FINAL AWARD ALLOWING COMPENSATION
(In Compliance with the January 3, 2013, Mandate
from the Missouri Court of Appeals for the Eastern District)

Injury No.: 01-071426

Employee: Larry Abt

Employer: Mississippi Lime Company

Insurer: Federal Insurance Company

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

Preliminaries

On December 11, 2012, the Missouri Court of Appeals for the Eastern District issued an opinion affirming in part, reversing in part, and remanding the March 13, 2012, decision of the Labor and Industrial Relations Commission (Commission). *Abt v. Mississippi Lime Company*, ED98282 (Mo. App. Dec. 11, 2012).

By mandate dated January 3, 2013, the court reiterated its reversals as to the Commission's determinations and remanded the matter to the Commission for reconsideration.

Findings of Fact

On January 15, 2001, employee was using a locomotive to transport rail cars between a loading area and a rail yard.[1] Employee was standing on the side of the locomotive while driving it and looking behind him to ensure that he did not derail. When employee looked forward, he observed a truck stopped in the locomotive's path on the railroad tracks. Employee was unable to stop the locomotive before it collided with the truck. Employee's body hit the truck before he "ended up on the ground." As a result of the accident, employee sustained a degloving injury[2] to his left calf, injuries to his lower back, and fractured ribs.

At the time of the primary injury, employee suffered from a number of preexisting conditions. Employee was morbidly obese, fractured his left wrist in 1982, had suffered from bilateral lower extremity cellulitis and/or phlebitis resulting in hospitalizations in 1993, and was diagnosed with bilateral lower extremity swelling, rashes, and bilateral dermatitis of his legs in 1999. As a result of these diagnoses to his lower extremities, employee had been instructed to wear elastic stockings and to keep his legs elevated whenever possible. However, progressive swelling of the left lower leg resulted in employee being admitted to Ste. Genevieve Memorial Hospital on September 6, 1999. He was discharged on September 15, 1999. As a result of employee's hospitalization and post-operative care, he missed a month of work and returned to employment on

[1] There is some inconsistency throughout the record regarding the date of injury. In some instances, the date of injury is listed as January 15, 2001, and in other instances, it is listed as January 16, 2001. The employee's Claim for Compensation lists January 15, 2001, as the date of injury, therefore, we will use that date in this decision.

[2] In a degloving injury, a section of skin is torn from the underlying tissue.

October 4, 1999. At the time of discharge, he was again instructed to keep his left leg elevated with no prolonged standing or excessive ambulation.

Following employee's January 15, 2001, primary injury and subsequent recovery, a May 7, 2001, functional capacity evaluation determined employee to be employable at a heavy workload demand level. Employee went back to work for employer in May 2001. Employee returned to work at his previous job for 4½ years until December 2005. The only assistance employee required in performing his job during this time was lifting 100 lb. doors on a locomotive. He required this assistance due to back complaints, but not the result of any residual disability with his left leg.

On January 26, 2005, employee sustained a lower back injury at work while lifting. On February 26, 2005, employee sustained an injury to his left ankle. In May 2005, employee developed left wrist discomfort, which necessitated conservative care and diagnostic evaluation. In October 2005, employee was hospitalized at Ste. Genevieve Memorial Hospital for 4-5 days for lymphedema and cellulitis of the lower left leg and was treated with antibiotics.

Employee did not notify employer as to why he was hospitalized in October 2005, nor did employee ever request additional medical care for his left leg from employer after May 1, 2001. Employee went back to work following the October 2005 hospitalization, but was only able to work for a week or two due to left leg swelling. Employee officially quit his job in December 2005.

Dr. Tate opined that employee reached maximum medical improvement on September 3, 2001. She further opined that as a result of the primary injury employee sustained 7% permanent partial disability to his left calf. Dr. Tate did not attribute any other permanent disability to the primary injury. Further, she testified that employee would be able to sustain employment. However, she also stated that due to his bilateral venous stasis, lymphedema, and cellulitis, standing might be difficult and he would be restricted to a sedentary job with a limited amount of walking or standing up to one hour at a time for a total of three hours a day.

Dr. Cadiz noted in his August 9, 2002, report that employee had a preexisting condition of venous insufficiency, bilaterally, and that the January 2001 incident was a soft tissue acute injury, superimposed upon a chronic condition. Dr. Cadiz stated in his September 5, 2002, report that the acute injury from the January 2001 accident had resolved.

