

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

Injury No.: 02-076147

Employee: Gary Abdullah
Employer: Waste Management of St. Louis (Settled)
Insurer: Indemnity Insurance of North America (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. We have reviewed the evidence, read the parties' briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Preliminaries

The parties asked the administrative law judge to resolve the following issues: (1) Second Injury Fund liability; (2) employee's average weekly wage and rate of compensation; and (3) dependency for purposes of *Schoemehl v. Treasurer of State*, 217 S.W.3d 900 (Mo. 2007).

The administrative law judge rendered the following findings and conclusions: (1) the Second Injury Fund is liable for permanent total disability benefits; (2) employee's average weekly wage was \$491.56 or (apparently a clerical error) \$491.46, and the resulting compensation rate is \$327.87 for both permanent partial and permanent total disability benefits; and (3) employee's wife is not entitled to survivor benefits pursuant to the *Schoemehl* decision.

Employee filed a timely Application for Review with the Commission alleging the administrative law judge erred in denying survivor benefits to employee's wife under *Schoemehl*.

The Second Injury Fund filed a timely Application for Review with the Commission alleging the administrative law judge erred: (1) in awarding permanent total disability benefits to employee; and (2) in setting employee's rate of compensation at \$327.87.

For the reasons explained below, we modify the award of the administrative law judge on the issues of: (1) average weekly wage and rate of compensation; and (2) benefits under the *Schoemehl* decision.

Findings of Fact

The administrative law judge's award sets forth the stipulations of the parties and the administrative law judge's findings of fact on the issues disputed at the hearing. We adopt and incorporate those findings to the extent that they are not inconsistent with the

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modifications set forth in our award. Consequently, we make only those findings of fact pertinent to our modification herein.

Compensation rate

Employee testified that employer paid him by the hour. Employee submitted a wage statement which provides the weekly total number of hours employee worked in the weeks preceding the work injury. The wage statement suggests employee generally worked between thirty and forty-four hours per week, but also suggests that he did not work at all during the four weeks from June 2 to June 29, 2002, and that his total hours dropped significantly during the weeks ending May 25, June 1, July 6, and July 13, 2002. The wage statement does not make clear whether the drop in employee's hours was owing to day-long absences from regularly scheduled work, shifts that lasted less than eight hours, or some other circumstance, and employee did not offer any testimony to explain the fluctuation in his hours. Employee did testify that he normally worked between 50 and 55 hours per week, but we find this testimony lacking credibility as to the thirteen weeks preceding the week in which employee was injured, because it conflicts with the wage statement.

We find the wage statement to be credible evidence of employee's earnings in the time period preceding the work injury. Consistent with the wage statement, we find employee's wages were fixed by the hour at \$13.42 in the thirteen weeks preceding the week of the work injury, and that he earned a total of \$3,440.96 during that time period. We find that employee did not work any hours for employer or earn any wages during the four weeks from June 2 to June 29, 2002.

Dependency of Linda Abdullah

Employee married Linda Susan Abdullah in St. Charles County, Missouri, on November 16, 2001. Employee testified that Mrs. Abdullah's maiden name was Bowen; we note that the documentary evidence suggests it was Schroeder. See *Transcript*, page 1566. Employee and Mrs. Abdullah were still married as of July 15, 2002, and they continue to be married. Mrs. Abdullah resided with employee and was financially dependent on employee for support as of July 15, 2002. Employee's claim for permanent total disability benefits was pending between January 9, 2007, and June 26, 2008.

Conclusions of Law

Compensation rate:

Section 287.250.1 RSMo provides the framework for calculating an employee's average weekly wage, and provides, as follows:

- (4) If the wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be computed by dividing by thirteen the wages earned while actually employed by the employer in each of the last thirteen calendar weeks immediately preceding the week in which the employee was injured or if actually employed by the employer for less than thirteen weeks, by the number of calendar weeks, or any portion of a week, during which the employee was actually employed by the employer. For purposes of computing the average weekly wage pursuant to this subdivision, absence of five regular or scheduled work days, even if not in the same calendar week, shall be considered as absence for a calendar week. ...

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...

(7) In computing the average weekly wage pursuant to subdivisions (1) to (6) of this subsection, an employee shall be considered to have been actually employed for only those weeks in which labor is actually performed by the employee for the employer and wages are actually paid by the employer as compensation for such labor.

The administrative law judge found, without explanation, that during the thirteen weeks preceding the week in which employee was injured, employee was absent for thirteen regular or scheduled work days in addition to the four weeks during which employee did not work any hours or earn any wages at all. It appears the administrative law judge assumed a forty-hour work week divided into five eight-hour shifts, then subtracted from forty the total hours employee worked during weeks where his hours fluctuated, and then divided the results by eight. But this approach ignores both employee's testimony on the subject and the wage statement itself, neither of which support the assumption that employee worked exactly forty hours per week. The administrative law judge's approach also assumes, absent any evidence, that the fluctuation in employee's hours was owing to absences from regular or scheduled work days, rather than some other circumstance. In any event, the administrative law judge found that those assumed thirteen days of absences should be converted into two weeks under the language of § 287.250.1(4) RSMo that provides "absence of five regular or scheduled work days, even if not in the same calendar week, shall be considered as absence for a calendar week."

