite pain with trunk rotation, to light touch in the low lumbar spine, and to head compression (positive Waddell findings). All objective testing was normal. Dr. Burke reviewed the films taken on June 15, 2001 which he indicated did show grade I spondylolisthesis of L5 on S1 and marked degenerative disk disease at L5-S1 with spurs off the inferior body of L5 and the superior aspect of S1. He also reviewed x-rays taken in his office on March 21, 2002 which he indicated did show Grade I spondylolisthesis of L5 on S1 with degenerative disk disease and spurring. Oblique films showed no evidence of pars defects. Flexion-extension views were negative for any segmental instability. Dr. Burke diagnosed claimant with low back pain and Grade I spondylolisthesis of L5 on S1. He noted that Mr. Stallings was at high risk not to do well with conservative care because of his multiple Waddell findings and the length of time since his injury. Nevertheless, he recommended anti-inflammatories and 3 to 4 weeks of physical therapy. (Employer/Insurer's Exhibit 2, depo ex 2)

On April 12, 2002 following a mediation of this case by ALJ Jennifer Schwendemann Employer/Insurer entered into a written agreement to provide a course of physical therapy as determined by employer/insurer's physician. (Employer/Insurer's Exhibit 8)

Physical therapy was arranged with ProRehab in south St. Louis City. On May 24, 2002 claimant underwent an evaluation ^[13] and initial treatment by Brian Kelly, a certified physical therapist. A hot moist pack was applied to his low back and he was instructed in home exercise. (Claimant's Exhibit H, Pages 6-7) Claimant failed to show up for his follow up appointment on July 3, 2002. Mr. Kelly made numerous unsuccessful attempts to contact Mr. Stallings to reschedule his appointment. (Employer/Insurer's Exhibit 10, ex 1)

Mr. Stallings filed an Application for Hardship Setting on July 23, 2002. (Cour Exhibit 2) Employer/Insurer responded with a Motion to Suspend Temporary Disability Payments/Compel Attendance at Physical Therapy. (Employer/Insurer's Exhibit 9) On August 29, 2002 ALJ Jennifer Schwendemann ordered claimant to appear for physical therapy appointments and directed employer/insurer to pay temporary benefits on a weekly basis while employee was attending therapy. (Employer/Insurer's Exhibit 9)

Mr. Stallings returned to ProRehab for physical therapy on September 9, 2002. He told Mr. Kelly that his pain had increased since his initial evaluation on May 24, 2002. Waddell's screening revealed 2/5 positive signs for nonanatomic pain presentation. (Claimant's Exhibit H, Page 4)

Mr. Stallings attended 11 out of 17 scheduled appointments though October 4, 2002. He reported on October 4 that his condition was 10% improved relative to his initial physical therapy session. Waddell screening revealed 4/5 positive signs for nonanatomic pain presentation. In addition Mr. Kelly observed Mr. Stallings display visual distress while performing activities which he was later able to perform both in and outside the facility without displaying visual distress. (Claimant's Exhibit H, Pages 1-2)

Dr. Burke scheduled a follow-up appointment with employee for October 7, 2002. Claimant failed to show up for his appointment. Dr. Burke scheduled another appointment for October 9, 2002. Claimant also missed that appointment. (Employer/Insurer's Exhibit 3, depo ex 2) Dr. Burke reviewed the physical therapy note dated October 4, 2002 and concluded in a letter dated November 6, 2002 that claimant had reached maximum medical benefit from his therapy and released him from his care. (Employer/Insurer's Exhibit 3, depo ex. 2)

Medical Opinions

Dr. Joseph Hanaway testified by deposition on behalf of employee on February 13, 2002. He testified that claimant

told him that he worked as a molder and a grinder for Corbitt Manufacturing Company and that he primarily made aluminum hatch covers. Dr. Hanaway's understanding of claimant's work activities is consistent with my previous findings. Claimant also described accidents on April 28, 1999 and June 1, 2001. The accident of June 1, 2001 is consistent with my previous findings. (Claimant's Exhibit C, Pages 8-12)

Dr. Hanaway reviewed the x-rays performed at Concentra which showed a spondylolisthesis of L5 on S1 and a narrowing of the L5-S1 disk space suggesting a protrusion. (Claimant's Exhibit C, Pages 12-14 & 48) He testified that claimant had underlying spondylolisthesis of L5 on S1 and a narrowed disk at L5-S1 with an aggravated underlying congenital defect. Dr. Hanaway ordered a CT scan of claimant's spine because he was concerned that the disk at L5-S1 might be herniated and contributing to claimant's back pain and the disk could only be seen on a CT scan. It was performed on August 14, 2001. (Claimant's Exhibit C, Pages 20-21, 24 & 36) Though he ordered the CT scan, Dr. Hanaway did not review the films from the CT scan and testified he did not consider the report in making his opinions. He stated: "I never believe these reports."^[14] (Claimant's Exhibit C, Pages 22-23) He added that without seeing the scan, he was not able to recommend an MRI. (Claimant's Exhibit C, Page 56)

Dr. Hanaway testified that employee complained to him of back pain only, without radiation to either leg. (Claimant's Exhibit C, Pages 14, 32, 47, & 55) He indicated that claimant's lack of leg symptoms indicate that any disk pathology is not touching the nerve root. (Claimant's Exhibit C, Page 55) He testified that claimant's spondylolisthesis is congenital and was not caused by any accident. (Claimant's Exhibit C, Pages 48-50) He thought that employee injured his back (aggravated his underlying condition) by lifting heavy pieces of equipment at work, although he could not make a definite diagnosis of the extent of his low back problem. (Claimant's Exhibit C, Pages 39 & 50)

Dr. Hanaway was unaware of the June 13, 2001 St. Mary's Health Center report stating that employee had a history of low back stiffness and soreness off and on for one to two years. He agreed this could indicate a chronic back problem. He also testified that he did not record any prior back complaints because he did not want trivial complaints, only major ones. He assumed that claimant had never experienced any serious, disabling low back pain in the past. He knew that employee smoked and agreed that smoking could contribute to back conditions. (Claimant's Exhibit C, Page 43-44, 50, & 53-54)

Dr. Hanaway testified again by deposition on September 16, 2003. He reexamined claimant's back on April 23, 2003. He opined that Mr. Stallings had low back pain with a herniated disk at L5-S1 and spondylolisthesis. On examination Dr. Hanaway found spasm in the right and left lower lumbar region and tenderness at the L4-5 level down to the sacroiliac region. Claimant was only able to bend forward to 30 degrees, side bend to 5 degrees, and extend to 5 degrees. (Claimant's Exhibit C1, Pages 8-9) He opined that employee had a traumatic low back problem with an underlying spondylolisthesis of L5 on S1 and an extremely narrow L5-S1 disk which was protruding or herniated. (Claimant's Exhibit C1, Page 9) He gave employee Tylenol with Codeine. Dr. Hanaway testified that his previously stated medical opinion that claimant's employment occasioned an aggravation of the preexisting spondylolisthesis and disk lesion at L5-S1 remained the same. (Claimant's Exhibit C1, Page 10)

Dr. Hanaway again recommended that claimant's back be evaluated by a surgeon, though he did not recommend surgery. (Claimant's Exhibit C1, depo ex 1) On cross examination, he admitted that he had not reviewed any diagnostic studies since his last exam. He was unaware that employee had been evaluated by a spine surgeon, Dr. Burke. No one showed him Dr. Burke's reports. He acknowledged that he was not recommending surgery for the low back, calling it "out of the question for this patient." (Claimant's Exhibit C1, Pages 15-17 & 23-24)

On redirect examination Dr. Hanaway stated that claimant had a herniated disk. He said that he had 50% flattening of his disk. He stated that it did not vaporize; it is bulging and protruding. He recommended a scan to prove his diagnosis. (Claimant's Exhibit C1, Pages 21-22) On recross examination he conceded that if the scan were negative, he would have to change his diagnosis; but he was quite certain that it would not be negative because he said that disk material does not disappear. (Claimant's Exhibit C1, Pages 22-23)