Dr. Poetz provided three separate independent medical evaluation reports, one in 2004, 2007, and 2010. In 2004, Dr. Poetz opined that as a result of the primary injury employee sustained 60% permanent partial disability to the left lower extremity at the knee, 25% permanent partial disability of the body as a whole for the rib injury, and 30% permanent partial disability of the body as a whole referable to the lumbar spine injury. With respect to employee's preexisting disabilities, Dr. Poetz opined that employee suffered from 10% permanent partial disability of the left leg for phlebitis, 10% permanent partial disability of the left leg for cellulitis, 25% permanent partial disability of the left wrist, 10% permanent partial disability of the body as a whole for astigmatism,

presbyopia, and myopia, and 30% permanent partial disability of the body as a whole referable to his morbid obesity and metabolic syndrome. Dr. Poetz further opined in this 2004 report that "[t]he combination of the present and prior disabilities results in a total which exceeds the simple sum by 10-15%."

In Dr. Poetz's 2007 report, all of his ratings remained the same except his rating for employee's lower left extremity. In 2007, he opined that as a result of the primary injury employee sustained 70% permanent partial disability of the lower left extremity at the left knee, as opposed to his 60% rating in 2004. In addition, Dr. Poetz also opined in his 2007 report that employee is permanently totally disabled as a result of his primary injuries combining with his preexisting disabilities. Dr. Poetz's conclusions in his 2010 report mirrored those in his 2007 report.

Vocational expert, Wilbur Swearingen, concluded that employee is permanently and totally disabled as a result of the primary injury in isolation.

Employee filed a claim for compensation in April 2003. On March 21, 2011, an ALJ held a hearing on the claim. Employee and employer advised the ALJ that the claim involved three issues: 1) the "nature and extent of disability, PTD vs PPD"; 2) Second Injury Fund liability; and 3) employer's liability for past medical expenses.

Procedural History

The ALJ issued an award denying employee's claim for permanent total disability benefits against employer and the Second Injury Fund. In arriving at this decision, the ALJ found that Mr. Swearingen's report and Dr. Poetz's 2007 and 2010 reports were not credible because they lacked information and "failed to review records concerning employee's injury to his left ankle in February 2005, left wrist problem in May 2005, neck problem in October 2005, right elbow and hand in October 2005, and left leg hospitalization in October of 2005." The ALJ also held that "[t]he record clearly supports a finding that employee's permanent total disability condition was a result of subsequent deterioration and not a result of employee's … work injury."

The ALJ did, however, award permanent partial disability benefits against employer for the primary injury and enhanced permanent partial disability benefits against the Second Injury Fund. The ALJ found that as a result of the primary injury employee sustained 30% permanent partial disability of his left lower extremity at the 160 week level, 4% permanent partial disability of the body as a whole referable to the ribs, and 15% permanent partial disability of the body as a whole referable to the lumbar spine. With respect to employee's preexisting disabilities, the ALJ found that employee suffered from 15% permanent partial disability of the left wrist, 5% permanent partial disability of the body as a whole referable to phlebitis of the left leg, 5% permanent partial disability of the body as a whole referable to cellulitis of the left leg, 5% permanent partial disability of the body as a whole referable to astigmatism with presbyopia and myopia, and 7.5% permanent partial disability of the body as a whole referable to morbid obesity with metabolic syndrome.

The ALJ found that employee's primary injury disabilities to his lower left extremity and lumbar spine combined with his preexisting left wrist disability to create greater overall disability than their simple sum. The ALJ assessed 15% enhanced permanent partial disability against the Second Injury Fund.[3]

In addition to the aforementioned findings, the ALJ found employer liable for past medical expenses in the amount of $3,266.03. These past medical expenses were incurred by employee for lumbar treatment provided by Dr. Kuenzel at Physicians Health and Rehab (1/14/02 – 3/31/04). The ALJ denied employee's claim for past medical expenses related to treatment provided by Ste. Genevieve Memorial Hospital (10/23/05 – 11/01/05), Mid America Rehab (11/01/05 – 11/22/05), and Dr. Pearson (10/23/05 – 10/12/06). The ALJ found that the denied expenses are "a result of subsequent deterioration and not related to [e]mployee's January [15], 2001, work related injury."

Employee filed an Application for Review with the Commission alleging the ALJ erred in: 1) finding Mr. Swearingen's report and Dr. Poetz's 2007 and 2010 reports not credible; 2) finding employee permanently totally disabled as a result of subsequent deterioration; and 3) denying his claim for future medical care. Employee also argued in his brief that the ALJ erred in denying him past medical expense reimbursement for his treatment with Dr. Kuenzel and his October 2005 hospitalization at Ste. Genevieve Memorial Hospital.