The Second Injury Fund argues that the administrative law judge erred in converting the thirteen assumed days of absence into two week-long absences, because there was no evidence to show that the fluctuations in employee's hours were due to absences for an entire work day, let alone whether those days were regular or scheduled. The Second Injury Fund argues that employee's total wages for the time period should be divided by 9 instead of 7.

We agree. "A claimant has the burden of proving all of the material elements of the claim, and that includes sufficient proof for the Commission to determine the proper compensation rate." *Pavia v. Smitty's Supermarket*, 118 S.W.3d 228, 241-242 (Mo. App. 2003)(citation omitted). The wage statement submitted by employee does nothing to explain the fluctuation in employee's hours. The statement simply provides the total number of hours worked by week; it does not reveal employee's work schedule on any particular day. Consequently, we don't know whether the lower weekly totals are a result of employee's having been absent from one or more entire days of work, and if so, whether those were regular or scheduled work days. It's equally possible that employee's shifts fluctuated in length, or that employer simply didn't schedule employee for those hours. Employee did not provide any testimony to resolve these ambiguities.

We conclude employee's average weekly wage is \$382.33 (\$3,440.96 divided by 9), which, pursuant to § 287.200.1(4) RSMo, results in a compensation rate of \$254.89 for permanent total disability benefits.

Dependent's right to benefits under Schoemehl:

At oral arguments in this matter on January 23, 2013, the parties announced that they had reached a stipulation regarding the *Schoemehl* issue involved in this case.

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Thereafter, the parties submitted to the Commission proposed language regarding the *Schoemehl* issue which they agreed should be included in a modified award. According to that proposed language, the parties stipulate as follows:

Employee Gary Abdullah's wife, Linda Bowen Abdullah, is entitled to receive employee's permanent total disability benefits in the event she remains married to employee and employee predeceases her while they remain married. Her entitlement to permanent total disability benefits shall cease upon her death or remarriage.

To the extent the administrative law judge's comments, analysis, and conclusions on the *Schoemehl* issue departed from the foregoing stipulation, we reverse those conclusions. Because the issue has been resolved by stipulation of the parties, there is no need for us to render our own conclusions of law as to the *Schoemehl* issue involved in this case.

Award

We modify the award of the administrative law judge as to the issues of the appropriate rate of compensation for permanent total disability benefits, and employee's wife's entitlement to benefits under *Schoemehl v. Treasurer of State*, 217 S.W.3d 900 (Mo. 2007).

Employee is entitled to permanent total disability benefits from the Second Injury Fund at the rate of \$254.89 per week.

In all other respects, we affirm the award.

The award and decision of Chief Administrative Law Judge Grant C. Gorman, issued March 7, 2011, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fees 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 1st day of March 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Gary Abdullah

Injury No. 02-076147

Dependents: None

Employer: Waste Management of St. Louis (Settled)

Additional Party: Second Injury Fund

Insurer: (Settled)

Hearing Date: November 29, 2010

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: GCG/ln

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 15, 2002
5. State location where accident occurred or occupational disease was contracted: St. Charles County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was lifting a garbage container and injured his back.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Low Back
14. Nature and extent of any permanent disability: 12.5% of the body as a whole.
15. Compensation paid to-date for temporary disability: Unknown
16. Value necessary medical aid paid to date by employer/insurer? Unknown

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- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$491.46
- 19. Weekly compensation rate: \$327.87 for PPD and PTD benefits
- 20. Method wages computation: Statutory calculation

COMPENSATION PAYABLE

21. Amount of compensation payable: \$0

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:
\$327.87 payable by SIF weekly beginning September 9, 2003
and continuing for Claimant's lifetime.

TOTAL: SEE AWARD

23. Future requirements awarded: None

Said payments to begin as of the date of this Award 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:

Diane Sandza

Employee: Gary Abdullah

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: Gary Abdullah

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Dependents: None

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Waste Management of St. Louis (Settled)

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

Additional Party Second Injury Fund

Insurer: (Settled)

Checked by: GCG/ln

PRELIMINARY STATEMENT

Hearing on the above-referenced case was held before the undersigned Administrative Law Judge on November 29, 2010 at the Division of Workers' Compensation in St. Charles, Missouri. Gary Abdullah (Claimant) was present, and represented by Diane Sandza. The liability of Waste Management of St. Louis (Employer) and Indemnity Ins. Co. (Insurer) was previously settled. Assistant Attorney General Barbara Toepke represented the Second Injury Fund. Ms. Sandza requested a fee in the amount of 25%. The parties submitted post-trial briefs.

STIPULATIONS

The parties entered into the following stipulations:

1. On or about July 15, 2002, Claimant sustained an accident arising out of and in the course of his employment resulting in injury to Claimant's back. The accident occurred in St. Charles County, Missouri.
2. Claimant was an employee of employer pursuant to Chapter 287 RSMo.
3. Venue is proper in St. Charles, Missouri.
4. Employer received proper notice of the Claim.
5. Claimant filed a claim within the time allowed by law.

ISSUES

1. The rate of compensation for permanent partial disability and permanent total disability.
2. Liability of the Second Injury Fund.
3. Dependency of Linda Bowen Abdullah per *Schoemehl*.

SUMMARY OF THE EVIDENCE

Only evidence necessary to support this award will be summarized. Any objections not expressly ruled on during the hearing or in this award are now overruled. Certain exhibits

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offered into evidence may contain handwritten markings, underlining and/or highlighting on portions of the documents. Any such markings on the exhibits were present at the time they were offered by the parties. Further, any such notes, markings and/or highlights had no impact on any ruling in this case.

