

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

Injury No. 11-110863

Employee: David Wright
Employer: Roto-Rooter Services Company (Settled)
Insurer: Zurich American Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ We have read the briefs, reviewed the evidence, and considered the whole record. We find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge by this supplemental opinion.

We offer this supplemental opinion to add additional legal authority to the administrative law judge's sound reasoning and to address arguments raised in the parties' briefs.

Discussion

Employee injured his back when the chair in which he was seated collapsed. At the time of the chair collapse, employee was seated on a chair owned by employer during his lunch break on employer's premises in a lunch room provided by employer. Employee may or may not have been clocked in at the time of the chair collapse but, as will be seen, it makes no difference.

The parties stipulated that the incident during which employee's chair collapsed was the prevailing factor in causing employee's injury. Consequently, the issue in this case is confined to the application of subsection 287.020.3(2)(b). Subsection 287.020.3(2) states "[a]n injury shall be deemed to arise out of and in the course of the employment only if... (b) [i]t 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." The Missouri Supreme Court has explained that § 287.020.3(2)(b) provides the test for determining if there exists a causal connection between the injury at issue and the employee's work activity.²

¹ Statutory references are to the Revised Statutes of Missouri 2010, unless otherwise indicated.

² *Miller v. Mo. Highway & Transp. Comm'n*, 287 S.W.3d 671 (Mo. 2009); *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504 (Mo. 2012).

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The Court of Appeals for the Western District of Missouri recently analyzed the case law regarding the proper application of § 287.020.3(2)(b) and set forth a simple two-step process to achieve the proper application:

The "causal connection" standard announced in *Miller* and further addressed in *Johme*...first requires identification of the risk source of a claimant's injury, that is, identification of the activity that caused the injury, and then requires a comparison of that risk source or activity to normal nonemployment life.³

Identification of risk source/identification of activity that caused the injury

Employee sustained his injury when the chair upon which he was seated collapsed. We identify the risk source of employee's injury as the collapse of *this particular chair* belonging to employer.

Comparison of the risk source or activity to normal nonemployment life

This second step of the causal connection test requires us to quantitatively compare employee's work exposure to the risk of employer's chair collapsing under him to employee's non-work exposure to the risk of employer's chair collapsing under him.⁴

The Second Injury Fund argues that employee "was equally exposed to a chair collapsing at work as he was in his nonemployment life." The Second Injury Fund's argument fails. We are not concerned with whether employee was equally exposed to the risk of *any* chair collapsing under him in his non-employment life. We are concerned with whether employee was equally exposed to the risk of *this* chair collapsing under him.⁵

The Second Injury Fund also suggests that employee had to prove that employer's collapsing chair was defective as an element of his case in chief. Again, the Fund's argument fails. There is no statutory requirement that employee prove the chair was defective. In any event, it is undisputed that employer's chair collapsed. The ordinary purpose of a chair is to sit upon it. The expectation is that a chair will maintain its structure when it is used for its ordinary purpose. The chair in this case did not perform up to expectations. Under these circumstances, we think it is reasonable to infer the chair was in some way dangerous or defective and we so find.

We find that employee's back injury came from a hazard or risk related to work – employer's collapsing chair. Employee was exposed to the risk of employer's collapsing

³ *Gleason v. Treasurer*, No. WD77607 (Mo. App. W.D., March 3, 2015)(mandate issued March 25, 2015).

⁴ We are cognizant that some courts have compared the injured worker's non-work exposure to the risk of injury to the injured worker's work exposure to the risk. In fact, the statute directs us to quantitatively compare the non-work exposure of workers in general to the risk of this chair collapsing with employee's work exposure to the risk of the chair collapsing. See § 287.020.3(2)(b) RSMo which conditions compensation on a finding that the injury did not come from a "hazard or risk unrelated to the employment to which **workers** would have been equally exposed outside of and unrelated to employment..." In the instant case, employee's work exposure to the failing chair was greater than both his non-work exposure to the failing chair and the non-work exposure of workers in general to the failing chair.

⁵ See *Dorris v. Stoddard County*, 436 S.W.3d 586 (Mo. App. 2014); *Duever v. All Outdoors, Inc.*, 371 S.W.3d 863 (Mo. App. 2012). See also, *Scholastic, Inc. v. Viley*, No. WD77546 (Mo. App. W.D., October 28, 2014)(app. for transfer to S. Ct. denied February 3, 2015).

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chair only at work. We agree with the administrative law judge's finding that employee's injury did not come from a hazard or risk unrelated to his employment to which employee (or workers in general) would have been equally exposed outside of and unrelated to his employment in his normal nonemployment life.

The Second Injury Fund also contends compensation must be denied because "employee failed to meet his burden of proof that he was working at the time of his accident."

Other language in the Workers' Compensation Law authorizes compensation for injuries sustained by workers even though they are not actively performing their job duties. In the 2005 amendments to the Workers' Compensation Law, the legislature explicitly preserved the extension of premises doctrine as regards employee injuries sustained on property owned or controlled by employer. Inasmuch as such cases, by definition, involve injuries sustained prior or subsequent to the actual performance of job duties, the legislature clearly contemplated and accepted compensability of injuries sustained as a result of work-related risks even though employee was not at the time engaged in the performance of job duties (e.g. going to and coming from employer's lunchroom or bathroom).

Recent Missouri cases have applied the retained extension of premises doctrine and confirmed that compensation is not limited to workers injured while actively engaged in their duties (i.e. "working"). In *Scholastic, Inc. v. Viley*, the Court held that "[p]ursuant to the plain language of section 287.020.5, the extended premises doctrine is not totally eliminated but is now limited to situations where the employer owns or controls the area where the accident occurs."⁶ The existing extension of premises doctrine permits recovery of workers' compensation benefits for injuries sustained by workers going to or coming from work if (a) the injury-producing accident occurs on premises which are owned or controlled by the employer, **and** (b) that portion of such premises is a part of the customary, expressly or impliedly approved, permitted, usual and acceptable route or means employed by workmen to get to and depart from their places of labor and is being used for such purpose at the time of the injury. Mr. Viley was awarded compensation for an injury he sustained when he fell on ice on a parking lot controlled – but not owned – by employer while he was walking to his car at the conclusion of his work shift.

In the instant case, employee sustained injury while he was eating his lunch on property owned and controlled by employer. Applying the Second Injury Fund's theory, had employee been injured by a work risk (e.g. a wet floor) while walking from his work station to his lunchroom chair his injury would be compensable under the extension of premises doctrine because his injury would have occurred on employer-owned property while he was coming from work. The same would be true if employee had been injured by a work risk while walking from his lunchroom chair to his work station because employee would have been going to work. The Second Injury Fund would have us carve out artificial islands of non-compensability at the workplace, which islands have indistinct geographic and temporal boundaries. We deem such an approach impractical, inconsistent with the purposes of the Workers' Compensation Law, and unsupported by statutory language. As noted above, "arising out of and in the course of employment" is defined by § 287.020.3(2)

⁶ 452 S.W.3d 680, 684 (Mo. App. 2014).