On March 13, 2012, the Commission issued an award modifying the amount of permanent partial disability enhancement awarded to employee. The Commission found that employee's other primary and preexisting disabilities should be included in the calculation despite the fact that they do not each, individually meet the statutory thresholds in § 287.220 RSMo. The Commission adopted and affirmed the ALJ's award with respect to all other issues.

Employee appealed to the Missouri Court of Appeals for the Eastern District. Employee essentially raised the same arguments with the court as he did with the Commission.

As mentioned above, on December 11, 2012, the court issued an opinion affirming in part, reversing in part, and remanding the March 13, 2012, decision of the Commission. *Abt v. Mississippi Lime Company*, ED98282 (Mo. App. Dec. 11, 2012). In said opinion, the court first addressed the rejection of Mr. Swearingen's report and Dr. Poetz's 2007 and 2010 reports. The court found that Dr. Poetz's 2010 report addressed employee's 2005 injuries and hospitalization. The court determined that this unimpeached evidence directly contradicts the Commission's finding that in 2010, Dr. Poetz "lack[ed] information and failed to review records concerning [employee's] injury to his left ankle in February 2005, left wrist problem in May 2005, neck problem in October 2005, right elbow and hand in October 2005, and left leg hospitalization in October of 2005." Therefore, the court held that the Commission's rejection of Dr. Poetz's 2010 opinion was not supported by substantial and competent evidence.

[3] The ALJ excluded all other primary and preexisting disabilities from the calculation of enhanced permanent partial disability because he determined they did not meet the statutory thresholds provided in § 287.220 RSMo.

The court found that the Commission's decision to reject Dr. Poetz's 2007 report and Mr. Swearingen's report was supported by competent and substantial evidence. Therefore, the court affirmed that portion of the Commission's decision.

The court next addressed employee's contention of error by the Commission in finding employee permanently and totally disabled solely from a subsequent deterioration of his preexisting conditions. The court held that none of the medical experts' opinions supported this conclusion and, therefore, the Commission's finding is not supported by substantial and competent evidence. See *Angus v. Second Injury Fund*, 328 S.W.3d 294, 302 (Mo. App. 2010)(holding that the Commission's award was not supported by substantial and competent evidence where no expert medical testimony supported the Commission's conclusion as to medical causation of the claimant's permanent total disability).

Lastly, the court addressed employee's argument that the Commission erred in denying reimbursement for certain past medical expenses. The court focused on the language of the award stating that the denial was "[b]ased on the evidence **and my above findings**...." (emphasis added). The court pointed out that said "above findings" included the Commission's rejection of Dr. Poetz's 2010 opinion and the Commission's finding that employee's permanent total disability resulted solely from subsequent deterioration of his preexisting conditions. Based on the court's determination that the Commission erred in making both of those findings and that the Commission did not specify what evidence it found persuasive, the court concluded that it could not meaningfully determine whether the Commission's conclusion was supported by substantial and competent evidence.

By mandate dated January 3, 2013, the court reiterated its reversals as to the Commission's determinations that: 1) Dr. Poetz's 2010 report did not consider employee's 2005 medical history; 2) subsequent deterioration of the preexisting disabilities solely accounted for employee's permanent total disability; and 3) employee was not entitled to reimbursement of the 2005 and 2006 medical expenses. Further, the court remanded this matter to the Commission for reconsideration of the award in light of the foregoing.

In accordance with the court's mandate, we issue this new decision with additional, specific findings supporting our previous conclusions.

Additional Findings and Discussion

Despite the fact that Dr. Poetz accounted for employee's 2005 medical history in his 2010 report, we still do not find his 2010 opinion that employee is permanently and totally disabled as a result of his primary injuries combining with his preexisting disabilities persuasive. Even considering Dr. Poetz's 2010 opinion, we still find that the great weight of the evidence supports Dr. Poetz's 2004 opinion that employee's primary injuries combine with his preexisting disabilities to result in only enhanced permanent partial disability.

Employee's work accident occurred on January 15, 2001. The most significant injury employee sustained as a result of this accident was the degloving injury to his left leg. While employee suffered from preexisting bilateral lower extremity venous stasis, lymphedema, phlebitis and cellulitis, he was treated for this primary injury for only five months before returning to full duty, heavy lifting work for an additional 4½ years. The

only assistance employee required during this period of employment involved lifting 100 lb. locomotive doors.