Dr. James Burke, Jr., a board-certified orthopedic surgeon, testified by deposition on behalf of the employer/insurer on April 3, 2002. He testified that on March 21, 2002 employee complained to him of low back pain. Employee described his job of lifting 70 lb. pieces of metal and grinding off the edges. Employee provided multiple descriptions of how he hurt his back at work. (Employer/Insurer's Exhibit 2, Pages 6-7) Dr. Burke personally reviewed the x-ray films of the lumbar spine taken at Concentra on June 15, 2001. He testified that the films revealed a Grade I spondylolisthesis of L5 on S1. (Employer/Insurer's Exhibit 2, Page 8) Employee also had marked degenerative disk disease at that level, and spurs at L5 and S1. (Employer/Insurer's Exhibit 2, Pages 9 & 29) Dr. Burke took plain x-rays in his office and the findings were the same. Dr. Burke explained that segmental instability can be a significant reason for back pain. Films taken of employee's spine showed no segmental instability. (Employer/Insurer's Exhibit 2, Pages 9 & 15-16)

Dr. Burke testified that the CT scan report of August 14, 2001 confirmed these diagnoses, which is why he did not discuss that report in his report. (Employer/Insurer's Exhibit 2, Pages 22-23) Upon cross-examination regarding the CT scan report indicating an L1 compression fracture, Dr. Burke testified that he did not see any sort of compression abnormality on the x-rays. Further, employee gave no history of anything which could have remotely led to an L1 compression fracture. Regarding the CT scan report indicating lumbar disc bulging, he explained that this would be expected in a person with spondylolisthesis and degenerative disc disease. Dr. Burke opined that in the absence of radicular findings, the finding of disk bulging was not germane to the case. (Employer/Insurer's Exhibit 2, Pages 23, 25, & 33)

Dr. Burke explained that spondylolisthesis can be congenital or acquired. For it to have been acquired, there must have been fractures or congenital pars defects. Employee had neither of these. Dr. Burke explained that employee's spondylolisthesis was congenital and longstanding because of the large, degenerative bone spurs at L5-S1. (Employer/Insurer's Exhibit 2, Pages 9-10)

Dr. Burke testified to employee's symptom magnification and inconsistencies. He indicated that employee had multiple Waddell findings. Waddell's tests are performed to determine if there are any nonphysiologic behavior patterns in patients. The tests, which include head compression, light touch to the skin, and trunk rotation, should not elicit any low back pain. However, the tests did elicit low back pain complaints in employee. (Employer/Insurer's Exhibit 2, Pages 12-14) Dr. Burke also noticed the inconsistency of employee being unable to demonstrate any active lumbar extension in the examining room, yet being able to demonstrate lumbar extension during the taking of x-rays. (Employer/Insurer's Exhibit 2, Pages 12-14)

While finding the examination unreliable due to these inconsistencies, Dr. Burke was clear on the diagnoses. The unreliable examination only caused him difficulty in ascertaining the subjective amount of pain or subjective losses of motion. (Employer/Insurer's Exhibit 2, Pages 21, 24 & 30)

Dr. Burke concluded that employee has congenital and longstanding spondylolisthesis, bone spurs, and degenerative disk disease. He stated that the combination of these findings with a soft tissue injury can cause low back pain. Accordingly, Dr. Burke thought employee could benefit from a three to four week course of physical therapy for range of motion and strengthening in his low back. He also recommended a ten pound lifting restriction with no repeated bending or twisting, to coincide with the length of the physical therapy course. Upon completion of that course, employee was to be reevaluated. Dr. Burke testified that the described work injuries did not cause the spondylolisthesis, but were a small aggravation of the preexisting condition. (Employer/Insurer's Exhibit 2, Pages 12-13, 16-17, 19, & 30-31)

Brian Kelly, a certified physical therapist, testified by deposition on behalf of employer/insurer on September 22, 2003. At claimant's last physical therapy appointment Mr. Kelly observed employee displaying signs of discomfort as he ambulated throughout the treatment facility. He displayed difficulty clearing the right lower extremity during swing phase, forward flexed posturing, and facial grimacing while walking. (Employer/Insurer's Exhibit 4, Page 22) In order to determine if there were any inconsistencies with these observations, Mr. Kelly observed employee on his way out of and outside the treatment facility. Mr. Kelly has done this with other patients who present with inconsistencies. (Employer/Insurer's Exhibit 4, Pages 25 & 37) He observed employee with a faster walking speed, less observable signs of discomfort and limping, and the ability to clear the lower extremity with swing limb advancement. Also, he was no longer clutching his low back with his right upper extremity. (Employer/Insurer's Exhibit 4, Pages 22-23)

Mr. Kelly also testified that during the evaluation of October 4, 2002, employee displayed visual distress when transferring from standing to sitting position on the treatment table. Yet, he showed no signs of discomfort transferring during straight leg raising. Furthermore, Mr. Kelly observed employee transferring to the driver's side of his car, displaying no signs of discomfort. Once seated, he reached to grab his seat buckle and engage it across his lap. Again, there was no sign of discomfort. (Employer/Insurer's Exhibit 4, Pages 23-24) Mr. Kelly testified that the amount of rotation required to be in a sitting position and grasp a seat buckle with a hand requires more range of motion than employee showed during evaluation. (Employer/Insurer's Exhibit 4, Page 24) Also on October 4, 2002, employee presented with four out of five positive signs during the Waddell's testing, including positive sham testing, collapsing weakness throughout the right lower extremity with resisted muscle testing, and poor active range of motion while sitting. (Employer/Insurer's Exhibit 4, Pages 25-26 & 28-29)

Dr. Burke testified again by deposition on June 24, 2003. He testified that he relies upon the reports of other doctors and other medical personnel, including physical therapists, to learn information relevant to a medical case. (Employer/Insurer's Exhibit 3, Page 9) He testified that a doctor must rely on such records in conjunction with his/her experience, physical exam of the patient and the history on the patient. (Employer/Insurer's Exhibit 3, Page 11) Dr. Burke

noted in Mr. Kelly's reports the numerous instances of inconsistency by employee and his noncompliance (all of which are aforementioned) Dr. Burke elaborated on the testing. He explained that the antalgic limping and difficulty clearing the right foot (or shuffling) are non-anatomic findings. He provided an example of a sham test for this case: employee complained of increased back pain when his ankle was moved up and down. Dr. Burke explained that it is anatomically impossible to have back pain from this motion. (Employer/Insurer's Exhibit 3, Pages 12-17)

Dr. Burke testified as to employee's noncompliance with treatment. Dr. Burke testified that he and his staff made numerous attempts to accommodate employee to allow him to see Dr. Burke. (Employer/Insurer's Exhibit 3, Page 12) Dr. Burke explained that no additional appointments were scheduled because employee had missed three total appointments with Dr. Burke (the first being on February 14, 2002) and had missed other appointments (October 7 and 9, 2002) during treatment, making it obvious that employee was not compliant with his care and that Dr. Burke would not be able to help him any further. (Employer/Insurer's Exhibit 3, Pages 6-9)

Dr. Burke testified that the non-physiologic findings documented by Brian Kelly were completely consistent with those observed by Dr. Burke during his evaluation of employee on March 21, 2002. (Employer/Insurer's Exhibit 3, Pages 17-18 & 28) Dr. Burke explained employee is not a surgical candidate because he is neurologically intact, has conditions (degenerative disc disease and spondylolisthesis) which are not treated by surgery, has positive Waddell signs, and was noncompliant with treatment. (Employer/Insurer's Exhibit 3, Pages 20-21) Dr. Burke placed employee at maximum medical improvement with a diagnosis of Grade I spondylolisthesis. (Employer/Insurer's Exhibit 3, Pages 19-20)

Dr. Burke explained that the alleged work injury was only a triggering event in bringing about symptoms from the underlying degenerative disc disease and spondylolisthesis. (Employer/Insurer's Exhibit 3, Page 37)

Additional Findings

The medical treatment clearly demonstrates that claimant sustained an injury to his low back in early May 2001 and that he suffered another flare-up of low back pain in early June 2001. There is no doubt that claimant has preexisting spondylolisthesis of L5 on S1, narrowing of the L5-S1 disk space, and degenerative spurring at L5 and S1. The parties disagreed over claimant's low back symptoms present a soft tissue injury or an injury to the L5-S1 intervertebral disk.

