

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

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

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.<sup>1</sup> We have reviewed the evidence and briefs and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the award and decision of the administrative law judge (ALJ). We adopt the findings, conclusions, decision, and award of the ALJ to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

We agree with the ALJ's conclusion that employee's primary injuries and preexisting disabilities combine to produce only permanent partial disability (PPD) and not permanent total disability. We further agree with the ALJ's conclusion that a 15% load factor is appropriate to account for the combination of employee's primary injuries and preexisting disabilities. We disagree, however, with the ALJ's exclusion of the following preexisting disabilities from his Second Injury Fund liability calculation: 5% PPD of the body as a whole (BAW) referable to phlebitis of the left leg, 5% PPD of the BAW referable to cellulitis of the left leg, 5% PPD of the BAW referable to astigmatism, presbyopia and myopia, and 7.5% PPD of the BAW referable to morbid obesity.

On page 9 of his award, the ALJ separately discussed each of the aforementioned preexisting disabling conditions, and found that they do not meet the thresholds of § 287.220.1 RSMo. Based on this assessment, the ALJ excluded these conditions from his calculation of Second Injury Fund liability. The ALJ's comments and conclusions suggest that he was operating under what we believe to be a common misperception; to wit, that if one of a worker's preexisting disabling conditions, considered in isolation, fails to meet one of the thresholds in § 287.220.1, then that condition is ignored for all purposes when considering the liability of the Second Injury Fund. Such an approach has no support in the Missouri Workers' Compensation Law or in Missouri case law. We reject the administrative law judge's reasoning regarding the triggering of Second Injury Fund liability. Our analysis of the operation of the Second Injury Fund thresholds follows.

*Purpose of the Second Injury Fund*

The purpose of the Second Injury Fund is "to encourage the employment of individuals who are already disabled from a preexisting injury, regardless of the type or cause of that injury." *Pierson v. Treasurer of Mo. As Custodian of the Second Injury Fund*, 126 S.W.3d

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<sup>1</sup> Statutory references are to the Revised Statutes of Missouri 2000 unless otherwise indicated.

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386, 390 (Mo. 2004) (citation omitted). The Second Injury Fund statute encourages such employment by ensuring that an employer is only liable for the disability caused by the work injury. Any disability attributable to the combination of the work injury with preexisting disabilities is compensated, if at all, by the Second Injury Fund.

Purpose of the thresholds

Before 1993, any preexisting disability that was a hindrance to employment or reemployment could open the door to possible Second Injury Fund liability. The Second Injury Fund statute was amended in 1993 to limit PPD awards against the Second Injury Fund to those cases where both the preexisting disabilities and the disabilities from the work injury are more than de minimis. The provision defining what disabilities will trigger Second Injury Fund liability now states:

If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting 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 preexisting disability.

The thresholds found in the quoted provision serve to protect the Second Injury Fund from enhanced PPD claims of claimants with de minimis disabilities. And that is where the service of the thresholds ends. Section 287.220.1 goes on to say:

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...(emphasis added).

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Under the plain language of the statute, once it is determined that the thresholds are met, all disabilities that exist at the time of the work injury should be considered in the calculation of Second Injury Fund liability.

Application of the thresholds

The second threshold applies when a claimant has preexisting PPD of a single major extremity (“if a major extremity injury only”). In all other circumstances, the first threshold applies.

The legislature chose two different units of measurement to describe the thresholds: “fifty weeks of compensation” for preexisting disabilities of the body as a whole; and “fifteen percent permanent partial disability” for a preexisting disability to a major extremity only. We believe the legislature rested on different units of measurement to foster arithmetic simplicity.

Where a claimant has only a preexisting disability to a major extremity, the legislature made “a simple 15% disability to a major extremity the threshold rather than attempt a more complex formula based on weeks of disability to various body parts at various levels.” *Motton v. Outsource Int'l*, 77 S.W.3d 669, 675 (Mo. App. 2002).

But where there is more than one preexisting disability, the simplicity described above cannot be achieved. In that event, we need a method to combine the various disabilities to determine claimant’s overall preexisting disability as of the moment of the primary injury. In order to combine the disabilities for comparison to the threshold, the disabilities must be converted to a common unit of measure. The legislature selected weeks of compensation as the common unit of measure.

This claim

In the instant case, employee had more than a single preexisting disabling condition so the first threshold applies. Using the ratings and findings from the ALJ, we observe that employee suffered from a total of 116.25 weeks<sup>2</sup> of PPD at the time the last injury was sustained. Employee has met the threshold.

Simply put, the thresholds have no bearing on calculating Second Injury Fund liability once that liability is triggered, and thus they provide no support for discounting certain conditions that, considered individually, do not amount to 15% permanent partial disability of an extremity or 50 weeks of compensation.

As our analysis above makes clear, we find that the ALJ inappropriately applied the thresholds of § 287.220.1. When the aforementioned disabilities are included in the calculation, employee’s combined disability is 240.25 weeks.<sup>3</sup> Therefore, we modify the

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<sup>2</sup> 26.25 weeks for his left wrist + 20 weeks for his phlebitis + 20 weeks for his cellulitis + 20 weeks for his astigmatism + 30 weeks for his obesity

<sup>3</sup> 116.25 weeks + 124 weeks

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award and find that the Second Injury Fund is liable for 36.0375 weeks,<sup>4</sup> or \$11,325.14.<sup>5</sup> In all other respects, we affirm the award of the ALJ.

The award and decision of Administrative Law Judge Carl Strange, as modified herein, is attached and incorporated by reference.

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

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

Given at Jefferson City, State of Missouri, this 13<sup>th</sup> day of March 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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James Avery, Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

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<sup>4</sup> .15 x 240.25 weeks

<sup>5</sup> 36.0375 weeks x \$314.26 PPD rate

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 to 11/28/2007;

- 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. *Melvis 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

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*