Claimant offered the following exhibits, which were received into evidence without objection:

- A. Stipulation for Compromise Settlement for 12.5% PPD of the back and body as a whole
- B. Stipulation for Compromise Settlement (Injury No.: 02-019520) for 7.5% PPD right ankle
- C. Waste Management Wage Statement
- D. Dr. David Kennedy (Pgs. 1-3)
- E. Dr. Ronald Pearson/Tri County (Pgs. 1-45)
- F. Work Performance Center (Pgs. 1-24)
- G. HealthSouth MRI (Pgs. 1)
- H. St. John's Mercy Medical Center (Pgs. 1-221)
- I. Dr. Van Hargraves (Pgs. 1-320)
- J. Dr. Paul Mennes (Pgs. 1-11)
- K. Orthopedic Center of St. Louis (Pgs. 1-16)
- L. Barnes West County Hospital (Pgs. 1-196)
- M. Social Security Disability File (Pgs. 1-478)
- N. Dr. David Volarich deposition
- O. Delores Gonzalez deposition
- P. Marriage Certificate

The Second Injury Fund offered the following exhibits which were received into evidence without objection:

- I. James England deposition
- II. Claimant's deposition of June 14, 2006

Claimant testified that he is 55 years of age, left handed and has completed one year of college education. He is able to read, write and do basic mathematical equations. Claimant uses the computer two to three times a week at 30 minutes per interval to catch up on current events, astronomy and the weather. Claimant is not currently working and was last employed in September, 2002 at Waste Management in Foristell, Missouri as a residential waste truck driver. He is currently receiving Social Security Disability benefits and has since 2003. His regular duties included driving a front loader, rear loader and side loader to pick up waste containers. He was required to lift 60 to 70 pounds manually at one time and lifted approximately 3,000 to 9,000 pounds per day. He was also responsible for minor maintenance of the trucks. He worked alone but would occasionally have a helper. He worked 8 to 10 hour a day, 5 days a week and overtime

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on Saturdays. He worked on average about 50 hours a week. Claimant applied for Social Security Disability benefits on September 23, 2002. Leading up to his last day worked he was on light duty which consisted of office work and auditing driver's routes. At the time he last worked he was averaging 40 hours of light duty at a rate of approximately \$13.25 to \$13.75 per hour.

On July 15, 2002 Claimant was performing his regular job duties as a residential waste truck driver when he bent over to pick up a trash can that was half full of water and sustained an injury to his low back. Claimant testified he initially experienced severe pain in the low back radiating into the tailbone and down the right leg to about mid-thigh, numbness in the right thigh and tingling in the right leg. He had never experienced symptoms of that severity prior to July 15, 2002.

Claimant filed a Workers' Compensation claim against Waste Management (Employer) for his back injury. Employer accepted the claim and paid for all medical treatment. Diagnostic studies and physical therapy were prescribed. He was diagnosed with low back pain and right sacroiliac joint dysfunction. Claimant was taken off of work by Dr. Pearson on July 24, 2002 and remained off until he was returned to light duty on August 11, 2002. He was given restrictions of no lifting over 10-15 pounds, avoid repetitive bending and twisting and no driving of trash vehicles. He was given a job that consisted of office clerical work and auditing the residential driver's routes. He remained on light duty through August 30, 2002. (Exhibit E)

Claimant continued to suffer from severe low back pain radiating into the right leg and numbness in the right thigh. On September 5, 2002 Claimant underwent an MRI of the lumbar spine that revealed degenerative disc disease at L4-5 with a focal central protrusion lateralizing to the left and effacement of the descending left L5 nerve root. (Exhibit G) On September 12, 2002 Dr. Pearson indicated Claimant could return to work limited duty with no lifting over 40 pounds, drive with a helper and lift trash one half of the work shift for two weeks and then return to full unrestricted duty beginning September 24, 2002. (Exhibit E) Dr. Pearson further indicated that given Claimant's poor level of conditioning and frequent treatments for his underlying renal disease he may consider finding a lighter job. (Exhibit E)

Claimant was still on light duty when he stopped working for Waste Management in September, 2002. Claimant does not recall the exact date he last worked but testified that he applied for Social Security Disability benefits on September 23, 2002. Claimant testified he was unable to continue working due to his low back pain and kidney problems. Specifically, Claimant stated that the pain in his low back and right leg, as well as the fatigue that he was experiencing and his kidney issues made it impossible for him to continue to work on a repetitive basis. On September 25, 2002 he underwent a series of three Solu-Medrol infusions as a result of his kidney condition. (Exhibit I)

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On January 7, 2003, he was examined by Dr. Kennedy for continuing low back pain. Dr. Kennedy felt that Claimant's numerous other medical problems were complicating a full recovery from his back injury. Claimant was not a candidate for epidural steroid injections or any other type of injections because he was taking Coumadin. Claimant has been taking Coumadin for conditions associated with his kidney disease since 1990. (Exhibit M, Pgs. 238 & 255) Dr. Kennedy did not think Claimant could return to work in his former capacity primarily in view of his significant underlying medical problems. Specifically he did not think he should be in an occupation that involved heavy lifting. Dr. Kennedy imposed permanent work restrictions of no lifting more than 20 pounds or doing more than occasional bending, twisting, or stooping. He specifically notes in his record of January 7, 2003, "primarily by virtue of his underlying medical problems from the standpoint of the injury alone I do not know that he necessarily would need restrictions of this nature but his overall medical condition puts him at high risk for recurrences." (Exhibit D)

Claimant suffered from a number of physical conditions, as well as cognitive and retention issues prior to July 15, 2002. He had problems with reading, retention, concentration, staying on task and with memory. The majority of his problems were related to fatigue. Claimant suffers from Membranous Glomerulonephritis and has since the late eighties. He has undergone extensive treatment for this condition as well as other conditions that have developed as a result.

