Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 99-113105

Employee: Robert Allen

Employer: Western Carriers Transport (Open)

Insurer: None

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

Date of Accident: July 6, 1999

Place and County of Accident: Camden County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 2, 2006, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge John K. Ottenad, issued November 2, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 10th day of August 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

_____
William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

_____
Secretary

AWARD

Employee: Robert Allen Injury No.: 99-113105

Dependents: N/A

Employer: Western Carriers Transport (Open)

Additional Party: Second Injury Fund

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

Insurer: None

Hearing Date: July 5, 2006 and July 11, 2006 Checked by: JKO

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: July 6, 1999
5. State location where accident occurred or occupational disease was contracted: Camden County, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? No
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? N/A
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was employed as truck driver for Employer and was involved in a motor vehicle accident.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Left femur and left hip
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: $0.00
16. Value necessary medical aid paid to date by employer/insurer? $0.00

Employee: Robert Allen Injury No.: 99-113105

17. Value necessary medical aid not furnished by employer/insurer? Undetermined
18. Employee's average weekly wages: $500.00
19. Weekly compensation rate: $333.33 for TTD/ $303.01 for PPD
20. Method wages computation: Pursuant to Mo. Rev. Stat. §287.250

COMPENSATION PAYABLE

21. Amount of compensation payable: None

$0.00

22. Second Injury Fund liability: None $0.00

TOTAL: **$0.00**

23. Future requirements awarded: None

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

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Robert Allen

Injury No.: 99-113105

Dependents: N/A

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

Employer: Western Carriers Transport (Open)

Additional Party: Second Injury Fund

Insurer: None

Checked by: JKO

On July 5, 2006, the employee, Robert Allen, appeared by his attorney, Mr. James M. Hoffmann, for a hearing for a final award on his claim against the Second Injury Fund. The employer, Western Carriers Transport, was not present at the hearing or represented by an attorney since they are uninsured and in bankruptcy. The Second Injury Fund was represented by Assistant Attorney General Kareitha A. Osborne. The parties agreed that this is a Second Injury Fund Only hearing for uninsured employer medical benefits and permanent disability combination benefits. The hearing was continued until July 11, 2006 to give Claimant the opportunity to submit additional evidence which was not presented on the first day of the hearing. At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of facts and rulings of law, are set forth below as follows:

STIPULATIONS:

1) Robert Allen (Claimant) sustained an accidental injury on or about July 6, 1999.
2) Venue is proper in the City of St. Louis by consent of the parties.
3) The Claim was filed within the time prescribed by the law.
4) Western Carriers Transport (Employer) has not paid any benefits to date.

ISSUES:

1) Is Claimant an employee of Employer?

2) Did Employer receive proper notice of the injury?

3) Did the accident arise out of and in the course of employment?

4) What is the appropriate rate for this injury?

5) Is Claimant entitled to payment for an undetermined amount of past medical benefits related to this injury?

6) What is the nature and extent of Claimant's permanent partial disability attributable to this accident?

7) What is the liability of the Second Injury Fund for uninsured employer medical benefits and permanent disability combination benefits?

EXHIBITS:

The following exhibits were admitted into evidence:

Employee Exhibits:

A. Videotape of Claimant's deposition testimony from February 24, 2006
B. Deposition of Robert Allen dated February 24, 2006
C. Notice of Hearing for July 5, 2006 setting dated June 9, 2006
D. Deposition of Ronald E. Hoffmann, M.D., with attachments, dated May 31, 2006
E. Medical bills of Dr. Scott
F. Medical bill of St. John's
H. Medical bill of Lake Orthopedic Group
I. Medical bill of Unity Health
J. Medical bill of Dr. David East at Lake Internal Medicine Specialists, Inc.
K. Medical bill for an osteogenic stimulator
O. Medical bills of VNA of Central Illinois

Second Injury Fund Exhibits:

Nothing submitted at the time of hearing

EVIDENTIARY RULINGS:

Claimant offered Exhibits G, L, M, N, P, Q, and R into evidence on the second day of the hearing. These exhibits purport to be some of the medical bills reviewed by Dr. Hoffmann which are allegedly related to the injury that forms the basis of this claim. The Second Injury Fund objected to the admission of these exhibits because the records are uncertified and lack a proper foundation. The Fund also objected to their authenticity since the exhibits contained extraneous handwriting, and blackened out or redacted portions. I indicated at the time of hearing that I would take the objections under advisement and rule on the admissibility of the exhibits in the final award.