On January 13, 2002 Dr. Hanaway opined that employee had aggravated his underlying condition by lifting heavy pieces of equipment at work, although he could not make a definite diagnosis of the extent of his low back problem. (Claimant's Exhibit C, Pages 39 & 50) He stated that he could not make a definite diagnosis concerning disk pathology without viewing the films from the CT scan which he ordered in August of 2001. (Claimant's Exhibit C, Pages 22-23) Dr. Hanaway testified that employee complained to him of back pain only without radiation to a leg. (Claimant's Exhibit C, Pages 14, 32, 47, & 55)

On September 16, 2003 Dr. Hanaway opined that Mr. Stallings had a traumatic low back problem with an underlying spondylolisthesis of L5 on S1 and an extremely narrow L5-S1 disk which was protruding or herniated. (Claimant's Exhibit C1, Page 9) Dr. Hanaway testified that his previously stated medical opinion that claimant's employment occasioned an aggravation of the preexisting spondylolisthesis and disk lesion at L5-S1 remained the same. (Claimant's Exhibit C1, Page 10) On redirect examination Dr. Hanaway stated that claimant had a herniated disk. He said that he had 50% flattening of his disk. He stated that it did not vaporize; it is bulging and protruding. He recommended a scan to prove his diagnosis. (Claimant's Exhibit C1, Pages 21-22) On recross examination he conceded that if the scan were negative, he would have to change his diagnosis; but he was quite certain that it would not be negative because he said that disk material does not disappear. (Claimant's Exhibit C1, Pages 22-23) This firming up of Dr. Hanaway's opinion occurred without viewing the films from the CT scan which he had ordered in August of 2001 and without knowledge that claimant had been evaluated by Dr. Burke and had received physical therapy from Brian Kelly. The only additional information which Dr. Hanaway had was his examination on April 23, 2003 after which Dr. Hanaway noted that employee's complaints and examination had not changed. (Claimant's Exhibit C1, Pages 13-14)

The radiologist reported that CT scan of the lumbar spine showed a mild disk bulge at L3-4, facet disease at L4-5, a disk protrusion at L5-S1, and a slight compression fracture of L1. (Claimant's Exhibits C2, Page 7 & D)

Dr. Burke, an orthopedic surgeon, who testified on April 3, 2002, at least read the radiologist's report of the CT scan. (Employer/Insurer's Exhibit 2, Pages 22) Dr. Burke testified that lumbar disk bulging was not surprising as this would be expected in a person with spondylolisthesis and degenerative disk disease. He added that those findings were not germane as claimant did not have any radicular symptoms or findings. (Employer/Insurer's Exhibit 2, Pages 23, 25, & 33) Dr. Burke had additional x-rays taken of Mr. Stallings spine on March 21, 2002. They did not show any change in claimant's underlying

diagnosis. In addition they showed no segmental instability. (Employer/Insurer's Exhibit 2, Pages 9 & 15-16) He opined that the work injuries caused a small aggravation of claimant's preexisting condition. (Employer/Insurer's Exhibit 2, Pages 30-31)

Dr. Burke testified again on June 24, 2003 that claimant failed to show up for his post therapy examinations by Dr. Burke on October 7 and 9, 2002. After reviewing the physical therapy records from Brian Kelly, Dr. Burke noted that the non-physiologic findings documented by Mr. Kelly were completely consistent with those observed by Dr. Burke during his evaluation of employee on March 21, 2002. (Employer/Insurer's Exhibit 3, Pages 17-18 & 28) Dr. Burke explained that employee is not a surgical candidate because he is neurologically intact, has conditions (degenerative disc disease and spondylolisthesis) which are not treated by surgery, has positive Waddell signs, and was noncompliant with treatment. (Employer/Insurer's Exhibit 3, Pages 20-21) Dr. Burke placed employee at maximum medical improvement with a diagnosis of Grade I spondylolisthesis. (Employer/Insurer's Exhibit 3, Pages 19-20) Dr. Burke explained that the alleged work injury was only a triggering event in bringing about symptoms from the underlying degenerative disk disease and spondylolisthesis. (Employer/Insurer's Exhibit 3, Page 37)

There is no objective evidence that claimant has a herniated disk in his lumbar spine. Dr. Hanaway's opinion is based on speculation. He ordered the CT scan in order to determine whether claimant's low back symptoms were due to a herniated disk; yet he did not review those films. Dr. Hanaway conceded that claimant never had any radicular symptoms. Dr. Burke reviewed the report of the radiologist. He testified that L5-S1 disk bulging is often associated with L5-S1 spondylolisthesis. He said the disk bulging was not relevant as claimant did not have any radicular symptom or findings. Dr. Burke opined that claimant's work activities caused only a small aggravation of his preexisting condition. I find the opinions of Dr. Burke are far more persuasive than those of Dr. Hanaway. Based on the credible opinions of Dr. Burke, I find that claimant suffered a small aggravation of his preexisting spondylolisthesis and degenerative disk disease as a result of his work-related injuries on May 1 and June 7, 2001.

As I have found in Injury No. 01-095113 that the work-related aggravation of his preexisting spondylolisthesis and degenerative disk disease is compensable as an accident and as there is insufficient evidence to also find that his work-related aggravation is compensable as an occupational disease, I find that claimant did not sustain an occupational disease due to repetitive trauma affecting his low back. Accordingly, the claim against Employer/Insurer is denied.

SECOND INJURY FUND LIABILITY

Employee is also seeking an award of additional permanent disability from the Second Injury Fund pursuant to Section 287.220.1 Mo. Rev. Stat. (2000). Under that Section an employee who has a permanent partial disability and who subsequently sustains a compensable injury may recover from the Second Injury Fund any additional permanent disability caused by the combination of the preexisting disability and the disability from the subsequent injury. The employer is liable only for the disability caused by the work-related accident. The Second Injury Fund is liable for the difference between the sum of the two disabilities considered separately and independently and the disability resulting from their combination. Cartwright v. Wells Fargo Armored Serv., 921 S.W.2d 165, 167 (Mo. App. 1996); Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 973 (Mo. App. 1995); Brown v. Treasurer of Missouri, 795 S.W.2d 479 (Mo. App. 1990); Anderson v. Emerson Elec. Co., 698 S.W.2d 574, 576-77 (Mo. App. 1985). In order to recover from the Second Injury Fund the employee must prove a prior permanent partial disability, whether from a compensable injury or not, a subsequent compensable injury, and a synergistic combination of the preexisting and subsequent disabilities.

As I have previously found that claimant failed to prove a compensable injury against the employer/insurer, the claim against the Second Injury Fund is denied.