When Claimant was 14 years old he was involved in a bicycle accident that resulted in being struck in the left flank by his handle bar. He was diagnosed with a torn left renal vein and thrombosis. He was hospitalized several times for proteinuria. In March of 1989 he slipped in the bathtub and suffered a blow to his left kidney. He was diagnosed with recurrent membranous glomerulopathy. He was given prednisone and Cytoxan in varying doses. In September 1989 his renal function had stabilized. He continued to experience difficulties with hypertension, muscle cramping, difficulty sleeping, and generalized edema. He was diagnosed with hypertension, chronic thrombosis of the left renal veins and a varicocele in 1993 and eventually underwent a left spermatic vein ligation to relieve a left varicocele and testicular pain in February 1994. In 1999 he developed right hip pain and Dr. Berni diagnosed right greater trochanteric bursitis as well as avascular necrosis of the right hip. His treatment consisted of injections and a core decompression of the right hip in 2001. (Exhibit M)

In July 2001 Dr. Cheval performed a renal biopsy revealing stage I and II membranous glomerulonephritis and focal segmental glomerulosclerosis. He had a CT scan of the abdomen in August 2001 that suggested the possibility of renal vein thrombosis. A week later he was hospitalized for a pulmonary embolus at Barnes Hospital. Thereafter he was released to return to work full duty. Waste Management requested a second opinion regarding his ability to work and he was subsequently examined and released to full duty. (Exhibit M, Pg. 359)

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Several months later, in December 2001, Italian protocol treatments were recommended for his kidney condition. This consists of an IV Solu-Medrol and 70 mg of prednisone daily for a week followed by a 6 mg of chlorambucil daily and 80 mg of Lasix. In January 2002 he was diagnosed with avascular necrosis of the right hip, plantar fasciitis of the left foot as well as peripheral edema and visual disturbances affecting his ability to drive and was admitted into St. Luke's Hospital for significant cellulitis of his right leg. From February 27, 2002 to March 1, 2002 he underwent a series of three Solu-Medrol infusions. (Exhibit M)

On or about March 12, 2002 Claimant slipped as he was climbing out of his truck and twisted his right ankle. He was diagnosed with right foot/ankle sprain and received conservative treatment. He was prescribed Vicodin, a splint and post-operative orthopedic shoe. (Exhibit E) After initially missing work he was returned to light duty on March 25, 2002. (Exhibit E) His restrictions consisted of sit down duties and standing and walking as tolerated, no driving and to wear an ankle brace. (Exhibit E) On April 11, 2002 his restrictions were changed to no lifting greater than 10 pounds, sit down duties primarily, standing and walking as tolerated and no driving of trash vehicles, only utility vehicles. (Exhibit E) On April 29, 2002 Claimant started another series of Italian protocol treatments. (Exhibit M) He was released for his ankle injury on May 7, 2002 with the restriction of no driving imposed as a result of the Italian protocol treatments. (Exhibit E) Following his March 12, 2002 right ankle work injury and leading up to the July 15, 2002 back work injury he continued to suffer from occasional pain and daily ankle stiffness. He received a workers' compensation settlement from Waste Management for this injury in the amount of 7.5% permanent partial disability of the right ankle (Exhibit B). He was released to return to work on July 9, 2002 and was found to be medically stable to perform full unrestricted duty. (Exhibit E)

Prior to July 15, 2002 Claimant had difficulties performing his job. Specifically Claimant testified that he had difficulties with his right hip and leg, right ankle and fatigue prior to the work injury. He could not put much pressure or weight on his right leg because of severe hip pain and occasional right foot pain. As a result he would favor his right leg by placing most of his weight on his left leg. Following his right hip core decompression he required the use of a helper on some occasions for lifting. In addition, he suffered from occasional back pain radiating into the sacroiliac joint, muscle spasms in the low back and right leg and fatigue. He missed time from work due to his right hip condition, Italian protocol treatments and subsequent complications from his kidney disease but was always able to return to full unrestricted duty. Despite all of these difficulties and extensive medical treatment he was able to work 40 hours a week, sometimes up to 55 hours a week, on a regular basis.

Since his July 15, 2002 low back injury, Claimant continues to suffer from constant aching pain with stiffness in the sacroiliac joint area radiating into the right buttock and down the

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postereolateral aspect of his right thigh. (Exhibit N). He testified that his pain varies in intensity and increases with activity. He is unable to sit, stand or walk for longer than 30-40 minutes. Bending, turning, twisting, and climbing stairs cause significant increase in low back and right leg pain. He can't lift more than 20 pounds. Fixed positions and weather changes cause increased pain. His most comfortable position is to lie flat on his back. His back and right leg pain affect his sleeping habits. He averages about 4 to 5 hours a night, waking regularly due to back and right leg pain. His lack of sleep coupled with his back and right leg pain and the symptoms associated with his kidney condition cause him great fatigue requiring him to nap daily. Claimant takes several daily medications for his back pain and kidney condition. He testified that he takes Morphine daily. These medications along with the years of steroid use affect his ability to read, concentrate and stay on task.