Having now had a chance to review the exhibits and consider the objections raised by the Second Injury Fund, I am sustaining the objections of the Second Injury Fund and I rule that Exhibits G, L, M, N, P, Q, and R are inadmissible in this case. There has been no certification attached to any of these exhibits from a custodian of records, nor has there been any testimony from a custodian or other qualified witness to certify the method and time of preparation or the authenticity of the documents. Additionally, Claimant's attorney admitted at the hearing that he did make handwritten notes on the records and thus altered them from their original state. Accordingly, these exhibits amount to inadmissible hearsay that cannot be used as competent evidence by virtue of **Mo. Rev. Stat. § 490.680**. They are also inadmissible because of Claimant's failure to offer any of the supporting medical records into evidence. ***Meyer v. Superior Insulating Tape***, 882 S.W.2d 735 (Mo.App. E.D. 1994) *citing* ***Martin v. Mid-America Farm Lines, Inc.***, 769 S.W.2d 105 (Mo. Banc 1989).

Finally, Exhibit D was admitted subject to the objections contained in the record. Unless otherwise specifically noted below, the objections are overruled and the testimony fully admitted into evidence.

FINDINGS OF FACT:

Based on a comprehensive review of the substantial and competent evidence, including Claimant's testimony and the expert medical testimony of Dr. Ronald Hoffmann, I find:

1) **Claimant** testified by videotaped deposition because of an inability to travel to the Division office in St. Louis for a hearing. He is a 71-year-old individual who was last employed as a truck driver for Employer. He worked for Employer for about 17 years prior to July 6, 1999. He did not have any certain route that he drove for Employer, but he regularly drove a Peterbilt tanker truck. He was given on the job training by Employer. Employer withheld taxes from his paycheck. Claimant estimated Employer had about 75 employees.

2) Claimant testified he was making approximately $500.00 per week for the six years prior to July 6, 1999.

3) Claimant testified that on July 6, 1999, he was involved in a motor vehicle accident while he was driving a truck for Employer. He believed another driver came across the center line and stuck his truck. The accident occurred near Lake of the Ozarks. He was taken to the Emergency Room where he was told he had a fractured left femur. He testified a pin was placed in the femur first and then he had left hip replacement surgery. He also said he had a bone graft surgery. He could not remember the names of any of his doctors.

4) In addition to not remembering the names of his doctors, Claimant did not identify any of the medical bills as being related to, and the product of, his injury.

5) Claimant testified that Employer did not have workers' compensation coverage (insurance) and he has never received any workers' compensation benefits from Employer. Claimant testified it was his understanding that Employer filed bankruptcy.

6) Claimant has never gone back to work since the date of his injury. Claimant testified he cannot walk long distances (over 180 feet), but he can climb seven steps to get into his house. He said he can drive a vehicle but his wife will not let him do it because he has not gotten his eyeglass prescription filled yet. He said that the pain in his leg was one problem with these activities but his breathing condition also affected his ability to do them. Claimant is not receiving any further treatment and is not taking any medication for his leg injury.

7) Prior to this accident, Claimant testified that he had some problems with, and treatment for, chronic obstructive pulmonary disease (COPD). He said he was diagnosed with COPD in 1986 and he treated with Dr. Savage. Claimant saw Dr. Savage on 4/15/99, at which time he was getting short of breath. Claimant said that he had to get in and out of the truck, as well as climb up a ladder on the truck to open the dome lid for the tanker. Those activities were getting more difficult because of his breathing.

8) As of the time of his testimony, Claimant was treating with Dr. Fry for his COPD. Dr. Fry prescribed inhalers and Claimant was on oxygen. Claimant was on oxygen at his home with a long tube attached to a tank so that he can move around the house without disconnecting the hose. Claimant admitted that his lung condition and breathing has gotten quite a bit worse since his 1999 accident.