Date: _____

Made by: _____

JOHN HOWARD PERCY

Administrative Law Judge

Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 01-095117

Employee: Jackie Stallings
Employer: Corbitt Manufacturing Company
Insurer: Hartford Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: June 7, 2001
Place and County of Accident: St. Louis City, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated September 22, 2006. The award and decision of Administrative Law Judge John Howard Percy, issued September 22, 2006, 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 5th day of April 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Jackie Stallings Injury No. 01-095117
Dependents: N/A Before the
Employer: Corbitt Manufacturing Company **Division of Workers'**
Additional Party: Second Injury Fund **Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Insurer: Hartford Insurance Company
Hearing Date: June 8 and July 10, 2006 Checked by: JHP

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
4. 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
8. Date of accident or onset of occupational disease: through June 7, 2001
9. State location where accident occurred or occupational disease was contracted: St. Louis City, Mo.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
11. 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:
Repetitive lifting and holding of heavy objects while grinding and polishing
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: both upper extremities
16. Nature and extent of any permanent disability: 5% permanent partial disability of the each upper extremity at the wrist
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? \$850.88 (per temporary award)

Employee: Jackie Stallings Injury No. 01-095117

17. Value necessary medical aid not furnished by employer/insurer? None
20. Employee's average weekly wages: \$379.80
19. Weekly compensation rate: \$253.20 PTD/TTD/PPD
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

For Medical Aid: per temporary award \$ 850.88 (paid)
17.5 weeks of permanent partial disability from Employer \$4,431.00

22. Second Injury Fund liability: No

TOTAL: \$4,431.00

23. Future requirements awarded: None

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

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

Harry Nichols

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Jackie Stallings	Injury No. 01-095117
Dependents:	N/A	Before the Division of Workers'
Employer:	Corbitt Manufacturing Company	Compensation
Additional Party:	Second Injury Fund	Department of Labor and Industrial Relations of Missouri
Insurer:	Hartford Insurance Company	Jefferson City, Missouri Checked by: JHP

This case was originally heard on November 7, 2003. This claim was heard with two other related claims: Injury Nos. 01-095113 and 01-095116. A Temporary Award was issued in this claim on February 20, 2004. The parties now request that Final Awards be issued in this and the other two claims. The hearing of all three claims continued on June 8, 2006. The record was left open for 30 days for the submission of additional evidence. None was submitted. The record was closed on July 10, 2006.

All of the stipulations, findings of facts, conclusions of law, set forth in the Temporary Award of February 20, 2004 are restated and incorporated into this Final Award by this reference. The Temporary Award is an integral part of this Final Award. Many of the findings in this award are based on findings and conclusions made in the Temporary Award which have only been summarized in this Final Award. [\[15\]](#)

ADDITIONAL STIPULATIONS

The parties stipulated that employer/insurer have paid \$850.88 in medical expenses in compliance with the temporary award issued herein.

ADDITIONAL ISSUES

The additional issues to be resolved in this proceeding are:

1. whether employee was exposed to an occupational disease due to repetitive trauma affecting his wrists and elbows which arose out of and in the course of his employment;
2. if the employee was exposed to an occupational disease by his work-related activities, whether he sustained an injury as a result of the occupational disease exposure;

3. if the employee sustained a compensable injury, whether employee is entitled pursuant to Section 287.140 Mo. Rev. Stat. (2000) to be reimbursed for any medical expenses, which he may have incurred in obtaining treatment for the injury;
4. if the employee sustained a compensable injury, whether he should be provided with any future medical treatment for the injury;
5. whether and to what extent employee sustained any permanent disability which would entitle him to an award of compensation; and
6. whether and to what extent employee has sustained any additional permanent partial/total disability for which the Second Injury Fund would be liable as a result of the combination of any preexisting disabilities with the primary injury.

OCCUPATIONAL DISEASE **MEDICAL CAUSATION**

Jackie Stallings, employee herein, claims that he developed bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome as a result of repetitive grinding and polishing of parts at Corbitt Manufacturing Company up to June 7, 2001.

An employee's claim for compensation due to an occupational disease is to be determined under Section 287.067 Mo. Rev. Stat. (2000). It defines occupational disease as:

an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence. (1993 additions underlined)

Section 287.067.2, which was added in 1993, provides that an occupational disease is compensable "if it is clearly work related and meets the requirements of an injury which is compensable as provided in subsections 2 and 3 of section 287.020. An occupational disease is not compensable merely because work was a triggering or precipitating factor." Subsection 2 of section 287.020 provides that an injury is clearly work related "if work was a substantial factor in the cause of the resulting medical condition or disability." [\[16\]](#)

Subsection 3(1) of section 287.020 provides that an injury must arise out of and in the course of the employment and be incidental to and not independent of the employment relationship and that "ordinary, gradual deterioration or progressive degeneration of the body caused by aging" is not compensable unless it "follows as an incident of employment."

Subsection 3(2) of section 287.020 provides that an injury arises out of and in the course of the employment "only if (a) It is reasonably apparent, upon consideration of all the circumstances, that the employment is a substantial factor in causing the injury; and (b) It can be seen to have followed as a natural incident of the work; and (c) It can be fairly traced to the employment as a proximate cause; and (d) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life[.]"

Much of new subsection 3(2) of section 287.020 was contained in the prior definition of an occupational disease set forth in Section 287.067. Section 287.020.3(2)(b), (c), and (d) were part of the former occupational disease statute. Section 287.020.3(2)(a) is a revision of the prior requirement of a direct causal connection between the conditions under which the work was performed and the occupational disease. Direct causal connection is now defined as "a substantial factor in causing the injury." The Supreme Court held in Kasl v. Bristol Care, Inc., 984 S.W.2d 501 (Mo. 1999) that the foregoing language overruled the holdings in Wynn v. Navajo Freight Lines, Inc., 654 S.W.2d 87 (Mo. 1983), Bone v. Daniel Hamm Drayage Company, 449 S.W.2d 169 (Mo. 1970), and many other cases which had allowed an injury to be compensable so long as it was "triggered or precipitated" by work. A substantial factor does not have to be the primary or most significant causative factor. Bloss v. Plastic Enterprises, 32 S.W.3d 666, 671 (Mo. App. 2000); Cahall v. Cahall, 963 S.W.2d 368, 372 (Mo. App. 1998). The additional language in section 287.020.3(1) concerning deterioration or degeneration of the body due to aging probably does not overturn any prior court decisions.

Since the 1993 amendments pertaining to occupational diseases have largely readopted the prior statute, caselaw interpreting the prior statute is of some significance. In repetitive motion cases, [\[17\]](#) as practically all movements of the human body done during the course of employment are also replicated in nonworking environments and as most occupationally

induced diseases also sometimes occur in the public at large, the courts have focused on a particular risk or hazard to which an employee's exposure is greater or different than the public at large. Collins v. Neevel Luggage Manufacturing Co., 481 S.W.2d 548, 552-54 (Mo. App. 1972); Prater v. Thorngate, Ltd., 761 S.W.2d 226, 230 (Mo. App. 1988); Hayes v. Hudson Foods, Inc., 818 S.W.2d 296, 299-300 (Mo. App. 1991). Claimant must present substantial and competent evidence that he or she has contracted an occupationally induced disease rather than an ordinary disease of life. The Courts have stated that the determinative inquiry involves two considerations: "(1) whether there was an exposure to the disease which was greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee's job which is common to all jobs of that sort". Id. at 300; Dawson v. Associated Elec., 885 S.W.2d 712, 716 (Mo. App. 1994); Prater at 230; Jackson v. Risby Pallet and Lumber Co., 736 S.W.2d 575, 578 (Mo. App. 1987); Polavarapu v. General Motors Corp., 897 S.W.2d 63, 65 (Mo. App. 1995); Sellers v. Trans World Airlines, Inc., 752 S.W.2d 413, 415 (Mo. App. 1988).