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RSMo. This is the test for compensability in this case according to the holding in *Johme v. St. John's Mercy Healthcare*.⁷ Under strict construction, no additional burden of proof can be imposed. There is no provision of the Law that requires employee to prove he was "working" at the time of his accident.

We believe the purposes of the workers' compensation law are best-achieved by including within the sphere of compensability injuries such as the one sustained by employee where it is clear the injury occurred *because* employee was at work and not merely *while* employee was at work.⁸ Employers expect the protection of the exclusive remedy of workers' compensation for injuries sustained by hazards present in the workplace and employees expect a speedy and certain remedy for injuries sustained as a result of those hazards.

Award

We affirm the administrative law judge's award, as supplemented herein.

We approve and affirm 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.

We attach the September 4, 2014, award and decision of Administrative Law Judge John K. Ottenad. We affirm and adopt the administrative law judge's findings, conclusions, award and decision to the extent they are not inconsistent with our findings and conclusions herein.

Given at Jefferson City, State of Missouri, this 7th day of April 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

⁷ 366 S.W.3d at 509 ("The express terms of the workers' compensation statutes as revised in 2005 instruct that section 287.020.3(2) must control any determination of whether Johme's injury shall be deemed to have arisen out of and in the course of her employment.")

⁸ See *Pope v. Gateway to the West Harley Davidson*, 404 S.W.3d 315, 320 (Mo. App. 2012); See also *Johme*, 366 S.W.3d at 511 ("[I]t is not enough that an employee's injury occurs while doing something related to or incidental to the employee's work; rather, the employee's injury is only compensable if it is shown to have resulted from a hazard or risk to which the employee would not be equally exposed in 'normal nonemployment life.'").

AWARD

Employee: David Wright

Injury No.: 11-110863

Dependents: N/A

Employer: Roto-Rooter Services Company (Settled)

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

Additional Party: Second Injury Fund

Insurer: Zurich American Insurance Company C/O
Sedgwick Claims Management Services (Settled)

Hearing Date: June 2, 2014

Checked by: JKO

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: July 21, 2011
5. State location where accident occurred or occupational disease was contracted: St. Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was employed in the office assisting the production manager for Employer and injured his low back and body as a whole, when the chair collapsed under him in Employer's lunchroom and he fell to the floor onto his back.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Body as a Whole—Low Back
14. Nature and extent of any permanent disability: 25% of the Body as a Whole—Low Back
15. Compensation paid to-date for temporary disability: Resolved by the compromise settlement with Employer
16. Value necessary medical aid paid to date by employer/insurer? Resolved by the compromise settlement with Employer

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- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Sufficient to result in the appropriate rates of compensation
- 19. Weekly compensation rate: \$519.83 for TTD/\$425.19 for PPD
- 20. Method wages computation: By agreement (stipulation) of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable:

Employer's liability resolved by virtue of the compromise settlement

22. Second Injury Fund liability:

\$94.64 per week for 100 weeks from 07/02/12 until 06/02/14 \$9,464.00

\$519.83 per week for Claimant's lifetime starting 06/03/14, subject to review and modification by law

TOTAL: \$9,464.00 THROUGH 06/02/14 PLUS CONTINUING WEEKLY BENEFITS AS DESCRIBED

23. Future requirements awarded: As awarded

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

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	David Wright	Injury No.: 11-110863
Dependents:	N/A	Before the
Employer:	Roto-Rooter Services Company (Settled)	Division of Workers' Compensation
Additional Party:	Second Injury Fund	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Insurer:	Zurich American Insurance Company C/O Sedgwick Claims Management Services (Settled)	Checked by: JKO

On June 2, 2014, the employee, David Wright, appeared in person and by his attorney, Mr. James G. Krispin, for a hearing for a final award on his claim against the Second Injury Fund. The employer, Roto-Rooter Services Company, and its insurer, Zurich American Insurance Company C/O Sedgwick Claims Management Services, were not present or represented at the hearing since they had previously settled their risk of liability in this case. The Second Injury Fund was represented at the hearing by its attorney, Assistant Attorney General Kevin A. Nelson. At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of fact and rulings of law, are set forth below as follows:

STIPULATIONS:

- 1) On or about July 21, 2011, David Wright (Claimant) sustained an accidental injury that resulted in injury to Claimant.
- 2) Claimant was an employee of Roto-Rooter Services Company (Employer).
- 3) Venue is proper in the City of St. Louis.
- 4) Employer received proper notice.
- 5) The Claim was filed within the time prescribed by the law.
- 6) At the relevant time, Claimant earned an average weekly wage sufficient to result in applicable rates of compensation of \$519.83 for total disability benefits and \$425.19 for permanent partial disability (PPD) benefits.
- 7) Employer resolved any liability for temporary total disability (TTD) benefits as a part of the compromise settlement of this case.

- 8) Employer resolved any liability for medical benefits as a part of the compromise settlement of this case.
- 9) Claimant reached the point of maximum medical improvement following his July 21, 2011 injury on July 1, 2012.

ISSUES:

- 1) Did the accident arise out of and in the course of Claimant's employment for Employer?
- 2) What is the nature and extent of Claimant's permanent partial and/or permanent total disability attributable to this injury?
- 3) What is the liability, if any, of the Second Injury Fund?

EXHIBITS:

The following exhibits were admitted into evidence:

Employee Exhibits:

- A. Deposition of Dr. David Volarich, with attachments, dated March 19, 2014
- B. Deposition of Mr. James England, Jr., with attachments, dated October 17, 2013
- C. Deposition of Mr. William Arand dated May 30, 2014
- D. Stipulation for Compromise Settlement in Injury Number 11-110863 (Date of Injury of July 21, 2011) between Claimant and Employer
- E. Claimant's Performance Appraisal from Employer for the period of June 2010 to June 2011
- F. Claimant's Performance Appraisal from Employer for the period of June 2008 to June 2009
- G. Claimant's Performance Appraisal from Employer for the period of June 2006 to June 2007
- H. Certified medical treatment records of Signature Health
- I. Certified medical treatment records of St. Louis Internal Medicine
- J. Certified medical treatment records of Dr. Brij Vaid at St. Louis Internal Medicine
- K. Certified medical treatment records of Gateway Cardiology
- L. Certified medical treatment records of Dr. Kenneth Floro, Jr.
- M. Certified medical treatment records of Dr. Thomas Hawk
- N. Medical treatment records of St. Anthony's Medical Center

Second Injury Fund Exhibits:

- I. Medical treatment record of St. Louis Internal Medicine dated July 13, 2011
- II. Medical treatment record of Dr. Benjamin Crane dated July 22, 2011

- III. Medical treatment record of Dr. Ravi Shitut dated August 2, 2011
- IV. Claim for Compensation for the July 21, 2011 accident
- V. Deposition of Claimant taken on February 15, 2013, page 34, lines 7-10

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

2) Any stray markings or writing on the Exhibits in evidence in this case were present on those Exhibits when they were admitted into evidence on June 2, 2014. No additional markings have been made since their admission on that date.