We find that employee's primary injuries combined with his preexisting disabilities to result in only 15% enhanced permanent partial disability. We find that this conclusion is supported by the opinions of Drs. Tate, Cadiz, and Poetz (2004 report), as well as employee's history of returning to full duty, heavy lifting work for 4½ years after the primary injury.

With respect to past medical expenses, we note that while employee included reimbursement for past medical expenses as an argument in his brief filed with the Commission, he did not include this issue in his Application for Review. For this reason, we deem the issue not preserved for our review and abandoned.

> An applicant for review of any final award, order or decision of the administrative law judge shall state specifically in the application the reason the applicant believes the findings and conclusions of the administrative law judge on the controlling issues are not properly supported. It shall not be sufficient merely to state that the decision of the administrative law judge on any particular issue is not supported by competent and substantial evidence.

8 CSR 20-3.030(3)(A).

"It has become virtually hornbook law that [8 CSR 20-3.030(3)(A)] means any issue not included in a timely application for review is not preserved for review by the Commission or any appellate court." *Stonecipher v. Poplar Bluff R1 Sch. Dist.*, 205 S.W.3d 326, 332 (Mo. App. 2006).

For the benefit of the parties, we note that had the issue of past medical expenses been properly raised in employee's Application for Review, we still would affirm the ALJ's denial. Employee testified that he barely recalled any of his medical history and deferred to the records for nearly every fact regarding the same. We find that employee failed to provide sufficient testimony causally linking the relevant treatment and medical bills to the January 15, 2001, work injury. See *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105, 111-12 (Mo. banc 1989).

In addition to the aforementioned, we specifically find, based upon employee's unequivocal testimony, that at no time after being released in May of 2001, did employee request further medical care to treat the primary injury. Therefore, regardless of whether employee properly raised this issue, or whether the medical care was reasonably necessary to cure and relieve him from the injuries of the compensable accident, employer is not responsible for these medical bills because employer was not given a reasonable opportunity to provide treatment. *Anderson v. Parrish*, 472 S.W.2d 452, 457 (Mo. App. 1971).

Award

We have reconsidered this matter in light of the court's December 11, 2012, opinion. Based upon our review of the entire record and the aforementioned additional findings

listed herein, we again award employee 124 weeks[4] of permanent partial disability benefits against employer and 36.0375 weeks[5] of enhanced permanent partial disability benefits against the Second Injury Fund. We specifically find that employee is not permanently totally disabled solely as a result of the primary injury, nor as a result of the primary injury combining with his preexisting disabilities.

We find that employee failed to include the issue of past medical expenses in his Application for Review filed with the Commission and, therefore, the issue is not preserved for our review.

The award and decision of Administrative Law Judge Carl Strange, is attached and incorporated to the extent it is not inconsistent with the findings listed herein.

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

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

Given at Jefferson City, State of Missouri, this 6th 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

[4] 124 weeks = 48 weeks for left knee + 16 weeks for ribs + 60 weeks for lumbar spine.

[5] .15 x 240.25 weeks of total PPD.

ISSUED BY DIVISION OF WORKERS' COMPENSATION

AWARD

Employee: Larry Abt Injury No. 01-071426

Dependents: N/A

Employer: Mississippi Lime Company

Additional Party: Second Injury Fund

Insurer: Federal Insurance Company

Hearing Date: March 21, 2011 Checked by: CS/rf

SUMMARY OF FINDINGS

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? January 16, 2001.

5. State location where accident occurred or occupational disease contracted: Ste. Genevieve, 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 happened or occupational disease contracted: Employee was injured when he was operating a locomotive and a truck hit the locomotive throwing the employee off of it onto the truck.

12. Did accident or occupational disease cause death? N/A

13. Parts of body injured by accident or occupational disease: Left lower extremity at the level of the knee, ribs referable to the body as a whole, and lumbar spine referable to the body as a whole.

14. Nature and extent of any permanent disability: 30% of the left lower extremity at the level of the knee, 4% of the body as a whole referable to the ribs, 15% of the body as a whole referable to the lumbar spine, & a pre-existing 15% of the upper left extremity at the level of the wrist (See Findings).

15. Compensation paid to date for temporary total disability: $10,199.32

16. Value necessary medical aid paid to date by employer-insurer: $19,358.59

17. Value necessary medical aid not furnished by employer-insurer: $3,266.03 (See Findings).

18. Employee's average weekly wage: Not calculated.

19. Weekly compensation rate:

    $599.96 for temporary total disability and permanent total disability; and
    $314.26 for permanent partial disability.