Claimant must also establish, generally through expert testimony, the probability that the claimed occupational disease was caused by conditions in the work place. Dawson at 716; Selby v. Trans World Airlines, Inc., 831 S.W.2d 221, 223 (Mo. App. 1992); Brundige v. Boehringer, 812 S.W.2d 200, 202 (Mo. App. 1991). Claimant must prove that work was "a substantial factor" in causing "the resulting medical condition or disability." Section 287.020.2. Moreover, "an occupational disease is not compensable merely because work was a triggering or precipitating factor." Section 287.067.2 Mo. Rev. Stat. (1994). The Supreme Court held in Kasl v. Bristol Care, Inc., 984 S.W.2d 501 (Mo. 1999) that the foregoing language overruled the holdings in Wynn v. Navajo Freight Lines, Inc., 654 S.W.2d 87 (Mo. 1983), Bone v. Daniel Hamm Drayage Company, 449 S.W.2d 169 (Mo. 1970), and many other cases which had allowed an injury to be compensable so long as it was "triggered or precipitated" by work. On the other hand, injuries which are triggered or precipitated by work may nevertheless be compensable if the work is found to be the "substantial factor" in causing the injury. Kasl, supra.

A single medical opinion will support a finding of compensability even where the causes of the disease are indeterminate. Dawson at 716; Sellers v. Trans World Airlines Inc., 776 S.W.2d 502, 504 (Mo. App. 1989); Sheehan at 797. The opinion may be based on a doctor's written report alone. Prater v. Thorngate, Ltd., 761 S.W.2d 226, 230 (Mo. App. 1988). "A medical expert's opinion must be supported by facts and reasons proven by competent evidence that will give the opinion sufficient probative force to be substantial evidence." Silman v. Montgomery & Associates, 891 S.W.2d 173, 176 (Mo. App. 1995); Pippin v. St. Joe Minerals Corp., 799 S.W.2d 898, 903 (Mo. App. 1990). Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. Hawkins v. Emerson Electric Co., 676 S.W.2d 872, 877 (Mo. App. 1984). Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. George v. Shop 'N Save Warehouse Foods, 855 S.W.2d 460 (Mo. App. 1993); Webber v. Chrysler Corp., 826 S.W.2d 51, 54 (Mo. App. 1992); Hutchinson v. Tri-State Motor Transit Co., 721 S.W.2d 158, 163 (Mo. App. 1986). An administrative law judge may not constitute himself or herself as an expert witness and substitute his or her personal opinion of medical causation of a complicated medical question for the uncontradicted testimony of a qualified medical expert. Wright v. Sports Associated, Inc., 887 S.W.2d 596 (Mo. 1994); Bruflat v. Mister Guy, Inc., 933 S.W.2d 829, 835 (Mo. App. 1996); Eubanks v. Poindexter Mechanical, 901 S.W.2d 246, 249-50 (Mo. App. 1995). However, even uncontradicted medical evidence may be disbelieved. Massey v. Missouri Butcher & I Supply, 890 S.W.2d 761, 763 (Mo. App. 1995); Jones v. Jefferson City School Dist., 801 S.W.2d 486, 490 (Mo. App. 1990).

The work-related aggravation of a preexisting disease or infirmity caused by repetitive trauma is compensable as either an accident or as an occupational disease. Smith v. Climate Engineering, 939 S.W.2d 429, 433-34 (Mo. App. 1996).

Claimant's Testimony

Claimant testified at the final hearing that the hatch covers weighed approximately 100 to 120 pounds and that the cross manifold weighed 120 pounds.

Testimony of Lindell Bast

Lindell Bast, a highly accredited and experienced individual in the field of foundry work, testified at the final hearing on behalf of Employer/Insurer. Mr. Bast has been employed by Employer since 1994. For his first eight years, he was a foundry engineer. In approximately 2000, he became the "Facility and Plant Engineer." Since January of 2006, he has been special projects coordinator.

Mr. Bast testified that the hatch covers were aluminum, 24 inches in diameter, less than two inches thick, and weighed 23 pounds. He supported this testimony with photographs illustrating a hatch cover. (Employer/Insurer's Exhibit 16) He further testified that the cross manifolds are 34 ½ inches long, 33 inches wide, and weigh 43 pounds. before they are grinded

by machine. The casting consists of aluminum tubes of which the holes are five inches wide. After they leave the foundry, two of these get affixed to railroad cars. The hatch covers are likewise affixed to railroad cars.

Findings of Fact

Based on my observations of claimant's demeanor at the hearing and the inconsistencies between his October 22, 2001 deposition testimony (Employer/Insurer's Exhibit 11) and his testimony at the hearing, I find that he is only partially credible. I find the testimony of Lindell Bast is entirely credible. Based on the evidence adduced at the hearing, some of which comes from the claimant's testimony, some of which comes from the testimony of Lindell Blast and some of which is based on the medical records, I make the following findings of fact.

Description of Accident/Work Activities

Jackie Stallings, employee herein, began working for employer, Corbitt Manufacturing Company, a metal foundry, in late 1999 as a temporary worker from Southside Temporary Services. He initially worked as a parts washer for 90 days and was hired by Corbitt Manufacturing Company on April 28, 2000. Claimant worked primarily as a molder/grinder. He also drove a forklift truck.

As a molder he used a cup with a handle to pour liquid aluminum into molds. The molds were then carried by a crane to a cooling area. His main job was grinding parts such as handles, cores, gear boxes, cross manifolds and hatch covers with grinding wheels. The parts were delivered to his station in a basket. Cross manifolds weighed 43 pounds. Hatch covers weighed 23 pounds.^[18] He picked up a hatch cover out of the container, held one side against his abdomen and the opposite side against a grinding machine, which grinded off about 10 pounds of excess material while he rotated the cover. He then carried the hatch cover 5 to 10 feet and placed it in another container. As a finisher he used hand tools to smooth the edges of the cover. He apparently spent 65% of his time grinding, 10% driving a fork lift, and 25% fine polishing. (Claimant's Testimony & Employer/Insurer's Exhibit 11)

On or about May 1, 2001, employee was working on aluminum hatch covers when he bent over and picked one up and heard something pop in his back. He stopped working for about an hour and then returned to work. (Claimant's Testimony)

On June 7, 2001 while lifting a manifold, claimant slipped and fell into a cardboard box and hurt his back. He went home early and has not returned to work since then. (Employer/Insurer's Exhibit 11)

Medical Treatment

There was no evidence of any additional treatment for claimant's upper extremities subsequent to the original hearing.

Additional Findings

I previously found in the temporary award based on Dr. Joseph Hanaway's nerve conduction study of August 16, 2001 and his clinical findings on September 6, 2001 that claimant developed bilateral carpal tunnel syndrome and bilateral cubital syndrome between August 16, and September 8, 2001.^[19] I readopt that findings herein

I also previously found in the temporary award based on the credible opinion of Dr. Hanaway that claimant's bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome were work-related and were occupational diseases. I also found based on the opinions of Drs. David Brown and Dennis McGraw that employee developed left biceps tendonitis as a result of his lifting activities at Corbitt Manufacturing Company.^[20]

The only changes in my prior findings with respect to claimant's work were to the weights of the cross manifolds and the hatch covers. As Dr. Hanaway's deposition was not retaken, it would be speculation to assume that his prior opinions on medical causation would change due to much lighter weights of the two principal objects which claimant grinded.

Accordingly, I once again find that claimant's bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome are work-related and are occupational diseases and that claimant also developed left biceps tendonitis as a result of his lifting activities at Corbitt Manufacturing Company.

REIMBURSEMENT FOR ADDITIONAL MEDICAL EXPENSES

At the beginning of the hearing Claimant indicated that he was seeking reimbursement for additional medical bills not included in the temporary award. The record was left open 30 days for additional exhibits.

In the temporary award, I found that claimant was entitled to reimbursement of medical bill from Dr. Joseph Hanaway for 3 examinations and the nerve conduction study (Claimant's Exhibit C2), totaling \$850.88. The parties stipulated at the final hearing that the foregoing amount was paid by employer/insurer in compliance with the temporary award.

As no additional medical bills were offered into evidence at the final hearing, I find that claimant is not entitled to reimbursement of any additional medical bills.

FUTURE MEDICAL CARE

Employee is requesting an award of future medical care for his upper extremities.