FINDINGS OF FACT:

Based on a comprehensive review of the evidence, including Claimant's testimony, the expert medical opinions and deposition, the vocational opinions and deposition, the medical treatment records, the other documentary evidence, and the deposition testimony of the other witness, as well as my personal observations of Claimant at hearing, I find:

- 1) **Claimant** is a 59-year-old, currently unemployed individual, who was working for Roto-Rooter Services Company (Employer) in the office assisting the production manager on or about July 21, 2011. He worked for Employer for almost 19 years, from 1994 to 2012, when he retired due to his disability. Claimant testified that he has not worked anywhere else since leaving Employer in 2012 because of the effects of all of his injuries/conditions. He did not think that he was capable of going back to work anywhere else. He applied for and received Social Security disability in August 2012.
- 2) Claimant testified that he is married, but currently separated. He graduated from high school and attended two years of college, before beginning to work for William P. Mahne Jewelry Company, where he was employed for 18 ½ years in positions such as return clerk, assistant buyer, credit manager and warehouse manager. Most of these positions involved office work, but the warehouse manager position was more physical labor.
- 3) When Claimant first started with Employer in 1994, he was working as a dispatcher. He worked in this position from 1994 until 2003. From 2003 until 2012, Claimant worked in the office assisting the production manager. He would perform filing, run reports and analyze guarantees and technician reports, in addition to serving as a liaison to the call center in Chicago and dealing with customer complaints as a customer service representative.
- 4) Claimant suffered from a number of pre-existing injuries/conditions that impacted his ability to work and function prior to July 21, 2011. First, he was diagnosed with Type 2 diabetes mellitus in 1994. He became insulin dependent in September 2005. He testified that as a result of the diabetes, he suffered from peripheral neuropathy that

- affected the fronts of his legs, as well as his hands and feet. He noted that the medications he took to deal with this condition also left him fatigued.
- 5) Claimant testified that he also had issues with his heart that were first diagnosed in 2006, which resulted in a pacemaker being implanted in 2009. As a result of his heart condition, Claimant testified that he suffered from fatigue, heart palpitations and chest pain.
 - 6) Medical treatment records from **Gateway Cardiology** (Exhibit K) document the cardiac complaints and various treatment Claimant received for his heart issues. They begin with a cardiac catheterization report dated July 28, 2003. In 2007 and 2008, Claimant was complaining about increased chest discomfort and increased palpitations, culminating in a pacemaker being implanted on April 3, 2009 at Des Peres Hospital to treat his sick sinus syndrome and sinus tachycardia. Despite the pacemaker placement, the records into 2010 still noted complaints of palpitations, and some references to Claimant feeling fatigued and tired.
 - 7) Claimant described problems with his knees prior to the July 21, 2011 work injury. He said that he had his first right knee surgery in 2002, followed by a lateral release surgery in 2005, and another right knee surgery in 2010 to repair a torn ligament. He also received a cortisone shot in his left knee because he was having trouble walking with the pain. Claimant testified that he had ongoing problems with his knees following this treatment, including pain, difficulty walking and difficulty kneeling or bending.
 - 8) On December 26, 2007, Dr. Lawrence Kriegshauser took Claimant to surgery at **St. Anthony's Medical Center** (Exhibit N) for his right knee. He performed an arthroscopic patellofemoral chondroplasty of the right knee and arthroscopic partial excision of the retropatellar fat pad, to treat Claimant's chronic right patellofemoral knee pain. Dr. Kriegshauser took Claimant back to surgery on June 15, 2010 and performed an arthroscopic partial right medial meniscectomy and chondroplasty of the patellofemoral joint, to treat Claimant's osteoarthritis and torn medial meniscus in the right knee.
 - 9) Claimant had a left shoulder surgery in 2010 for a torn labrum. He said that he had ongoing difficulty raising his arm above his head or reaching out in front of him.
 - 10) Medical treatment records from **St. Anthony's Medical Center** (Exhibit N) show that Claimant had left shoulder pain that was diagnosed after x-rays on October 30, 2009, as left acromioclavicular joint osteoarthritis. On April 8, 2010, Dr. David Dusek took Claimant to surgery for his left shoulder complaints. He performed a repair of a superior labrum anterior and posterior (SLAP) tear and subacromial decompression of the left shoulder, to treat Claimant's left shoulder bursitis and SLAP tear. He took Claimant back to surgery on July 29, 2010 for his continued left shoulder complaints. He performed an arthroscopic bursectomy of the left shoulder to treat mild recurrent bursitis of the left shoulder without a rotator cuff tear.

- 11) Claimant testified that he had a total of three surgeries to address abdominal hernias, one for an umbilical hernia and two for ventral hernias. He reported ongoing pain in his abdomen and fatigue from the medications he was prescribed to deal with these complaints.
- 12) Medical treatment records from **Dr. Kenneth Floro, Jr.** (Exhibit L) document the treatment Claimant received for ongoing abdominal pain from 2006 to 2010. The records confirm a diagnosis of a ventral hernia, which was repaired with mesh in 2006, but continued abdominal complaints into 2009, necessitating trigger point injections. When his complaints persisted, he underwent a second surgery on March 3, 2009 to remove the old mesh and repair a recurrent ventral hernia. By January 25, 2010, his abdominal pain complaints had returned and he had a neuroma formation, but no evidence of a recurrent ventral hernia. He was referred to St. Anthony's for pain management.
- 13) Claimant said that he was diagnosed with obstructive sleep apnea in 2005, for which he continues to use a CPAP machine. He reported that he was often very fatigued on account of this condition. He said that he would sometimes fall asleep at the wheel of his car or when talking to people on account of it.
- 14) Extensive medical treatment records from **St. Louis Internal Medicine** and **Dr. Brij Vaid** (Exhibits I and J) document the treatment Claimant has received for a myriad of medical conditions from November 9, 2007 through August 16, 2013, including GERD, uncontrolled diabetes mellitus, diabetic neuropathy, back pain, heart palpitations, depression/anxiety, abdominal issues/chronic constipation, asthma, urinary incontinence, obstructive sleep apnea, hypertension and hyperlipidemia. In fact, at his visit on July 13, 2011 (Exhibits I and SIF I), approximately one week prior to his injury at work, Claimant was receiving treatment for ongoing low back pain and following up for his diabetes mellitus and diabetic neuropathy conditions.
- 15) Finally, Claimant testified that he had prior episodes of low back pain that culminated in a low back surgery at L4-5 in May 2011. After a period of time off work recovering from his low back surgery, he returned to work for Employer in July 2011. He said that when he returned to work, he was back full time, but he needed help with lifting files and opening file drawers.
- 16) Medical treatment records from **Signature Health** (Exhibit H) show that from 2006 through 2010, Claimant had a number of lumbar epidural injections to attempt to alleviate his ongoing low back and sciatic pain complaints. Finally, Dr. Ravi Shitut took Claimant to surgery on May 5, 2011 for his longstanding low back and left-sided sciatica complaints. He performed a bilateral decompressive lumbar laminectomy at L4-5 to treat Claimant's bilateral lumbar spinal stenosis at that level. Following surgery, Claimant was reportedly doing better with decreased back and sciatic pain. By June 17, 2011, he was still walking with a cane, but was discharged from care with a prescription for some physical therapy.