9) **Dr. Ronald Hoffmann** testified by deposition on behalf of Claimant on May 31, 2006 to make his opinions in this case admissible at hearing. (Exhibit D) Dr. Hoffmann is a retired, board certified, orthopedic surgeon. He is the Claimant's attorney's father and did not charge for the reports or the deposition in this case.

10) Dr. Hoffmann testified that initially he reviewed medical records and medical bills before he issued his first report in October 2005. He opined Claimant was unemployable without even examining him. Dr. Hoffmann then went to Claimant's home in Illinois and spent about an hour with him, at which time he performed a "minimal examination," before he issued his second report dated April 4, 2006. The reports do not list any specific findings on the physical examination, nor do they list any restrictions Dr. Hoffmann felt were appropriate. In fact, Dr. Hoffmann noted that he did not provide any restrictions because he was not a treating physician.

11) Dr. Hoffmann listed the various bills he reviewed, and testified that the bills were reasonable and necessary. He admitted on cross-examination that some of the bills he reviewed may have included amounts for the treatment of the COPD.

12) Dr. Hoffmann opined that because of the left femur fracture, the hip replacement, and the COPD, Claimant was not employable in the open labor market. Part of his rationale for this opinion is that Claimant "can't breathe without oxygen." Dr. Hoffmann did not provide any opinions on a specific amount of permanent partial disability related to the primary injury or pre-existing condition. He also did not provide an opinion that divided out what amount of disability may be attributable to the subsequent deterioration of the COPD unrelated to the primary injury, since Claimant was not on oxygen before the July 6, 1999 injury. He testified that there is no question that the COPD has gotten worse since July 6, 1999 because it is a progressive disease. He testified that he reviewed

medical records regarding the COPD, but the records he may have reviewed are not listed anywhere in either of his reports.

13) Medical bills from the **Orthopedic Center of Illinois** were admitted into evidence. (Exhibit E) At the time the bills were offered into evidence, Claimant's attorney stated the bills totaled $2,028.00, but Dr. Hoffmann testified that bills were $1,977.00. There was absolutely no indication in Dr. Hoffmann's report or testimony to explain the discrepancy in the figures.

14) A medical bill from **St. John's** (Exhibit F) was admitted into evidence with a total of $576.50.

15) A medical bill from **Lake Orthopedic Group** (Exhibit H) was admitted into evidence with a total of $3,764.00.

16) A medical bill from **Unity Health** (Exhibit I) was admitted into evidence with a total of $80.00.

17) A medical bill from **Dr. David East at Lake Internal Medicine Specialists, Inc.** (Exhibit J) was admitted into evidence with a total of $99.00.

18) A medical bill from an **unknown provider for an osteogenic stimulator** (Exhibit K) was admitted into evidence with a total of $3,950.00.

19) Medical bills from **VNA of Central Illinois** (Exhibit O) were admitted into evidence. At the time the bills were offered into evidence, Claimant stated the bills totaled $1,136.74.

20) Neither medical treatment records regarding the primary left femur and left hip injury, nor any medical records regarding the COPD condition were offered or admitted into evidence in this case.

RULINGS OF LAW:

Given the nature of this Claim and the evidence submitted, these four issues in this case can be addressed at the same time.

Issue 1: Is Claimant an employee of Employer?

Issue 2: Did Employer receive proper notice of the injury?

Issue 3: Did the accident arise out of and in the course of employment?

Issue 4: What is the appropriate rate for this injury?

Based on a comprehensive review of the substantial and competent evidence described above, including Claimant's testimony, and the expert medical opinion and testimony, as well as based on the applicable laws of the State of Missouri, I find the following:

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

Considering the competent and substantial evidence listed above, I find that Claimant met his burden of proving that he was an employee of Employer and further that an accident occurred which arose out of and in the course of employment for Employer. Claimant also met his burden of proof on the rate. However, he failed to meet his burden of proof by failing to provide any evidence to show that Employer received proper notice of the injury.

I find Claimant was a credible witness who provided competent testimony that he was an employee of Western Carriers Transport. He credibly testified that he worked for Employer for 17 years driving various routes in one of their tanker trucks. He was given on the job training by Employer. Employer withheld taxes from his paycheck. Claimant estimated Employer had about 75 employees. All of this testimony was uncontradicted and unchallenged at hearing. In fact, there was no evidence in the record to challenge Claimant's employment status. Therefore, I find Claimant met his burden of proof to show that he was an employee of Employer at the time of the accident.