Subsequent to his July 15, 2002 work injury Claimant has been diagnosed with diabetes mellitus secondary to steroid use and bilateral avascular necrosis of the femoral heads. (Exhibit M) On April 30, 2003 he underwent a right total hip replacement. (Exhibit M) Post-operative x-rays demonstrated a crack in the distal tip of the stem and he returned to surgery for an open reduction internal fixation of the right femur fracture. He has continued to follow up with Dr. Mennes for annual examinations and blood work for persisting proteinuria. (Exhibit J)

Opinion Evidence

Dr. David Volarich examined Claimant on January 3, 2007 for purposes of a rating evaluation. Dr. Volarich testified that he examined Claimant's cervical, thoracic and lumbar spine, left hip, right hip, right knee, left ankle and right ankle. At the time of the examination, Claimant complained of ongoing difficulties with his right lower extremity, including but not limited to aching pain radiating from the ankle and midway up the anterior aspect of the right lower extremity varying in intensity and pain radiating into the arch of his right foot and all toes causing cramping and frequently waking him at night. He noted difficulty with standing longer than 15 to 20 minutes, climbing stairs and weather changes. He experience intermittent numbness in the right foot and all toes radiating into his right lower leg and walking on uneven ground results in loss of balance.

In addition he complained of constant aching pain with stiffness in his right SI joint radiating into his right buttock and down the posterior lateral aspect of his right hip. His pain is accompanied by intermittent numbness and tingling with occasional pain radiating into his tailbone, both hips and right testicle. His pain increases with cold, damp weather changes, with maintaining a fixed position of sitting or standing for longer than 30 minutes and climbing stairs down more than up. Walking on uneven ground and bending, turning, twisting or lifting greater than 20 pounds causes pain. He awakens frequently every night due to back pain and requires frequent changes in positions for relief.

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Leading up to and continuing beyond his work injury of July 15, 2002, he experienced difficulties as a result of his renal failure and treatment with steroids. He experienced chronic fatigue, aching flank pain bilaterally, and severe pain in the hips, right greater than left. Claimant's pain would increase with climbing stairs, walking on uneven ground and would frequently keep him awake at night. He noted instability and weakness in his right lower extremity especially when fatigued. He had extreme fatigue throughout the day which required him to nap twice a day. His kidney disease and its sequelae were a severe hindrance to him on the job leading up to his July 15, 2002 work injury.

Findings upon physical examination revealed a weak right hip girdle at +3/5, weak quadriceps and hamstring on the right at +4/5, a 4% loss in lumbar range of motion with extension, 20% loss of lumbar range of motion with right lateral flexion and a 20% loss of lumbar range of motion with left lateral flexion. Straight leg raise caused right hip discomfort and tightness of the right thigh at 45 degrees. There was a 30% loss in all motion in all planes of the right hip, a 5% loss in right ankle range of motion with dorsiflexion and plantar flexion, pain to palpation in the lateral compartment along the anterior talofibular ligament of the right ankle and pain to palpation at the right great toe at the metatarsophalangeal joint.

Based upon his physical examination and review of the medical records, Dr. Volarich diagnosed a disc protrusion at L4-5 causing intermittent lower extremity paresthesias as a result of the July 15, 2002 work injury. In addition, he diagnosed the following pre-existing illnesses: right ankle and foot strain/sprain, right leg/foot cellulitis, mild chronic lumbar syndrome, left renal vein thrombosis, nephrotic syndrome, Membranous Glomerulonephritis requiring multiple courses of prednisone and chemotherapeutic agents, hypercoagulable state causing pulmonary embolism requiring ongoing anticoagulation, avascular necrosis of the right hip status post core decompression, persistent right hip pain and hypertension.

Dr. Volarich provided a rating of 22.5% permanent partial disability of the body as a whole referable to the lumbar spine as a result of the July 15, 2002 work injury, 15% permanent partial disability of the right lower extremity rated at the ankle due to the March 12, 2002 ankle strain/sprain, 2 - 3% permanent partial disability of the right lower extremity rated at the leg near the ankle due to the pre-existing cellulitis, 7.5% permanent partial disability of the body as a whole rated at the lumbosacral spine for pre-existing mild chronic lumbar syndrome, and 75% permanent partial disability of the body as a whole due to advanced renal disease in the form of nephrotic syndrome due to membranous glomerulonephritis that pre-existed his July 15, 2002 work injury.

Dr. Volarich testified that the combination of Claimant's disabilities created a substantially greater disability than the simple sum or total of each separate injury and illness and

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a loading factor should be added. In addition, he imposed permanent restrictions referable to the spine and lower extremities. Dr. Volarich opined that Claimant is unable to engage in any substantial gainful activity nor can he be expected to perform in an ongoing work capacity in the future. Based upon his medical assessment alone he opined that Claimant is permanently and totally disabled as a result of the work injury of July 15, 2002 in combination with his extensive pre-existing medical conditions. (Exhibit N)

Delores Gonzalez is a vocational rehabilitation counselor that testified on behalf of the Claimant. Ms. Gonzalez testified that she met with Claimant in her office in Sunset Hills. At the time of her evaluation, Claimant complained that since his July 15, 2002 work injury he has continued to suffer from constant pain in his right hip, low back, neck and left hand. He is able to stand for approximately 5 minutes before having to rest and can walk 30 to 40 minutes at a time using a cane or walker but must avoid uneven terrain. He cannot bend, kneel and has difficulty climbing due to low back pain. He loses balance especially when stooping. He is able to sit 45 to 60 minutes depending upon the chair and must frequently change positions. He is unable to lift more than 20 pounds with both arms and must avoid repetitive movements. He often experiences shortness of breath. He experiences increased pain in cold, wet and humid conditions or with weather changes. He is unable to sleep more than 4 to 5 hours at a time waking up at least 2 times during the night because of back pain. In addition, he takes naps twice a day at about an hour each.