- 17) Claimant testified that on July 21, 2011, he was sitting down in Employer's lunchroom to eat his lunch, when the chair collapsed under him and he fell to the floor injuring his low back. He said that the accident was witnessed by a co-worker, Bill Arand. Claimant testified that after he fell, he developed intense pain in his low back and down his right leg.
- 18) Claimant testified that he got 30 minutes for lunch during his workday, while working for Employer. He said that he may have clocked out, but he was not sure. He admitted that he clocked out some days before going to lunch. He explained that he was unable to drive and his wife drove him to work, so his only option for lunch was eating in the lunchroom Employer provided. However, he further explained that often during his lunch time, whether he was technically on the clock or not, other employees would catch him in the lunchroom to ask work-related questions, and he would also take calls during lunch on his Employer-provided cell phone. He estimated that 75-80% of the time, he was handling business during lunch, whether he was on the clock or not. He acknowledged that when he received calls, such as during lunch, he would not have the chance to clock back in, take the call, and then clock back out after the call before continuing his lunch. Claimant noted that the cell phone he had from Employer was with him at all times, and he handled calls for Employer, at all times, even off the clock. He even received calls at home and dealt with those business calls then. He said that he never turned down calls or refused to answer questions because he was not on the clock at the time.
- 19) One of Claimant's co-workers, **William Arand** (Exhibit C) testified by deposition on May 30, 2014, as to the events that occurred on July 21, 2011. He confirmed that he was in Employer's lunchroom with Claimant when he witnessed the chair Claimant was sitting in collapse, with Claimant falling to the floor. He explained that the back leg of the chair just started to bow out and Claimant went down to the floor in a matter of seconds. Mr. Arand also confirmed that Claimant would take phone calls for Employer and talk to co-workers about work issues during lunch, as well as sometimes continue handling calls and just eat lunch at his desk. However, he acknowledged that Claimant was not doing paperwork or handling a call at the moment his chair collapsed in the lunchroom on July 21, 2011.
- 20) Claimant's **Performance Appraisals from Employer** from June 2006 to June 2007 (Exhibit G), June 2008 to June 2009 (Exhibit F) and June 2010 to June 2011 (Exhibit E), consistently paint a picture of Claimant as a good and valued employee for Employer. Claimant consistently received high marks in all areas of his evaluations. In his last two appraisals there were comments about having to pull Claimant away from his desk so he can take a lunch break. There were also references to some attendance issues that Claimant was having as a result of health problems and sickness in his 2008-2009 and 2010-2011 appraisals.
- 21) Claimant testified that he sought treatment the next day at St. Clare Hospital, and, then, followed up with Dr. Shitut. He received an injection in his low back from Dr. Kumar, had some physical therapy, but ultimately was taken back to surgery for his low back with Dr. Shitut in April 2012. He said that he continued working for

Employer up until his surgery in April 2012, but, then, never went back to work after the low back surgery.

- 22) Medical treatment records from **Signature Health** (Exhibit H) document the treatment Claimant received from physicians there following his July 21, 2011 work injury. Claimant was examined by **Dr. Benjamin Crane** (Exhibits H and SIF II) on July 22, 2011. Dr. Crane took a consistent history of Claimant's injury at work the prior day, when the chair he was sitting on collapsed and he developed increased back pain and right leg symptoms. He diagnosed lumbar stenosis and prescribed medication. In subsequent notes, Dr. Shitut noted that Claimant's recent fall aggravated his degenerative disease and right-sided lumbar radiculitis. When his complaints persisted, despite the conservative treatment, Dr. Shitut took Claimant to surgery at St. Anthony's Medical Center on April 18, 2012 for his low back complaints. Dr. Shitut performed a bilateral laminectomy at L4-5 and TLIF and posterolateral spinal fusion at L4-5 using autologous bone and instrumentation (cages).
- 23) Claimant testified that after his release from treatment for his low back injury on July 21, 2011, he developed a number of subsequent conditions/injuries that required a number of surgeries to treat them. He said that he developed orthostatic blood pressure in March 2013. He had one carpal tunnel release surgery in December 2012 and the other carpal tunnel release surgery in January 2013. Claimant testified that he also had a left knee surgery in October or November 2012.
- 24) Medical treatment records from **Dr. Thomas Hawk** (Exhibit M) confirm that Claimant was diagnosed with bilateral carpal tunnel syndrome on December 18, 2012. Dr. Hawk took Claimant to surgery and performed a left carpal tunnel release on December 26, 2012 and a right carpal tunnel release on January 16, 2013. Following surgery, the records confirm that the numbness in his hands markedly diminished. The **Signature Health** (Exhibit H) records also confirm the left knee surgery performed by Dr. Lawrence Kriegshauser on November 16, 2012. Dr. Kriegshauser reportedly found mild chondromalacia and a meniscal tear in the left knee that was addressed.
- 25) Claimant and Employer resolved this July 21, 2011 injury (Injury Number 11-110863) by **Stipulation for Compromise Settlement** (Exhibit D) for the payment of \$51,048.01, or 25% permanent partial disability of the body as a whole referable to the lumbar spine, plus an amount for future medical treatment. The Second Injury Fund Claim was left open on the Stipulation. This Stipulation was approved by me on March 24, 2014.
- 26) The deposition of **Dr. David Volarich** (Exhibit A) was taken on March 19, 2014 by Claimant to make his opinions in this case admissible at trial. Dr. Volarich is an osteopathic physician, who is board certified in nuclear medicine, occupational medicine and as an independent medical examiner. He examined Claimant on one occasion, July 2, 2013, for the purpose of an independent medical examination at the request of Claimant's attorney and he provided no treatment. He issued his report in

this case on that same date, after his review of the medical treatment records and after performing a physical examination of Claimant. Dr. Volarich took a consistent history of the injury at work on July 21, 2011 and of Claimant's medical treatment and complaints following that injury, as well as of Claimant's numerous pre-existing conditions/injuries and complaints. Medically causally related to the work injury on July 21, 2011, Dr. Volarich diagnosed lumbar right leg radiculopathy secondary to new instability at L4-5 and a new protrusion right greater than left at L4-5, status post L4-5 laminectomy, fusion, bone grafting and instrumentation. He rated Claimant as having 30% permanent partial disability of the body as a whole referable to the lumbar spine on account of the July 21, 2011 injury and subsequent treatment. Pre-existing the July 21, 2011 work injury, Dr. Volarich diagnosed and rated the following conditions/injuries:

- 1) 20% of the body as a whole referable to the lumbar spine as a result of lumbar leg left radiculopathy secondary to canal stenosis with mild central bulging at L4-5, status post decompression laminectomy at L4-5 without discectomy;
- 2) 25% of the body as a whole as a result of insulin dependent diabetes mellitus with peripheral neuropathy involving both upper and lower extremities, and autonomic dysfunction causing gastropathy, neurogenic bladder and erectile dysfunction;
- 3) 15% of the body as a whole referable to the heart as a result of sick sinus syndrome, status post pacemaker insertion;
- 4) 20% of the body as a whole as a result of obstructive sleep apnea and asthma;
- 5) 60% of the right knee as a result of right knee internal derangement, status post five separate arthroscopic repairs with accelerated posttraumatic arthropathy;
- 6) 15% of the left knee as a result of left knee chondromalacia, status post nonoperative treatment;
- 7) 35% of the left shoulder as a result of left shoulder internal derangement, status post arthroscopic labral repair and subacromial decompression, followed by arthroscopic bursectomy; and
- 8) 15% of the body as a whole referable to the abdominal wall as a result of an umbilical hernia, status post three separate repairs.

Dr. Volarich also diagnosed three conditions subsequent to the July 21, 2011 work injury, including surgically treated left knee internal derangement, surgically treated bilateral carpal tunnel syndrome and surgically treated infected abdominal wall mesh. He noted but did not quantify the additional disability that exists for these conditions subsequent to the July 21, 2011 work injury. He opined that these pre-existing conditions represented a hindrance or obstacle to employment and he also placed a number of restrictions on Claimant's ability to be employed on account of all of these conditions. Dr. Volarich ultimately concluded that as a result of the combination of the July 21, 2011 work injury and all of his pre-existing medical conditions, Claimant was permanently and totally disabled and unable to compete for work in the open labor market. He specifically noted that Claimant was permanently and totally disabled prior to the development of those three subsequent conditions and the subsequent surgeries.

- 27) The deposition of **Mr. James England, Jr.** (Exhibit B) was taken on October 17, 2013 by Claimant to make his opinions in this case admissible at trial. Mr. England is a certified vocational rehabilitation counselor. He evaluated Claimant at his attorney's request on May 20, 2013 to determine whether Claimant was able to be employed in the open labor market. He reviewed the extensive medical treatment records and the medical opinions in the course of his evaluation. He issued a report dated July 24, 2013. He noted that Claimant looked tired and physically uncomfortable during his meeting with him. He determined that his academics would not prevent him from a variety of vocational alternatives. He also found that Claimant had transferable skills down to a sedentary level of exertion, but the restrictions from Dr. Volarich would limit Claimant to less than even a full range of sedentary work. Based on Dr. Volarich's opinions/restrictions and Claimant's presentation and description of his daily functioning, Mr. England opined that the combination of all of his problems prevents Claimant from being able to sustain regular employment. He believed Claimant was totally disabled and unable to work in the open labor market. On cross-examination, Mr. England agreed that many of Claimant's pre-existing conditions were hindrances or obstacles to employment or re-employment, including his diabetic condition/neuropathy, obesity, low back problems, knee problems, heart condition, hernia surgeries and left shoulder problems. Mr. England also admitted that the restriction that Claimant needed to rest as needed after the July 21, 2011 low back injury is enough to disqualify Claimant from work in the open labor market by itself, because there are no such jobs in the open labor market where one can lie down as needed. While Mr. England acknowledged that he took all of Claimant's medical conditions/problems into account when rendering his opinion, he also noted that even if he disregarded the wrists and abdominal wall issues, Claimant would still be unemployable in the open labor market given the rest of his problems/disabilities and complaints.
- 28) In terms of his current complaints, Claimant testified that he continues to have problems standing, kneeling, bending, sitting for any length of time, reaching and walking. He said that he now sleeps in a chair because of his ongoing back pain.
- 29) On cross-examination, the Second Injury Fund attempted to show some inconsistency in the way Claimant described how the injury occurred. They tried to show that in some places he may have described the injury as occurring when he was about to sit down and the chair collapsed, as opposed to he was already sitting when it collapsed. They also tried to impeach his credibility by pointing out his prior testimony from his **deposition on February 15, 2013** (Exhibit SIF V), wherein he indicated that they had to clock out for lunch, as opposed to his trial testimony that he was unsure whether he actually clocked out that day before going to lunch. On both accounts, I failed to find any significant discrepancies in Claimant's testimony that would negatively impact his credibility in this case.
- 30) I observed that when Claimant entered the courtroom to testify in this matter, he walked with a cane.

RULINGS OF LAW:

Based on a comprehensive review of the evidence, including Claimant's testimony, the expert medical opinions and deposition, the vocational opinions and deposition, the medical treatment records, the other documentary evidence, and the deposition testimony of the other witness, as well as my personal observations of Claimant at hearing, and based upon the applicable laws of the State of Missouri, I find:

There is no dispute in this case and parties have stipulated that Claimant sustained an accident on July 21, 2011, resulting in an injury to his low back. It is undisputed that Claimant was in Employer's lunchroom on that date, when the chair he was sitting in collapsed under him and he fell to the floor injuring his low back. Medical causation is also not at issue in this case. The undisputed evidence in the record shows that medically causally related to the July 21, 2011 injury, Claimant sustained lumbar right leg radiculopathy secondary to new instability at L4-5 and a new protrusion right greater than left at L4-5, status post L4-5 laminectomy, fusion, bone grafting and instrumentation. The medical treatment records and medical opinions of Drs. Shitut and Volarich support this aspect of the case. The main threshold issue, before addressing the nature and extent of disability and the Second Injury Fund liability, is whether the accident on July 21, 2011 arose out of and in the course of Claimant's employment for Employer.

Considering the date of the injury, it is important to note the statutory provisions that are in effect, including **Mo. Rev. Stat. § 287.800 (2005)**, which mandates that the Court "shall construe the provisions of this chapter strictly" and that "the division of workers' compensation shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts." Additionally, **Mo. Rev. Stat. § 287.808 (2005)** establishes the burden of proof that must be met to maintain a claim under this chapter. That section states, "In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true."

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

Issue 1: Did the accident arise out of and in the course of Claimant's employment for Employer?