Section 287.140 Mo. Rev. Stat. (2000) requires that the employer/insurer provide "such medical, surgical, chiropractic, and hospital treatment ... as may reasonably be required ... to cure and relieve [the employee] from the effects of the injury." Future medical care can be awarded even though claimant has reached maximum medical improvement. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 278 (Mo. App. 1996). It can be awarded even where permanent partial disability is determined. The employee must prove beyond speculation and by competent and substantial evidence that his or her work-related injury is in need of treatment. Williams v. A.B. Chance Co., 676 S.W.2d 1 (Mo. App. 1984). Conclusive evidence is not required. However, evidence which shows only a mere possibility of the need for future treatment will not support an award. It is sufficient if claimant shows by reasonable probability that he or she will need future medical treatment. Dean v. St. Luke's Hospital, 936 S.W.2d 601, 603 (Mo. App. 1997); Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 277 (Mo. App. 1996); Sifferman v. Sears, Roebuck and Co., 906 S.W.2d 823, 828 (Mo. App. 1995). "Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." Tate v. Southwestern Bell Telephone Co., 715 S.W.2d 326, 329 (Mo. App. 1986); Sifferman at 828.

Where the sole medical expert believes that it is "very likely" that the claimant will need future medical treatment, but is unable to say whether it is more likely than not that the claimant will need such treatment, that opinion, when combined with credible testimony from the claimant and the medical records in evidence, can be sufficient to support an award which leaves the future treatment issue open. This is particularly true where the medical expert states that the need for treatment will depend largely on the claimant's pain level in the future and how well the claimant tolerates that pain. Dean, supra at 604-06.

The amount of the award for future medical expenses may be indefinite. Section 287.140.1 does not require that the medical evidence identify particular procedures or treatments to be performed or administered. Dean, supra at 604; Talley v. Runny Meade Estates, Ltd., 831 S.W.2d 692, 695 (Mo. App. 1992); Bradshaw v. Brown Shoe Co., 660 S.W.2d 390, 393-394 (Mo. App. 1983). The award may extend for the duration of an employee's life. P.M. v. Metromedia Steakhouses Co., Inc., 931 S.W.2d 846, 849 (Mo. App. 1996). The award may require the employer to provide future medical treatment which the claimant may require to relieve the effects of an injury or occupational disease. Polavarapu v. General Motors Corporation, 897 S.W.2d 63 (Mo. App. 1995). It is not necessary that such treatment has been prescribed or recommended as of the date of the hearing. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 277 (Mo. App. 1996). Where future medical care and treatment is awarded, such care and treatment "must flow from the accident before the employer is to be held responsible." Modlin v. Sun Mark, Inc., 699 S.W.2d 5, 7 (Mo. App. 1985); Talley v. Runny Meade Estates, Ltd. at 694. The employer/insurer may be ordered to provide medical and hospital treatment to cure and relieve the employee from the effects of the injury even though some of such treatment may also give relief from pain caused by a preexisting condition. Hall v. Spot Martin, 304 S.W.2d 844, 854-55 (Mo. 1957). However, where preexisting conditions also require future medical care, the medical experts must testify to a reasonable medical certainty as to what treatment is required for the injuries attributable to the last accident. O'Donnell v. Guarantee Elec. Co., 690 S.W.2d 190, 191 (Mo. App. 1985).

Claimant's Testimony

Claimant testified at the final hearing that he no longer had pain in his left elbow. He stated that his wrists were worse. He testified that they were swollen all of the time and the palmar aspect of both wrists was painful. Employee indicated that he has pain at the base of each thumb and that he cannot make a tight fist.

Claimant testified that since November of 2003 he had seen Dr. Hanaway about six times. Claimant offered no additional records of any such examinations into evidence.

Additional Findings

I previously found in the temporary award that Dr. Hanaway's opinions concerning the question of whether claimant needed additional treatment for claimant's upper extremity complaints were unpersuasive and that the opinion of Dr. Brown was persuasive. I found that while claimant may have had bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome in September of 2001, those conditions appeared to have substantially improved during the subsequent two years of claimant's unemployment. I found that his left biceps tendonitis had also resolved. Based on the nerve conduction studies of Dr. Peeples and the opinions of Dr. Brown, I found that claimant needed no further medical treatment for his work-related carpal tunnel syndrome, cubital tunnel syndrome and left biceps tendonitis and that he was at maximum medical improvement.^[21]

At the final hearing claimant did not offer into evidence any additional medical reports, treatment records or expert testimony suggesting that employee would require future treatment.

I find that claimant has failed to sustain his burden of proof with respect to the need for future medical treatment. While claimant may feel that his additional wrist complaints have worsened, he has not sought any additional treatment for them since the temporary award. There is no recent medical opinion which indicates that claimant will need future medical care for his upper extremities.

Accordingly, the request for future medical treatment is denied.

ALLEGED PERMANENT TOTAL DISABILITY

Employee claims that he is permanently and totally disabled as a result of the work-related injury to his upper extremities, or, alternatively, as a result of the combination of the work-related injury to his upper extremities with employee's alleged preexisting disabilities in his right lower extremity and low back. The claim of total disability against the employer must be considered first. Where the disability caused solely by the primary injury is total disability, there can be no liability for the Second Injury Fund. Hughey v. Chrysler Corp., 34 S.W.3d 845, 847 (Mo. App. 2000); Vaught v. Vaughts, Inc., 938 S.W.2d 931, 939 (Mo. App. 1997); Roller v. Treasurer of State of Mo., 935 S.W.2d 739, 740 (Mo. App. 1996).

Section 287.020.7 Mo. Rev. Stat. (2000) defines total disability as the "inability to return to any employment and not merely...[the] inability to return to the employment in which the employee was engaged at the time of the accident." The words "inability to return to any employment" mean "that the employee is unable to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment." Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919, 922 (Mo. App. 1982). The words "any employment" mean "any reasonable or normal employment or occupation; it is not necessary that the employee be completely inactive or inert in order to meet this statutory definition." Id. at 922; Brown v. Treasurer of Missouri, 795 S.W.2d 479, 483 (Mo. App. 1990); Crum v. Sachs Elec., 769 S.W.2d 131, 133 (Mo. App. 1989). "[W]orking very limited hours at rudimentary tasks [is not] reasonable or normal employment." Grgic v. P & G Const., 904 S.W.2d 464, 466 (Mo. App. 1995). The primary determination with respect to the issue of total disability is whether, in the ordinary course of business, any employer would reasonably be expected to employ the claimant in his or her present physical condition and reasonably expect him or her to perform the work for which he or she is hired. Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 367 (Mo. App. 1992); Talley v. Runny Mead Estates, Ltd., 831 S.W.2d 692, 694 (Mo. App. 1992); Brown v. Treasurer of Missouri, at 483; Fischer v. Archdiocese of St. Louis, 793 S.W.2d 195, 199 (Mo. App. 1990); Sellers v. Trans World Airlines, Inc., 776 S.W.2d 502, 504 (Mo. App. 1989). The test for permanent and total disability is whether given the employee's condition, he or she would be able to compete in the open labor market; the test measures the employee's prospects for obtaining employment. Reiner at 367; Brown at 483; Fischer at 199. A claimant who is "only able to work very limited hours at rudimentary tasks is a totally disabled worker." Grgic v. P & G Const., 904 S.W.2d 464, 466 (Mo. App. 1995).

The employee must prove the nature and extent of any disability by a reasonable degree of certainty. Downing v. Willamette Industries, Inc., 895 S.W.2d 650, 655 (Mo. App. 1995); Griggs v. A. B. Chance Company, 503 S.W.2d 697, 703 (Mo. App. 1974). Such proof is made only by competent and substantial evidence. It may not rest on speculation. Idem. Expert testimony may be required where there are complicated medical issues. Goleman v. MCI Transporters, 844 S.W.2d 463, 466 (Mo. App. 1993); Griggs at 704; Downs v. A.C.F. Industries, Incorporated, 460 S.W.2d 293, 295-96 (Mo. App. 1970). The fact finder may accept only part of the testimony of a medical expert and reject the remainder of it. Cole v. Best Motor Lines, 303 S.W.2d 170, 174 (Mo. App. 1957). Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. Hawkins v. Emerson Electric Co., 676 S.W.2d 872, 877 (Mo. App.