20. Method wages computation: By Agreement.

21. Amount of compensation payable:

    a. Employee awarded permanent partial disability from the employer-insurer in the amount of $38,968.24 (See Findings).
    b. Employee awarded previously incurred medical aid of $3,266.03 (See Findings).
    c. Employee awarded permanent partial disability benefits from Second Injury Fund in the amount of $6,328.41 (See Findings).

22. Second Injury Fund liability: Yes (See Findings).

22. Future requirements awarded: N/A

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall 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: Robert Lenze.

FINDINGS OF FACT AND RULINGS OF LAW

On March 21, 2011, the employee, Larry Abt, appeared in person and by his attorney, Robert Lenze, for a hearing for a final award. The employer-insurer was represented at the hearing by its attorney, Matthew Mocherman. The Second Injury Fund was represented by its attorney, Assistant Attorney General Gregg Johnson. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows.

UNDISPUTED FACTS:

1. On or about January 16, 2001, Mississippi Lime Company was operating under and subject to the provisions of the Missouri Workers' Compensation Act and its liability was insured by Federal Insurance Company.
2. On or about January 16, 2001, the employee was an employee of Mississippi Lime Company and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. On or about January 16, 2001, the employee sustained an accident during the course of his employment.
4. The employer had notice of employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's rate for temporary total disability and permanent total disability is $599.96 and his rate for permanent partial disability is $314.26.
7. The employee's injury is medically causally related to the work injury on or about January 16, 2001.
8. The employer has furnished $19,358.59 in medical aid to employee.
9. The employer has paid temporary total disability benefits for 17 weeks at a rate of $599.96 per week for a total of $10,199.32.

ISSUES:

1. Previously Incurred Medical Aid.
2. Nature and Extent of Disability.
3. Liability of the Fund.

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

A. Medical Records of Ste. Genevieve County Memorial Hospital 05/31/1991 to11/28/2007;

B. Medical Records of Point Basse Family Healthcare/Ste. Genevieve Health Group 05/13/1991 to 04/22/2008;
C. Withdrawn;
D. Medical Records of Dr. Joseph Sharlow 10/25/2004 to 05/31/2001;
E. Medical Records of Dr. Theodore A. Mueller 04/15/1999;
F. Medical Records of Dr. Richard Pearson 05/05/1999 to 10/11/2005;
G. Medical Records of Ste. Genevieve County Memorial Hospital Home Health Agency 01/19/2001 to 01/29/2001;
H. Medical Records of PRO REHAB 04/05/2001 to 04/30/2001;
I. Medical Records of Physicians Health and Rehab 01/14/2002 to 03/31/2004;
J. Medical Records of Bloomsdale Family Health Center 03/18/2004 to 05/16/2005;
K. Medical Records of Mid American Rehab 11/01/2005 to 11/22/2005;
L. Medical Bills of Physicians Health and Rehab 01/14/2002 to 03/31/2004;
M. Withdrawn;
M1. Medical Bills of Ste. Genevieve County Memorial Hospital;
N. Withdrawn;
N1. Medical Bills of Dr. Richard Pearson;
O. Deposition of Wilbur Swearingin dated 10/05/2010; and
P. Deposition of Dr. Robert Poetz dated 10/18/2010.

Employer-Insurer's Exhibits

1. Medical Records of Ste. Genevieve Medical Group;
    a. Office note of 07/20/1999;
    b. Office note of 08/02/1999;
    c. Office note of 08/10/1999;
    d. Office note of 09/29/1999;
2. Medical Records of Ste. Genevieve County Memorial Hospital 09/06/1999 to 09/15/1999;
3. Medical Records of Ste. Genevieve County Memorial Hospital 03/27/2001;
4. Medical Records of PRO REHAB – Functional Capacity Exam 04/26/2001;
5. Medical Records of Dr. Joseph Sharlow 05/29/2001;
6. Medical Records of Ste. Genevieve County Memorial Hospital Lumbar 05/29/2001;
7. Report of Dr. Peter Mirkin 05/30/2001;
8. Medical Records of Ste. Genevieve County Memorial Hospital 08/22/02001;
9. Medical Records of Ste. Genevieve Medical Group;
    a. Office note 08/22/2001;
    b. Office note 08/24/2001;
10. Withdrawn;
11. Medical Records of Ste. Genevieve County Memorial Hospital 01/10/2002;
12. Report of Dr. B. Cadiz 08/09/2002;
13. Report of Dr. B. Cadiz 09/05/2002;
14. Employer's first report of injury 01/28/2005;
15. Employer's first report of injury 02/26/2005;
16. Withdrawn; and
17. Deposition of Dr. Sandra Tate.