Under **Mo. Rev. Stat. § 287.120.1 (2005)**, every employer subject to the Workers' Compensation Act shall furnish compensation for the personal injury of the employee by accident arising out of and in the course of employee's employment. According to **Mo. Rev. Stat. § 287.020.2 (2005)**, accident is defined as "an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an

injury caused by a specific event during a single work shift.” Further, under **Mo. Rev. Stat. § 287.020.3(1) (2005)**, “An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. ‘The prevailing factor’ is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.” Finally, under **Mo. Rev. Stat. § 287.020.3(2) (2005)**, an injury is deemed to arise out of and in the course of the employment only if the accident is the prevailing factor in causing the injury and 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.

Therefore, Claimant has the burden of meeting the two-prong test to establish that the accident arose out of and in the course of Claimant’s employment for Employer. Claimant must prove, first, that the accident is the prevailing factor in causing the injury, and, second, that 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.

In a Workers’ Compensation case, expert medical testimony is not necessarily needed to establish the cause of the injury, if causation is a matter within the understanding of laypersons. *Knipp v. Nordyne, Inc.*, 969 S.W.2d 236 (Mo. App. W.D. 1998) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). When the condition presented in a case is a sophisticated injury that requires surgical intervention or highly scientific technique for diagnosis, and especially when there is a serious question of pre-existing disability, then the proof of causation is not within the realm of lay understanding. *Id.* at 240.

In this case, I find that there is really no dispute that the accident, falling to the floor when the chair collapsed under him, is the prevailing factor in causing the injury, lumbar right leg radiculopathy secondary to new instability at L4-5 and a new protrusion right greater than left at L4-5, status post L4-5 laminectomy, fusion, bone grafting and instrumentation. This finding is supported by the Claimant’s credible testimony, as well as the competent, credible and reliable medical opinions of Dr. Volarich. Therefore, I find that Claimant has met his burden of proof with regard to the first prong of §287.020.3(2).

The consideration, then, shifts to the second prong of the statute, whether Claimant has met his burden of proving that the injury does not come from a hazard or risk unrelated to the employment, to which workers would be equally exposed outside of and unrelated to the employment in normal nonemployment life. Having considered the competent and substantial evidence in the record, I find that Claimant has also met his burden of proof on this second prong as well, and, as such, his accidental injury arose out of and in the course of his employment for Employer in this case.

In reaching my determination on this issue regarding the second prong of §287.020.3(2), it is necessary to consider a number of recent decisions by the Courts that have interpreted this section of the statute and have given some clarity to the meaning behind this section. To support their argument that this should not be a compensable Workers’ Compensation injury, the Second Injury Fund cites *Miller v. Missouri Highway and Transportation Commission*, 287 S.W.3d 671 (Mo. 2009), *Johme v. St. John’s Mercy Healthcare*, 366 S.W.3d 504 (Mo. 2012) and *Porter v. RPCS, Inc.*, 402 S.W.3d 161 (Mo. App. S.D. 2013). Conversely, to support the

contention that this injury did arise out of and in the course of employment, I found *Pope v. Gateway to the West Harley Davidson*, 404 S.W.3d 315 (Mo. App. E.D. 2012), *Dorris v. Stoddard County*, 2014 WL 350422 (Mo. App. S.D.) and *Randolph County v. Moore-Ransdell*, 2014 WL 3720444 (Mo. App. W.D.).

The determination in each of the cases cited by the Second Injury Fund turned on a specific factual finding of what Claimant proved he/she was doing at the time of the accident and whether the cause of the injury had a causal connection to the work activity other than the fact that it occurred at work. In *Miller*, the claimant experienced a popping in his knee, followed by pain, while walking briskly at work. The Court observed that, “The injury here did not occur because Mr. Miller fell due to some condition of his employment. He does not allege that his injuries were worsened due to some condition of his employment or due to being in an unsafe location due to his employment.” *Miller at 674*. In *Johme*, the Court found that her injury, turning and twisting her ankle and falling off her shoe, had no connection to her work activity other than the fact that it occurred in the office’s kitchen while she was making coffee. In *Porter*, the claimant could not even remember any details about how she fell or what caused her to fall. The Court held that, “there is no evidence that something about her work caused her to fall. Porter failed to prove she fell due to some condition of her employment or due to an unsafe location due to her employment.” *Porter at 172*. The Courts held that the injury in each case, the knee pop while walking, slipping off the shoe, and the unexplained fall, did not arise out of and in the course of employment, because the claimants provided no proof as to how those incidents had any connection to their employment, other than the fact that they all occurred while the claimants were at work. Courts have held that together these cases stand for the proposition that an injury is compensable and arises out of and in the course of employment, only if the injury occurred *because* Claimant was at work, as opposed to merely becoming injured *while* Claimant is at work. *Pope at 320*.

Conversely, in *Pope*, *Dorris* and *Randolph County*, the Courts have found that the accidents sustained by those claimants did arise out of and in the course of employment, by finding a causal connection between their injuries and their work activities, more so than that the injuries merely occurred at work. In *Pope*, the Court found that the risk source of the claimant’s injury, walking down steps in work boots while carrying a work-required helmet, was a risk to which the claimant was not equally exposed in his normal, nonemployment life. In *Dorris*, the Court found that the accident, tripping on a crack in the street while walking back to her office after looking at a new office building the employer was having built, showed evidence of a hazardous condition on the surface where the claimant was walking (cracks) in a place where the claimant was completing a task related to her work. The Court further held that the case was compensable because there was no evidence that the claimant had any exposure to this particular hazard (the cracks in that particular street), during her normal, nonemployment life. Finally, in *Randolph County*, the Court found that the claimant’s activity of squatting and twisting to remove a folder from a low filing cabinet resulted in a compensable claim because the work activity was the cause of the low back injury. In other words, she was not just bending, but bending to perform a specific work task that resulted in a compensable injury arising out of and in the course of employment.

In the case at bar, Claimant was in Employer’s lunchroom, sitting on one of Employer’s chairs, which collapsed, resulting in injury to his low back. Unlike *Porter*, we know the

mechanism of injury, the chair in the lunchroom collapsed. Unlike *Miller*, but in line with *Dorris*, I find that the collapsing chair in the lunchroom presented as an unsafe condition for Claimant in a location he was told to go by Employer. After all, Employer provided the lunchroom and in Claimant's performance appraisals, his supervisor noted that they had to pull Claimant away from his desk so he can take a lunch break. Finally, unlike *Johme*, there was no evidence produced to show that Claimant had ever experienced chairs collapsing on him outside of work, in normal nonemployment life, and the chair in question, was not only in Employer's lunchroom, but was also in a place where 75-80% of the time Claimant conducted business for Employer, even when he was off the clock on his lunch break. For all these reasons, I find that the case at bar is distinguishable from *Miller*, *Johme* and *Porter*, and more consistent with the holdings in *Pope*, *Dorris* and *Randolph County*. Accordingly, I find that the accident arose out of and in the course of Claimant's employment for Employer.