1984). Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. Webber v. Chrysler Corp., 826 S.W.2d 51, 54 (Mo. App. 1992); Hutchinson v. Tri-State Motor Transit Co., 721 S.W.2d 158, 163 (Mo. App. 1986).

However, where the facts are within the understanding of lay persons, the employee's testimony or that of other lay witnesses may constitute substantial and competent evidence. This is especially true where such testimony is supported by some medical evidence. Pruteanu v. Electro Core Inc., 847 S.W.2d 203 (Mo. App. 1993); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 367 (Mo. App. 1992); Fisher v. Archdiocese of St. Louis, 793 S.W.2d 195, 199 (Mo. App. 1990); Ford v. Bi-State Development Agency, 677 S.W.2d 899, 904 (Mo. App. 1984); Fogelsong v. Banquet Foods Corp. 526 S.W.2d 886, 892 (Mo. App. 1975). The trier of facts may even base its findings solely on the testimony of the employee. Fogelsong at 892. The trier of facts may also disbelieve the testimony of a witness even if no contradictory or impeaching testimony is given. Hutchinson v. Tri-State Motor Transit Co., *supra* at 161-2; Barrett v. Bentzinger Brothers, Inc., 595 S.W.2d 441, 443 (Mo. App. 1980). The uncontradicted testimony of the employee may even be disbelieved. Weeks v. Maple Lawn Nursing Home, 848 S.W.2d 515, 516 (Mo. App. 1993); Montgomery v. Dept. of Corr. & Human Res., 849 S.W.2d 267, 269 (Mo. App. 1993).

The determination of the degree of disability sustained by an injured employee is not strictly a medical question. While the nature of the injury and its severity and permanence are medical questions, the impact that the injury has upon the employee's ability to work involves factors which are both medical and nonmedical. Accordingly, the Courts have repeatedly held that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission. Sellers v. Trans World Airlines, Inc., 776 S.W.2d 502 (Mo. App. 1989); Quinlan v. Incarnate Word Hospital, 714 S.W.2d 237, 238 (Mo. App. 1986); Banner Iron Works v. Mordis, 663 S.W.2d 770, 773 (Mo. App. 1983); Barrett v. Bentzinger Brothers, Inc., 595 S.W.2d 441, 443 (Mo. App. 1980); McAdams v. Seven-Up Bottling Works, 429 S.W.2d 284, 289 (Mo. App. 1968). The fact finding body is not bound by or restricted to the specific percentages of disability suggested or stated by the medical experts. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences from such testimony. Fogelsong v. Banquet Foods Corporation, 526 S.W.2d 886, 892 (Mo. App. 1975). The finding of disability may exceed the percentage testified to by the medical experts. Quinlan v. Incarnate Word Hospital, at 238; Barrett v. Bentzinger Brothers, Inc., at 443; McAdams v. Seven-Up Bottling Works, at 289. The uncontradicted testimony of a medical expert concerning the extent of disability may even be disbelieved. Gilley v. Raskas Dairy, 903 S.W.2d 656, 658 (Mo. App. 1995); Jones v. Jefferson City School Dist., 801 S.W.2d 486 (Mo. App. 1990). The fact finding body may reject the uncontradicted opinion of a vocational expert. Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995).

CLAIM AGAINST EMPLOYER

An employer is liable for permanent total disability compensation under Section 287.200 Mo. Rev. Stat. (2000) only where there is evidence in the record that the primary accident alone caused employee to be permanently and totally disabled. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 276 (Mo. App. 1996); Feldman v. Sterling Properties, 910 S.W.2d 808, 810 (Mo. App. 1995); Moorehead v. Lismark Distributing Co., 884 S.W.2d 416, 419 (Mo. App. 1994); Kern v. General Installation, 740 S.W.2d 691, 692 (Mo. App. 1987); *accord*, Terrell v. Board of Education, City of St. Louis, 871 S.W.2d 20, 23 (Mo. App. 1993); Roby v. Tarlton Corp., 728 S.W.2d 586, 589 (Mo. App. 1987).

Findings of Fact

Based on the evidence adduced at the hearing, some of which comes from the claimant's testimony and some of which is based on the medical records, I make the following findings of fact. Based on my observations of claimant's demeanor at the hearing, I find that he is only partially credible. In particular, I find that he exaggerated the extent of his pain.

Educational and Employment History

Mr. Stallings has an associate's degree in fire science from the U.S. Naval Academy.

From 1979 to 1986 claimant worked as a firefighter in California. He was required to lift bags of sand weighing 200 pounds and climb 4 stories with an air pack and water hose. He was able to lift 220 pounds above his head.

He performed survey engineering for real estate companies in northern California. He drove light trucks.

He worked as an assistant chef at Stouffers and the Ritz Carlton hotels. He was employee by a temporary agency in 1999 as a parts washer. In 2000 he was hired by Employer on a part-time basis as a parts washer. He also drove a fork lift. Eventually he became a molder/grinder.

Claimant was 46 years old on August 25, 2003, when he was last examined by Dr. Brown and presumably reached maximum medical improvement with respect to his low back injury.

Claimant's Testimony

Claimant testified at the final hearing that he no longer had pain in his left elbow. He stated that his wrists were worse. He testified that they were swollen all of the time and the palmar aspect of both wrists was painful. Employee indicated that that he has pain at the base of each thumb and that he cannot make a tight fist.

Claimant testified that since November of 2003 he had seen Dr. Hanaway about six times. Claimant offered no additional records of any such examinations into evidence.

Medical Opinions

Dr. Hanaway did not offer any opinions with respect to the issue of whether claimant sustained any permanent disability from the primary injury herein.

Dr. Brown testified that employee told him on August 25, 2003 that his symptoms had not changed since March 20, 2002. Dr. Brown testified that the nerve conduction study performed by Dr. Peebles on August 5, 2003 of the left side was normal, and the study of the right side done on September 18, 2003 was normal. On examination all provocative testing for carpal tunnel and cubital tunnel syndromes was negative. (Employer/Insurer's Exhibit 1, Pages 24-29 & depo ex 5)

Dr. Brown opined that claimant had 4% permanent partial disability of each wrist, no portion of which was the result of his work at Employer. (Employer/Insurer's Exhibit 12, Page 44)

Vocational Opinions

Employee did not present any vocational testimony in support of his claim for permanent total disability.

Additional Findings

I previously found in the temporary award that although claimant told Dr. Brown that his symptoms had not improved in the two years while claimant was not working, the subsequent negative nerve conduction studies demonstrated an improvement in his condition. Dr. Brown's negative clinical examinations on March 20, 2002 and August 25, 2003, claimant's missing of two appointments with Dr. Adelman, and claimant's positive Waddell's signs and noncompliance with treatment in the companion back cases indicate that claimant may well have been exaggerating his symptoms in 2002 and 2003. ^[22]

Dr. Brown opined that claimant has 4% permanent partial disability in each wrist. As I previously found based on the opinion of Dr. Hanaway that claimant's bilateral carpal tunnel syndrome was work-related, Dr. Brown's opinion that claimant's disability was not related to his employment is irrelevant.

Taking into account all of the evidence, I find that Mr. Stallings sustained 5% permanent partial disability of each upper extremity at the wrist due to his work-related bilateral carpal tunnel syndrome. I further find that there is no evidence that claimant sustained any permanent partial disability at either elbow.

Claim against Second Injury Fund

Employee claims in the alternative that he is permanently and totally disabled as a result of the combination of the disability in his wrists with employee's alleged preexisting disabilities to his right lower extremity and low back.