Based upon her interview and review of the medical records, Delores Gonzalez concluded that Claimant, due to the severity of his physical limitations, could not perform his past relevant work and did not have transferable skills. In addition she testified that Claimant's age of 55 affects his employability making it harder for him to learn new skills and adapt. She opined that he had the residual functional capacity of less than sedentary work and as such was not capable of any competitive work for which there is a reasonable stable job market. Ms. Gonzalez's opinions regarding Claimant's employability were based upon the combination of his pre-existing injuries, and his primary injury low back of July 15, 2002. (Exhibit M)

James England is a vocational rehabilitation counselor that testified on behalf of the Second Injury Fund. Mr. England has never met nor has he spoken with Claimant. Mr. England opined that, while significant, the restrictions imposed by Dr. Kennedy and Dr. Volarich alone would not permanently and totally disable Claimant and that he would be able to return to his past relevant work as an office clerk or in data entry. He further opined that Claimant's kidney problems could potentially disable him; however he did not see a combination effect with the work injury because the restrictions for the work injury alone would allow Claimant to return to several types of past relevant work. Mr. England deferred all opinions regarding functional limitations, permanent partial disability and synergy to the medical professionals. (SIF Exhibit I)

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FINDINGS OF FACT AND RULINGS OF LAW

Based on the competent and substantial evidence presented, including the testimony of Claimant, my personal observations, expert medical and vocational testimony, and all other exhibits received into evidence, I find:

Under Missouri law, it is well-settled that the claimant bears the burden of proving all the essential elements of a workers' compensation claim, including the causal connection between the accident and the injury. *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo.App. W.D.2002); see also *Davies v. Carter Carburetor*, 429 S.W.2d 738, 749 (Mo.1968); *McCoy v. Simpson*, 346 Mo. 72, 139 S.W.2d 950, 952 (1940). While the claimant is not required to prove the elements of his claim on the basis of "absolute certainty," he must at least establish the existence of those elements by "reasonable probability." *Sanderson v. Porta-Fab Corp.*, 989 S.W.2d 599, 603 (Mo.App. E.D.1999) (citing *Cook v. Sunnen Prods. Corp.*, 937 S.W.2d 221, 223 (Mo.App. E.D.1996)). However, 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).

RATES OF COMPENSATION

There is a dispute between the parties concerning the permanent total disability rate of compensation. Section 287.250.1 (4) RSMo., states, in part:

if [an employee's] wages are fixed by the day, hour, or by the output of the employee his weekly wage shall be computed by dividing by thirteen the wages earned while actually employed by the employer for each of the last thirteen calendar weeks immediately preceding the week in which the employee was injured.

The parties stipulated to the admission of Exhibit C, Claimant's wage statement from Waste Management. Exhibit C reflects Claimant's wages for the thirteen (13) weeks preceding his July 15, 2002 work injury. Exhibit C reflects an hourly rate of \$13.42 thereby corroborating Claimant's testimony that he earned between \$13.25 and \$13.75 per hour at the time of his July 15, 2002. Weeks seven (7) through nineteen (19) represent the thirteen (13) weeks preceding his date of injury. Claimant's gross wages for this time period were \$3,440.96. In weeks twelve (12) through nineteen (19), Claimant did not work a full forty (40) hour week as scheduled. Section 287.250.1 (4) RSMo. states, [the] absence of five regularly scheduled work days, even if not in the same calendar week, shall be considered an absence for a calendar week.

In four of the calendar weeks, Claimant did not work at all; those four weeks are excluded from the calculation. In the remaining weeks, there are 13 additional days of absences. Pursuant to Section 287.250.1 (4) RSMo., there are two additional five day periods which can be

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excluded, totaling 6 weeks which are excluded from the calculation. Three calendar days of absences remain that are not excluded from the calculation, as the statute does not direct that a three day period of absences can be excluded from the calculation. Consequently, Claimant's gross wages of \$3,440.96 are divided by seven weeks, resulting in an average weekly wage of \$491.56. An average weekly wage of \$491.46 results in rates of compensation of \$327.87 for both permanent partial and permanent total disability.

PERMANENT TOTAL DISABILITY

Claimant suffered a work related injury on July 15, 2002. The injury resulted in a disc protrusion at L4-5. Based on the testimony of Claimant, the medical evidence, and other evidence, including but not limited to the stipulation for compromise settlement, I find Claimant suffered a permanent partial disability of 12.5% of the body as a whole referable to the lumbar spine at L4-5 as a result of the injury of July 15, 2002. This injury is not totally disabling in and of itself.