FINDINGS OF FACT:

Based on the testimony of Larry Abt ("Employee") and the medical records and reports admitted, I find as follows:

On January 16, 2001, Employee was working for Mississippi Lime Company (Employer) whose liability for worker's compensation insurance was covered by Federal Insurance Company (Employer-insurer). On that date, Employee was operating a locomotive engine when it was struck by a large truck causing multiple injuries. Employee was initially treated at Ste. Genevieve Hospital by Dr. Sharlow for a degloving injury to his left lower leg, left rib pain, and injury to his lumbar spine. Although Employee continued to treat with Dr. Sharlow over the next several months, he also saw Dr. Sandra Tate and Dr. Peter Mirkin. On February 14, 2001, Dr. Tate placed restrictions on Employee of no lifting greater than 30 pounds and no twisting at back more than four times per hour and deferred the treatment of the left lower extremity to Dr. Sharlow. On May 30, 2001, Dr. Mirkin placed Employee at maximum medical improvement and released him to full duty regarding his low back. Since Employee continued to have problems with his lumbar spine, he treated on his own with Physicians Health and Rehab for his lumbar spine from 1/14/2002 to 3/31/2004.

On August 23, 2004, Dr. Robert Poetz evaluated Employee and opined that as a result of the January 16, 2001 work injury he suffered a 60% permanent partial disability to the left lower extremity at the knee, a 25% permanent partial disability of the body as a whole for the rib injury, and a 30% permanent partial disability of the body as a whole for the lumbar spine injury. Finally he opined that the combination of the present and prior disabilities result in a total which exceeds the simple sum by ten/fifteen percent. With regard to his prior injuries, Dr. Poetz evaluated the employee and opined that he had a 10% permanent partial disability for left leg phlebitis, a 10% permanent partial disability for left leg cellulitis, a 25% permanent partial disability for a left wrist injury, a 10% permanent partial disability for astigmatism along with presbyopia and myopia, and a 30% permanent partial disability for morbid obesity and metabolic syndrome.

Following the first evaluation by Dr. Poetz, Employee injured his low back including lumbar on January 28, 2005 and left lower leg on February 28, 2005. Over the course of the rest of 2005, Employee received treatment for his left wrist, neck, right elbow and hand, and left leg. Employee began receiving short-term disability in 2006. In 2007 and 2010, Dr. Poetz issued supplemental reports increasing the primary rating of the lower left extremity to 70% and opining that Employee was permanently and totally disabled as a result of combination of the primary and pre-existing injuries. In 2007, Mr. Wilbur Swearingim, a vocational rehabilitation expert, issued his report stating that Employee was permanently and totally disabled as a result of the last injury alone. In 2009, Dr. Sandra Tate examined Employee and opined that Employee was not permanently and totally disabled as a result of the left lower extremity complaints.

At the time of the hearing, Employee testified that he continued to have problems with his left leg and lumbar spine that included pain, swelling, numbness, weakness, and decreased

range of motion. As a result of these problems, Employee had difficulty standing for long periods, walking for long periods, driving, mowing, hunting, and shopping.

APPLICABLE LAW:

- Although the workers' compensation law must be liberally construed in favor of the employee, the burden is still on the claimant to prove all material elements of his claim. *Melvies v Morris*, 422 S.W.2d 335 (Mo. App.1968), and *Marcus v Steel Constructors, Inc.*, 434 S.W.2d 475 (Mo.App.1968).
- Under Section 287.140.1 "the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance, and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury". Further, the employer is given the right to select the authorized treating physician. Subsection 1 also provides that the employee has the right to select his own physician at his own expense. The employer, however, may waive its right to select the treating physician by failing or neglecting to provide necessary medical aid. *Emert v Ford Motor Company*, 863 S.W. 2d 629 (Mo.App. 1993); *Shores v General Motors Corporation*, 842 S.W. 2d 929 (Mo.App.1992) and *Hendricks v Motor Freight*, 520 S.W. 2d 702, 710 (Mo.App.1978).
- In *Martin v Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo. 1989), the Court held that when the employee testified that her visits to the hospital and various doctors were the product of her fall and that the bills she received were the result of those visits, a sufficient factual basis exists for the commission to award compensation when the bills are offered into evidence and they relate to the professional services rendered as shown by the medical records in evidence. However, the employer, of course, may challenge the reasonableness or fairness of these bills or may show that the medical expenses incurred were not related to the injury in question. See also *Metcalf v Castle Studios*, 946 S.W.2d 282, 287 (Mo.App. W.D. 1997)
- The standard of proof for entitlement to an allowance for future medical aid cannot be met simply by offering testimony that it is "possible" that the claimant will need future medical treatment. *Modlin v Sunmark, Inc.*, 699 S.W. 2d 5, 7 (Mo.App.1995). The cases establish, however, that it is not necessary for the claimant to present "conclusive evidence" of the need for future medical treatment. *Sifferman v Sears Roebuck and Company*, 906 S.W. 2d 823, 838 (Mo. App.1995). To the contrary, numerous cases have made it clear that in order to meet their burden, claimants are required to show by a "reasonable probability" that they will need future medical treatment. *Dean v St. Lukes Hospital*, 936 S.W. 2d 601 (Mo.App.1997). In addition, employees must establish through competent medical evidence that the medical care requested, "flows from the accident" before the employer is responsible. *Landers v Chrysler Corporation*, 963 S.W. 2d 275, (Mo.App.1997).
- The test for finding the Second Injury Fund liable for permanent partial disability benefits is set forth in Section 287.220.1 RSMo as follows:

  > "All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a pre-existing permanent partial disability whether from compensable injury or

> otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining re-employment if the employee becomes unemployed, and the pre-existing permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no pre-existing disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, 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 shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for."

- The test for finding the Second Injury Fund liable for permanent total disability is set forth in Section 287.220.1 RSMo., as follows:

  > If the previous disability or disabilities, whether from compensable injuries or otherwise, and the last injury together result in permanent total disability, the minimum standards under this subsection for a body as a whole injury or a major extremity shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employee at the time of the last injury is liable is less than compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under Section 287.200 out of a special fund known as the "Second Injury Fund" hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in Section 287.414.

- Section 287.020.7 RSMo. provides as follows:

> The term "total disability" as used in this chapter shall mean the inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident.

RULINGS OF LAW:

Issue 2. Nature and Extent of Disability and Issue 3. Liability of the Fund

At the time of the hearing, Employee argued that either the Employer-Insurer or the Second Injury Fund was liable for permanent total disability benefits or in the alternative permanent partial disability benefits. In this case, Employee has offered the opinions of Dr. Robert Poetz and Mr. Wilbur Swearingim, a vocational rehabilitation expert, in support of his contention that he is entitled to benefits. Employer-Insurer has offered the opinions of Dr. Sandra Tate, Dr. Peter Mirkin, and Dr. B. Cadiz in support of their position. The Second Injury Fund offered no exhibits. I find the opinions of Mr. Swearingim and of Dr. Robert Poetz after August 23, 2004 to be not credible because they lack information and failed to review records concerning Employee's injury to his left ankle in February 2005, left wrist problem in May 2005, neck problem in October 2005, right elbow and hand in October 2005, and left leg hospitalization in October of 2005. The record clearly supports a finding that Employee's permanent total disability condition was a result of subsequent deterioration and not a result of Employee's January 16, 2001 work injury. I find the opinion of Dr. Robert Poetz dated August 23, 2004 to be the most credible and comprehensive based on the evidence. Consequently, I find that all of the rest of the opinions that are inconsistent or contradict that opinion to be not credible. Based on my above findings, I find that Employee has failed to meet his burden of proof regarding permanent total disability against the Employer-Insurer and Second Injury Fund.

Although the Employer-Insurer is not liable for permanent total disability benefits, the Employer-Insurer is still liable for permanent partial disability. Based on the evidence, I find that Employee has a 30% permanent partial disability of his left lower extremity at the 160 week level (48 weeks), a 4% permanent partial disability of the body as a whole referable to the ribs at the 400 week level (16 weeks), and a 15% permanent partial disability of the body as a whole referable to the lumbar spine at the 400 week level (60 weeks) related to the January 16, 2001 work related injury. This sum equals 124 weeks of disability. The Employer-Insurer is therefore directed to pay to Employee the sum of $314.26 per week for 124 weeks for a total award of permanent partial disability of $38,968.24

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Although the Second Injury Fund is not liable for permanent total disability benefits, Employee has in the alternative alleged that he is entitled to an award for permanent partial disability benefits from the Second Injury Fund. Employee has pre-existing disabilities related to phlebitis of the left leg, cellulitis of the left leg, left wrist fracture, astigmatism along with presbyopia and myopia, and morbid obesity with metabolic syndrome. Under Section 287.220.1 RSMo., Employee has the burden of proving that his pre-existing injuries were of such a serious nature as to constitute a hindrance or obstacle to employment or re-employment. Employee also has the burden of proving that his last injury and pre-existing disabilities exceed the applicable statutory threshold of 12½% for body as a whole rating or 15% of a major extremity. Further, the Second Injury Fund is only liable if the combination of Employee's pre-existing injuries and

the last injury had a synergistic affect which causes Employee's total disability to exceed the sum of the disabilities from the pre-existing injuries and the last injury.