The Second Injury Fund argues that since Claimant was off the clock on lunch at the time of his injury, that it should not be compensable. I disagree. While being on or off the clock may be one indicator (or some evidence) of whether an injury should arise out of or in the course of employment, I find that it is not the sole or main determining factor for deciding that issue. In this case, while Claimant may have been off the clock and at lunch when the chair collapsed, I find that the evidence in this case also showed that 75-80% of the time, Claimant continued to work (take calls, deal with customer service issues, talk to other employees about work-related issues) while he was at lunch, in the lunchroom, off the clock. While Employer required that employees clock out before lunch, no evidence suggested that they discouraged Claimant or others from continuing to perform work while at lunch and off the clock in the lunchroom. There was no evidence of any policy Employer had that required employees to clock back in before handling business during the lunch break, nor any prohibition for employees to handle business during lunch, while off the clock. In fact, I find that it was actually to Employer's benefit to provide such a space for lunch, because then employees were closer to their workstations to be able to return to work after lunch, but more importantly, it provided a space for employees to gather and discuss work issues even during the lunch break and off the clock. For all these reasons, I find that Claimant being off the clock and at lunch at the time of the accident does not disqualify his accident from arising out of and in course of his employment.

The Second Injury Fund also argues that Claimant was equally exposed to the risk of a chair collapsing in his nonemployment life as he was while at work. They suggest that because of his weight, and in the absence of proof that the chair was defective, his Claim must fail. Again, I disagree. I find no evidence in the record to suggest that Claimant's weight resulted in other chairs outside of work, or any other chairs for that matter, to collapse on him. Certainly, there were other chairs that Employer provided to Claimant, at his desk for instance, that were not shown to collapse when he sat in them. It was just this chair in Employer's lunchroom. Further, I find that whether Claimant could prove the chair was defective is of no consequence to my ruling on this issue. The fact remains that Employer provided this chair in Employer's lunchroom for Claimant to use, and when using this chair, on Employer's premises, for the purpose for which it was intended to be used (sitting), Claimant was injured when the chair collapsed.

The facts in this case, taken as a whole, lead me to conclude that Claimant's accident did not come from a hazard or risk unrelated to the employment to which Claimant would have been

equally exposed outside of and unrelated to the employment in normal nonemployment life. That being the case, Claimant has met his burden of proof on the second prong of §287.020.3(2). Having previously found that Claimant also met his burden of proof on the first prong of that statute, I find that Claimant's accident at work on July 21, 2011 arose out of and in the course of his employment for Employer.

As the final two issues in this case are so inter-related, I will address both of them together in the same section of the Award.

Issue 2: What is the nature and extent of Claimant's permanent partial and/or permanent total disability attributable to this injury?

Issue 3: What is the liability, if any, of the Second Injury Fund?

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

In cases such as this one where the Second Injury Fund is involved, we must also look to **Mo. Rev. Stat. § 287.220 (2005)** for the appropriate apportionment of benefits under the statute. In order to recover from the Fund, Claimant must prove a pre-existing permanent partial disability existed at the time of the primary injury. Then to have a valid Fund claim, that pre-existing permanent partial disability must combine with the primary disability in one of two ways. First, the disabilities combine to create permanent total disability, or second, the disabilities combine to create a greater overall disability than the simple sum of the disabilities when added together.

In the second (permanent partial disability) combination scenario, pursuant to **Mo. Rev. Stat. § 287.220.1 (2005)**, the disabilities must also meet certain thresholds before liability against the Second Injury Fund is invoked, and they must have been of such seriousness so as to constitute a hindrance or obstacle to employment or re-employment should employee become unemployed. *Messex v. Sachs Electric Co.*, 989 S.W.2d 206 (Mo. App. E.D. 1999) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). The pre-existing disability must result in a minimum of 12.5% permanent partial disability of the body as a whole (50 weeks) or 15% permanent partial disability of a major extremity. These thresholds are not applicable in permanent total disability cases.

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

First, is Claimant permanently and totally disabled?;

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

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

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

Considering the competent and substantial evidence listed above, I find that Claimant is permanently and totally disabled, and unable to compete for work in the open labor market. Claimant credibly described the continuing pain and problems he has attributable to his various injuries/conditions that keep him from functioning fully and normally on a daily basis. This finding is supported by the competent, credible and reliable medical report and testimony of Dr. David Volarich, as well as the competent, credible and reliable vocational report and testimony of Mr. James England, Jr.

I find that doctors have placed significant restrictions on Claimant's ability to function in the workplace. Dr. Volarich, who provided the most comprehensive report on Claimant's condition, placed significant restrictions on his physical activities based on his various injuries/conditions. Dr. Volarich concluded that from a medical standpoint, based on the combination of all of his primary and pre-existing conditions, injuries and disabilities, he was permanently and totally disabled. Dr. Volarich's opinions, and Claimant's allegation of permanent total disability, was further bolstered by the report and testimony of Mr. James England, Jr., a vocational rehabilitation counselor, who confirmed that Claimant was not employable in the open labor market given the totality of his condition.

The Second Injury Fund argues that the opinions and testimony of Dr. Volarich and Mr. England should be discounted or disregarded because they used the wrong legal standard for determining if Claimant is permanently and totally disabled. The Fund suggests that their determination of total disability was merely based on a belief that Claimant was unable to work 40 hours a week, but could perhaps work part time or at least less than 40 hours a week. I disagree on the Fund's characterization of these experts' opinions. Based on a full reading of their opinions and testimony, I am left to conclude that the restrictions of Dr. Volarich limit Claimant to less than even the full range of sedentary work in the open labor market, which, in turn, leads to the conclusion that Claimant cannot obtain or maintain employment in the open labor market at the current time based on the combination of the limitations he has from his primary and pre-existing disabling conditions.

Based on the totality of the evidence submitted at hearing, I find the opinions of Dr. Volarich and Mr. England to be credible and properly supported by the rest of the medical evidence in this case. Therefore, I find that Claimant is permanently and totally disabled, and unable to compete for work in the open labor market.

Since Claimant is found to be permanently and totally disabled, the next step of the inquiry then is to determine the extent of Employer's liability for the last injury alone, and specifically to determine if Employer is solely responsible for that permanent total disability.

Based on my review of the competent and substantial evidence, I do not believe the last injury alone caused Claimant to be permanently and totally disabled. I do not find any credible evidence to suggest that Claimant's permanent total disability is the result of the last injury on July 21, 2011 alone. Neither of the experts, who provided opinions on disability or on his ability to work, including Dr. Volarich and Mr. England, indicated that just the last injury alone was responsible for Claimant's permanent total disability.