Under Section 287.220.1 Mo. Rev. Stat. (2000) where a previous partial disability or disabilities, whether from a compensable injury or otherwise, and the last injury combine to result in total and permanent disability, the employer at the time of the last injury is liable only for the disability which results from the last injury considered by itself ^[23] and the

Second Injury Fund shall pay the remainder of the compensation that would be due for permanent total disability under Section 287.200. Grant v. Neal, 381 S.W.2d 838, 840 (Mo. 1964); Wuebbeling v. West County Drywall, 898 S.W.2d 615, 617-18 (Mo. App. 1995); Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 366 (Mo. App. 1992); Brown v. Treasurer of Missouri, 795 S.W.2d 479, 482 (Mo. App. 1990). The employee must prove that a prior permanent partial disability, whether from a compensable injury or not, combined with the subsequent compensable injury to result in total and permanent disability.

Combination of Preexisting and Primary Disabilities

Claimant alleged preexisting disability in his right lower extremity^[24] and low back.

It is not necessary to make any findings with respect to claimant's preexisting disabilities as he failed to present any expert medical opinion or vocational opinion that the combination of his preexisting disabilities with the disabilities in his upper extremities rendered claimant permanently and totally disabled. While the claimant may think that he is permanently and totally disabled, his personal opinion is not sufficient to sustain his burden of proof. See Minies v. Meadowbrook Manor, 105 S.W.3d 529, 538-39 (Mo. App. 2003).

Additional Permanent Partial Disability

Having found that employee was not permanently and totally disabled as a result of the combination of the disabilities in his upper extremities with the preexisting disabilities to his right lower extremity and low back, it is next necessary to determine whether employee is entitled to an award of additional permanent partial disability from the Second Injury Fund pursuant to Section 287.220.1 Mo. Rev. Stat. (2000). Under that Section an employee who has a permanent partial disability and who subsequently sustains a compensable injury may recover from the Second Injury Fund any additional permanent disability caused by the combination of the preexisting disability and the disability from the subsequent injury. The employer is liable only for the disability caused by the work-related accident. The Second Injury Fund is liable for the difference between the sum of the two disabilities considered separately and independently and the disability resulting from their combination. Cartwright v. Wells Fargo Armored Serv., 921 S.W.2d 165, 167 (Mo. App. 1996); Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995); Brown v. Treasurer of Missouri, 795 S.W.2d 479 (Mo. App. 1990); Anderson v. Emerson Elec. Co., 698 S.W.2d 574, 576-77 (Mo. App. 1985). In order to recover from the Second Injury Fund the employee must prove a prior permanent partial disability, whether from a compensable injury or not, a subsequent compensable injury, and a synergistic combination of the preexisting and subsequent disabilities.

I have previously determined the extent of claimant's disability from the primary injury.

Thresholds

The 1993 amendment to Section 287.220.1 also established minimum threshold requirements with respect to both the preexisting disability and the subsequent compensable injury of 50 weeks for a body as a whole injury or 15% of a major extremity.

Findings

As I have previously found that claimant sustained 5% permanent partial disability of each upper extremity at the wrist due to his work-related bilateral carpal tunnel syndrome, I find that the primary injury herein does not meet the statutory threshold requirement of Section 287.120.1. Mo. Rev. Stat. (2000). The claim against the Second Injury Fund is denied.

ATTORNEY'S FEES

This award is subject to a lien in the amount of 25% of the additional payments hereunder in favor of the employee's attorney, Harry Nichols, for necessary legal services rendered to the employee.

Date: _____

Made by: _____
JOHN HOWARD PERCY

*Administrative Law Judge
Division of Workers' Compensation*

A true copy: Attest:

Patricia "Pat" Secret
*Director
Division of Workers' Compensation*

[1] For example, the findings concerning claimant's medical treatment are not generally repeated herein. However, the disability ratings in this award are based in part on my prior findings concerning the nature and extent of claimant's injuries.

[2] See Page 17 of the temporary award.

[3] See Page 18 of the temporary award.

[4] See Page 18 of the temporary award.

[5] Claimant alleged occupational diseases to both upper extremities in Injury No 01-095117 with a last exposure of June 7, 2001, his last day of work for employer herein. As symptoms of these conditions did not appear until after May 1, 2001, they are treated as subsequent injuries for the purpose of the analysis of the instant claim.

[6] Presumably, employee does not claim that he has any preexisting disability in his low back. If he had contended that had preexisting disability in his low back, then I would not have been able to award any permanent disability due his failure to offer expert testimony which differentiated between his preexisting disability in his low back and the disability from the primary injury to his low back. Where an employee has a preexisting disability to the same area of the body injured as a result of the work-related accident, claimant must offer expert testimony of the extent of the preexisting disability in order that the extent of disability caused by the work-related injury may be calculated. His failure to do so bars him from recovering permanent partial disability benefits. Reeves v. Midwestern Mortg. Co., 929 S.W.2d 293, 296 (Mo. App. 1996); Eimer v. Bd. of Police Com'rs of Kan. City, 895 S.W.2d 117, 121 (Mo. App. 1995); Plaster v. Dayco Corp., 760 S.W.2d 911, 913 (Mo. App. 1988); Griggs v. A. B. Chance Company, 503 S.W.2d 697 (Mo. App. 1974).

[7] The employer's liability for permanent partial disability compensation is determined under Section 287.190. Stewart v. Johnson, 398 S.W.2d 850 (Mo. 1966).

[8] The evidence suggests that claimant may have had 15% permanent partial disability of the right foot. (Employer/Insurer's Exhibit 18)

[9] Subsection 2 of section 287.020 repeats the exclusion of injuries where work was merely a triggering or precipitating factor.

[10] The 1993 addition of section 287.067.7, which modifies the last exposure rule with respect to occupational diseases due to repetitive motion, could be construed as a legislative recognition that injuries caused by repetitive activities may be viewed as due to an occupational disease.

[11] The findings with respect to the weights of the cross manifold and hatch covers are based on the testimony of Lindell Bast. I find claimant's testimony not credible with respect to the weights of these items.

[12] There is a record of emergency room treatment at the Cochran Veterans Affairs Hospital on July 30, 2000 for low back pain which began on July 28, 2000 following the lifting heavy of objects at work. He was told to take Ibuprofen and avoid lifting more than 30 pounds. (Claimant's Exhibit L)

[13] Claimant's descriptions of his accidents were more embellished when he met with the therapist. (Claimant's Exhibit H, Page 7)

[14] The radiologist's interpretation was degenerative disk disease at L5-S1, disk bulges at L3-4 and L5-S1, and a slight compression fracture at L1. (Claimant's Exhibits C2, Page 7 & D)

[15] For example, the findings concerning claimant's medical treatment are not generally repeated herein. However, the disability ratings in this award are based in part on my prior findings concerning the nature and extent of claimant's injuries.

[16] Subsection 2 of section 287.020 repeats the exclusion of injuries where work was merely a triggering or precipitating factor.

[17] The 1993 addition of section 287.067.7, which modifies the last exposure rule with respect to occupational diseases due to repetitive motion,

could be construed as a legislative recognition that injuries caused by repetitive activities may be viewed as due to an occupational disease.

[18]

The findings with respect to the weights of the cross manifold and hatch covers are based on the testimony of Lindell Bast. I find claimant's testimony not credible with respect to the weights of these items.

[19]

See Page 15 of temporary award.

[20]

See Page 15 of temporary award.

[21]

See Page 20 of Temporary Award.

[22]

See Page 19 of the temporary award.

[23]

The employer's liability for permanent partial disability compensation is determined under Section 287.190. Stewart v. Johnson, 398 S.W.2d 850 (Mo. 1966).

[24]

The evidence suggests that claimant may have had 15% permanent partial disability of the right foot. (Employer/Insurer's Exhibit 18)