In computing permanent and total disability in the situation where claimant suffers from a previous disability, the ALJ ... first determines the degree of disability as a result of the last injury. *Garcia v. St. Louis County*, 916 S.W.2d 263, 266 (Mo.App. E.D. 1995). The ALJ ... then determines "the degree or percentage of employee's disability that is attributable to *all injuries or conditions existing at the time the last injury was sustained...*" § 287.220.1, RSMo. Cases have repeatedly held the nature and extent of the preexisting disability is measured as of the date of the primary injury. See, i.e. *Gassen v. Lienbengood* 134 S.W.3d 75, 80 -81 (Mo.App. W.D., 2004), citing *Carlson v. Plant Farm*, 952 S.W.2d 369, 373 (Mo.App.1997); and § 287.220.1. ("In order to calculate Fund liability, the [fact finder] must determine the percentage of the disability that can be attributed solely to the preexisting condition *at the time of the last injury.*") [T]he claimant must establish that an actual or measurable disability existed at this time. *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 214 (Mo.App.1999 *Id*; see also *Tidwell v. Kloster Co.*, 8 S.W.3d 585, 589 (Mo.App. 1999).

Claimant had a preexisting medical condition which is a hindrance or obstacle to employment. Based on the competent and substantial evidence presented, I find that at the time of the July 15, 2002 work injury, Claimant had a 60% permanent partial disability to the body as a whole as a result of nephrotic syndrome, Membranous Glomerulonephritis requiring multiple courses of prednisone and chemotherapeutic agents, hypercoagulable state causing pulmonary embolism requiring ongoing anticoagulation, avascular necrosis of the right hip status post core decompression, persistent right hip pain and hypertension. This finding takes into account the testimony of Claimant, the medical records and objective tests in evidence, and the opinions of the rating physicians.

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Claimant had a preexisting injury to the right ankle which is a hindrance or obstacle to employment. Based on the competent and substantial evidence presented, I find that at the time of the July 15, 2002 work injury, Claimant had a 7.5% permanent partial disability to the right lower extremity at the ankle. This finding takes into account the testimony of Claimant, the medical records and objective tests in evidence, and the opinions of the rating physicians.

Claimant sustained a disc protrusion at L4-5 causing right leg paresthesias as a result of his July 15, 2002 work injury. In addition, he suffers from membranous glomerulonephritis a severe kidney disorder that has required multiple courses of prednisone and chemotherapeutic agents. His kidney condition has resulted in a myriad of other medical conditions and treatment as well. As a result of his back injury he suffers from constant low back and right leg pain, numbness in the right thigh and intermittent tingling in the right leg. As a result his kidney condition Claimant suffers from constant right hip pain, muscle cramping and fatigue. These symptoms along with his low back and right leg pain cause difficulty sleeping, walking, standing and sitting for any extended period of time. The most comfortable position is lying down. He testified that his sleep is regularly interrupted because of his back pain. This, and the side effects associated with his kidney condition, cause extreme fatigue, requiring him to nap daily. In addition to these complaints the years of steroid use has caused problems with reading, retention, concentration, staying on task and with memory.

Although Claimant was not under any permanent work restrictions for any of these conditions leading up to July 15, 2002, he testified he was restricted in his activities and had difficulties performing his job due to symptoms associated with these conditions. Specifically Claimant testified that he had difficulties with his right hip and leg, right ankle and fatigue prior to the work injury. He could not put much pressure or weight on his right leg because of severe hip pain and occasional right foot pain. As a result he would favor his right leg by placing most of his weight on his left leg. Following his right hip core decompression he required the use of a helper on some occasions for lifting. In addition, he suffered from occasional back pain radiating into the sacroiliac joint, muscle spasms in the low back and right leg and fatigue. He missed time from work due to his right hip condition, Italian protocol treatments and subsequent complications from his kidney disease but was always able to return to full unrestricted duty. Despite all of these difficulties and extensive medical treatment he was able to work 40 hours a week, sometimes up to 55 hours a week, on a regular basis.

On July 15, 2002 he sustained a disc protrusion at L4-5 resulting in paresthesias. As a result, Claimant continues to suffer from constant aching pain with stiffness in the sacroiliac joint area radiating into the right buttock and down the posterolateral aspect of his right thigh. (Exhibit N). He testified that his pain varies in intensity and increases with activity. He is unable to sit, stand or walk for longer than 30-40 minutes. Bending, turning, twisting, and

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climbing stairs cause significant increase in low back and right leg pain. He can't lift more than 20 pounds. Fixed positions and weather changes cause increased pain. His most comfortable position is to lie flat on his back. His back and right leg pain affect his sleeping habits. He averages four to five hours of sleep per night, waking regularly due to back and right leg pain. His lack of sleep coupled with his back and right leg pain and the symptoms associated with his kidney condition cause him great fatigue requiring him to nap daily. Claimant takes several daily medications for his back pain and kidney condition. He testified that he takes Morphine daily.