Claimant has had a long history of injuries/conditions to various parts of his body which pre-existed the July 21, 2011 work injury. These pre-existing injuries/conditions to the low back, body as a whole (diabetes), heart, body as a whole (obstructive sleep apnea and asthma), right knee, left knee, left shoulder and abdomen (hernias) caused Claimant to seek treatment, miss time from work and take medications for his complaints. Additionally, Dr. Volarich assigned some pre-existing permanent partial disability on account of each of these pre-existing conditions/injuries. I believe Claimant when he testified to the problems he experienced with these various injuries/conditions prior to the July 21, 2011 injury at work. Dr. Volarich testified that the combination of the primary and pre-existing injuries and conditions was the reason Claimant was permanently and totally disabled. Mr. England also similarly opined that the combination of the disabilities rendered Claimant permanently and totally disabled and unable to compete for employment in the open labor market. Quite simply, there is no medical or vocational evidence in the record to support a finding that the last injury alone caused the permanent total disability in the case.

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

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

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

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

In awarding permanent partial disability for this injury under these statutory provisions, it is, thus, necessary to deal with each of these sections. Considering the competent and substantial evidence listed above, I find that the medical opinion from Dr. Volarich demonstrates and certifies, within a reasonable degree of medical certainty, that Claimant sustained permanent partial disability as a result of his pre-existing injuries/conditions, as well as the work-related injury on July 21, 2011.

Based upon all of these findings, as well as based on Claimant's testimony and the medical evidence, I find that Claimant has 25% permanent partial disability of the body as a whole referable to the lumbar spine, attributable to the July 21, 2011 work injury. I arrived at this finding by taking into consideration the physical findings in the examinations of the physicians, including, but not limited to, Drs. Shitut and Volarich, as well as Claimant's continuing complaints and problems with his low back. I also took into consideration the prior conditions/injuries, complaints, symptoms, limitations and medical treatment for this same body part. Finally, I noted Claimant's settlement agreement with Employer that brought resolution to the claim against Employer prior to trial in this case.

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

With regard to the pre-existing injuries and disabilities Claimant has alleged, I find Claimant has provided credible testimony and/or evidence to explain the nature of the injuries/disabilities to his low back, body as a whole (diabetes), heart, body as a whole (obstructive sleep apnea and asthma), right knee, left knee, left shoulder and abdomen (hernias). He also credibly explained the various ways in which these disabilities impacted his ability to work. It is clear to me from Claimant's testimony and from review of the medical reports and opinions that the prior low back, body as a whole (diabetes), heart, body as a whole (obstructive sleep apnea and asthma), right knee, left knee, left shoulder and abdomen (hernias) were all disabling to some extent prior to the July 21, 2011 injury. Then, of course, there is the credible medical opinion from Dr. Volarich, as well as the vocational opinion of Mr. England, both of whom opine Claimant is permanently and totally disabled as a result of the combination of his primary and pre-existing disabilities to multiple parts of his body.

Accordingly, based on all of this evidence, I find that Claimant has met his burden of proof to show that he is permanently and totally disabled as a result of the combination of his primary lumbar spine disability, with his pre-existing disabilities to the low back, body as a

whole (diabetes), heart, body as a whole (obstructive sleep apnea and asthma), right knee, left knee, left shoulder and abdomen (hernias). Since the permanent total disability is the result of the combination of his disabilities, the Second Injury Fund has liability for this disability.

Having established the responsibility of the Second Injury Fund for the permanent total disability exposure in this Claim, there is yet one issue left regarding the amount and timing of the payments under the statute. I find that Claimant reached the point of maximum medical improvement for his July 21, 2011 injury on July 1, 2012. Between his injury on July 21, 2011 and his date of maximum medical improvement on July 1, 2012, Employer had responsibility to pay temporary total disability benefits for any periods of time that Claimant was unable to work while he was receiving medical treatment related to the work injury on July 21, 2011. Employer's liability in that regard was extinguished by virtue of the settlement reached between Claimant and Employer on March 24, 2014. Therefore, this date of maximum medical improvement is relevant only for the purpose of calculating Second Injury Fund liability.

Since Claimant reached maximum medical improvement on July 1, 2012 and Employer was responsible for all appropriate temporary total disability up through that date, I find that Claimant is permanently and totally disabled as of July 2, 2012.

By the terms of this award, Employer was responsible for 100 weeks of permanent partial disability at a rate of \$425.19. Therefore, from July 2, 2012 until June 2, 2014 (100 weeks), Employer had liability for \$425.19 per week, which Claimant and Employer settled by the terms of the Stipulation for Compromise Settlement that extinguished Employer's liability for this case.

Because the PTD and PPD rates are different, there is a differential due from the Second Injury Fund. Therefore, from July 2, 2012 until June 2, 2014 (100 weeks), Claimant is to receive \$94.64 per week, or the difference between the permanent partial and permanent total disability rates ($\$519.83 - \$425.19 = \$94.64$), from the Second Injury Fund.

Starting then on June 3, 2014, the Second Injury Fund is to pay \$519.83 per week for Claimant's lifetime, subject to review and modification by law.

CONCLUSION:

Claimant sustained an accident on July 21, 2011, resulting in an injury to his low back. Claimant was in Employer's lunchroom on that date, when the chair he was sitting in collapsed under him and he fell to the floor injuring his low back. Medically causally related to the July 21, 2011 injury, Claimant sustained lumbar right leg radiculopathy secondary to new instability at L4-5 and a new protrusion right greater than left at L4-5, status post L4-5 laminectomy, fusion, bone grafting and instrumentation. Claimant met his burden of proof that the accident is the prevailing factor in causing the injury (the first prong of §287.020.3(2)), and that it did not come from a hazard or risk unrelated to the employment to which Claimant would have been equally exposed outside of and unrelated to the employment in normal nonemployment life (the second prong of §287.020.3(2)), so, therefore, Claimant's accident at work on July 21, 2011 arose out of and in the course of his employment for Employer. Claimant sustained permanent partial disability as a result of this July 21, 2011 injury in the amount of 25% of the body as a whole referable to the lumbar spine. Employer was responsible for 100 weeks of compensation for permanent partial disability attributable to the July 21, 2011 injury.

Claimant is permanently and totally disabled as a result of the combination of the primary injury and pre-existing disabilities to the low back, body as a whole (diabetes), heart, body as a whole (obstructive sleep apnea and asthma), right knee, left knee, left shoulder and abdomen (hernias). Claimant reached maximum medical improvement for the July 21, 2011 injury on July 1, 2012 and became permanently and totally disabled as of July 2, 2012. Compensation from the Second Injury Fund is payable in the amount of \$94.64 per week from July 2, 2012 until June 2, 2014 (100 weeks), or \$9,464.00. Compensation from the Second Injury Fund is then payable from June 3, 2014 for the rest of Claimant's life in the amount of \$519.83 per week, subject to review and modification by law. Compensation awarded is subject to a lien in the amount of 25% of all payments in favor of James G. Krispin, for necessary legal services.

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