Based on the credible testimony of Employee and the evidence submitted, I find that Employee's pre-existing disability to his left wrist was of such seriousness to constitute a hindrance or obstacle to employment or obtaining re-employment. I further find that the pre-existing wrist condition resulted in a permanent partial disability of 15% of Employee's left upper extremity at the level of the wrist or 26.25 weeks of compensation. With regard to his pre-existing phlebitis of the left leg, I find that Employee suffered a 5% permanent partial disability of the body as a whole or 20 weeks of compensation which does not meet threshold for Second Injury Fund liability purposes. With regard to his pre-existing cellulitis of the left leg, I find that Employee suffered a 5% permanent partial disability of the body as a whole or 20 weeks of compensation which does not meet threshold for Second Injury Fund liability purposes. With regard to his pre-existing astigmatism along with presbyopia and myopia, I find that Employee suffered a 5% permanent partial disability of the body as a whole or 20 weeks of compensation which does not meet threshold for Second Injury Fund liability purposes. With regard to his pre-existing morbid obesity with metabolic syndrome, I find that Employee suffered a 7.5% permanent partial disability of the body as a whole or 30 weeks of compensation which does not meet threshold for Second Injury Fund liability purposes.

After considering all of the evidence, I further find that Employee's pre-existing injury to his left wrist and the primary injuries to his lower left extremity and lumbar spine combined synergistically to create a total disability of 154.3875 weeks. This total disability is based on a loading factor of 15%. After deducting the percentage of disability that existed prior to the primary injury (108 weeks), and the disability resulting from the primary injury, considered alone (26.25 weeks), from the total disability attributable to all injuries or conditions existing at the time of the last injury (154.3875 weeks), the remaining balance to be paid by the Second Injury Fund is equal to 20.1375 weeks. The Second Injury Fund is therefore directed to pay to Employee the sum of $314.26 per week for 20.1375 weeks for a total award of permanent partial disability equal to $6,328.41.

Issue 1. Previously Incurred Medical Aid

Employee is seeking payment of $15,676.60 in previously incurred medical expenses. These costs are alleged to be for treatment that Employee received from Physicians Health and Rehab (1/14/2002 to 3/31/2004), Ste. Genevieve County Memorial Hospital (10/23/2005 to 11/1/2005), Mid America Rehab (11/1/2005 to 11/22/2005), and Dr. Richard Pearson (10/23/2005 to 10/12/2006). Employer-Insurer has disputed payment of these expenses based on causal relationship. Based on the evidence and my above findings, I find that the previously incurred medical expenses related to Ste. Genevieve County Memorial Hospital (10/23/2005 to 11/1/2005), Mid America Rehab (11/1/2005 to 11/22/2005), and Dr. Richard Pearson (10/23/2005 to 10/12/2006) are a result of subsequent deterioration and not related to Employee's January 16, 2001 work related injury. Therefore, Employee's request for previously incurred medical aid related to Ste. Genevieve County Memorial Hospital, Mid America Rehab, and Dr. Richard Pearson is denied. The remaining medical expenses to Physicians Health and Rehab (1/14/2002 to 3/31/2004) were for treatment to Employee's lumbar spine. Based on my

above findings and the evidence, I find that the remaining $3,266.03 in previously incurred medical aid owed to Physicians Health and Rehab is causally related to Employee's January 16, 2001 work related injury.

Based on the evidence submitted, I find that the above bills totaling $3,266.03 were reasonable and necessary to cure and relieve Employee from the effects of his work injury of January 16, 2001. I further find that these medical bills are medically causally related to Employee's January 16, 2001 accident. Employer-insurer is therefore directed to pay Employee the sum of $3,266.03 for previously incurred medical expenses.

ATTORNEY'S FEE:

Robert Lenze, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to Employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

INTEREST:

Interest on all sums awarded hereunder shall be paid as provided by law.

Made by:

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Carl Strange
Administrative Law Judge
Division of Workers' Compensation