As a result of Claimant's low back injury of July 15, 2002, he was given permanent work restriction by Dr. Kennedy of no lifting more than 20 pounds or doing more than occasional bending, twisting, or stooping. (Exhibit D) Specifically Dr. Kennedy did not think he should be in an occupation that involved heavy lifting. (Exhibit D) Dr. Kennedy felt that Claimant's numerous other medical problems were complicating a full recovery from his back injury. (Exhibit D) He did not feel claimant was a candidate for epidural steroid injections or any other type of injections because he was on Coumadin. (Exhibit D) Claimant has been taking Coumadin for symptoms associated with his kidney condition since 1990. (Exhibit M, Pg. 238, 255) Dr. Kennedy did not think Claimant could return to work in his former capacity primarily because his significant underlying medical problems put him at high risk for recurrences of low back pain and injury. (Exhibit D)

Dr. Volarich and Delores Gonzales testified that Claimant was permanently and totally disabled. (Exhibit N & O) Specifically Dr. Volarich opined that based upon his medical assessment alone it is his opinion that Claimant is permanently and totally disabled as a result of the work related injuries of March 12, 2002 and July 15, 2002 in combination with each other as well as in combination with his extensive past preexisting medical conditions. (Exhibit N) Dr. Volarich was the only medical expert to testify with regard to permanent total disability. Delores Gonzales testified that Claimant had the residual functional capacity of less than sedentary work and as such was not capable of any competitive work for which there is a reasonable stable job market. (Exhibit O) The testimony of Claimant and the opinions of Dr. Volarich and Ms. Gonzalez are credible.

Claimant reached maximum medical improvement September 24, 2002, which represents the date he was released from treatment and removed from limited duty by Dr. Ronald Pearson. At that time Dr. Pearson also recommended Claimant find "a lighter line of work."

Claimant has met his burden, and is permanently and totally disabled as a result of the combination of preexisting injuries and conditions, and the primary injury of July 15, 2002. The Second Injury Fund is therefore liable for permanent total disability benefits commencing 50 weeks after September 24, 2002, the date of maximum medical improvement, or September 9, 2003 in the amount of \$327.87 per week for life.

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DEPENDENCY OF SPOUSE PER SCHOEMEHL DECISION

In the case of *Schoemehl v. Treasurer of the State of Missouri*, 217 S.W.3d 900 (Mo. 2007), the Missouri Supreme Court found that the claimant's wife was considered the employee for purposes of permanent total disability benefits because the claimant was deceased. Since the decision in the *Schoemehl* case in January 2007, the Missouri Legislature amended the statute specifically to overturn the *Schoemehl* decision. This amendment was effective as of June 2008. The issue in Mr. Abdullah's case is whether the dependents have a vested right in the permanent total disability benefits. The controlling case for this issue is *Strait v. Treasurer of Missouri*, 257 S.W.3d 600 (Mo. banc 2008). *Strait* indicates that in order for dependents to receive permanent total disability payments "after the death of the claimant is dependent on whether the mother's claim was final -- or was still pending -- at the time of [her] death." *Strait*, at 602. In *Strait*, the claimant's case was still pending at the time of her death. The Supreme Court found that if Rosalyn Strait's claim was closed, then *Schoemehl* would not be applied to allow the substitution of her dependents as beneficiaries. *Strait*, at 602.

Since the Missouri Supreme Court's decision in *Strait*, there have been a handful of cases before the Eastern and Western districts, as well as the Labor and Industrial Relations Commission (LIRC), on this issue. The LIRC recently handed down an opinion which provides the proper analysis in these cases. In *Goad v. Treasurer of the State of Missouri*, Injury Number 07-104044, handed down on July 22, 2010, the LIRC analyzed a dependent's rights much more closely and with consideration as to the "vesting" of dependent's rights. Ms. Goad alleged a work related injury on August 13, 2007, after the *Schoemehl* decision (January 9, 2007) and prior to the legislative fix (June 26, 2008). While her claim remained open and pending with the Division of Workers' Compensation, the employee, Ms. Goad, died on April 15, 2009, of causes unrelated to her work injury. In its decision in *Goad*, the LIRC asked if the husband had any "vested rights" under the *Schoemehl* decision. The LIRC noted that Ms. Goad died after the June 26, 2008, changes in the statute. The LIRC found that the June 2008 amendments cannot be retroactively applied if they are "substantive." Substantive amendments are ones which "take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attached a new disability in respect to transactions or considerations already passed." *State ex rel. St. Louis-San Francisco Railway Co. v. Buder*, 515 S.W.2d 409, 410 (Mo. banc 1974)(emphasis in LIRC Award). The LIRC found that "a vested right must be something more than a mere expectation based upon an anticipated continuance of existing law." *St. Board of Registration for the Healing Arts v. Boston*, 72 S.W.3d 260, 265 (Mo. App. 2002). After reciting the law applicable to its determination as to the affect of the 2008 amendments on Mr. Goad's rights to get employee's permanent total disability benefits, the LIRC held that because the husband's rights to the employee's benefits were subject to divestment up until the date of her death, then he did not have a vested right in the benefits prior to the legislative fix.

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Since the *Schoemehl* holding and the subsequent legislative fix, there has been much confusion regarding the dependency issue. However, the *Strait* holding has been interpreted to mean that a case must be pending between January of 2007 and June of 2008, and a dependent's rights must have become vested by the death of the employee while the case is pending. The legislative fix in June of 2008 is a substantive right and is not retroactive. Mr. Abdullah has not passed away, and so his dependents do not have a vested right to his benefits. Linda Bowen Abdullah is not entitled to survivor benefits pursuant to the *Schoemehl* decision.

Attorney Diane Sandza is granted a lien in the amount of 25% of the proceeds of this Award for necessary legal services provided.

Made by: /s/ Grant C. Gorman
Grant C. Gorman
Chief Administrative Law Judge
Division of Workers' Compensation

This award is dated and attested to this 7th day of March, 2011.

/s/ Naomi Pearson
Naomi Pearson
Division of Workers' Compensation