Claimant also provided competent and credible testimony that the truck accident on July 6, 1999 arose out of and in the course of his employment for Employer. He testified that he was driving Employer's truck when he was struck by

another motorist. This testimony was unchallenged and uncontradicted. Therefore, I find Claimant has met his burden of proof to show that the accident arose out of and in the course of his employment.

Likewise, Claimant provided credible, unimpeached testimony about his wages for the period of time leading up to the July 6, 1999 injury. Claimant testified that he was making approximately $500.00 per week for the six years prior to his injury. Accordingly, pursuant to **Mo. Rev. Stat. § 287.250,** I find Claimant had an average weekly wage of $500.00 which provides a corresponding rate for PTD/TTD of $333.33 and for PPD of $303.01.

Claimant provided absolutely no evidence on the issue of notice. The record is devoid of any indication that Claimant ever provided written or actual notice to Employer of the injury. Certainly, one can assume that Employer would have known about the truck accident that caused the injuries to Claimant, but there is no evidence in the record to bolster that assumption. Courts have held that when claimant does not show that he either provided timely written notice of the accident, or that employer had actual knowledge of the accident, the burden rests on claimant to supply evidence and obtain a Labor and Industrial Relations finding that no prejudice to employer resulted from the lack of notice. ***Soos v. Mallinckrodt Chemical Co***., 19 S.W.3d 683 (Mo. App. E.D. 2000) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). Although it is the Second Injury Fund and not Employer raising this defense in this case, under **Mo. Rev. Stat. § 287.220.5**, the Second Injury Fund is entitled to the same defenses to these claims as the uninsured employer would have.

In the case at bar, Claimant is completely silent on the notice issue and also equally silent on any proof that Employer was not prejudiced by the lack of notice. In the absence of any evidence at all in the record regarding this notice issue, Claimant failed to meet his burden of proof and the Claim for Compensation is denied as a result.

Issue 5: Is Claimant entitled to payment for an undetermined amount of past medical benefits related to this injury?

Issue 6: What is the nature and extent of Claimant's permanent partial disability attributable to this accident?

Issue 7: What is the liability of the Second Injury Fund for uninsured employer medical benefits and permanent disability combination benefits?

Even if Claimant was able to get past the notice issue, I find Claimant also fails to meet his burden of proof concerning the past medical bills, permanency and Second Injury Fund liability.

Regarding the medical bill issue, **Mo. Rev. Stat. § 287.220.5** states, "If an employer fails to insure or self-insure as required in section 287.280, funds from the second injury fund may be withdrawn to cover the fair, reasonable, and necessary expenses to cure and relieve the effects of the injury or disability of an injured employee in the employ of an uninsured employer." Courts interpreting this section have held that the employee should only be compensated from the fund the actual expenses as a result of the injury when the employee is uninsured and further employee is not entitled to a windfall simply because the injury occurred with an uninsured employer. ***Mann v. Varney Construction***, 23 S.W.3d 231 (Mo.App. E.D. 2000). Additionally, it would not be fair, reasonable and necessary to take funds from the Second Injury Fund if the medical bills have already been paid by a source other than the injured worker. ***Phillips v. Par Electrical Contractors***, 92 S.W.3d 278 (Mo.App. W.D. 2002) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003).

Under **Mo. Rev. Stat. § 287.140.1**, "the employee shall receive and the employer shall provide such medical, surgical, chiropractic and hospital treatment…as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury." **Mo. Rev. Stat. § 287.140.3** also states, "All fees and charges under this chapter shall be fair and reasonable…" Claimant bears the burden of proving these elements of the claim.

The Supreme Court addressed the proof necessary for the claimant to meet his burden of proof on this issue. In ***Martin v. Mid-America Farm Lines, Inc.***, 769 S.W.2d 105 (Mo. 1989), the employee testified that her visits to the hospital and various doctors were the product of her fall. She also testified that the bills she received were the result of those visits. The Court held, "when such testimony accompanies the bills, which the employee identifies as being related to and the product of her injury, and when the bills relate to the professional services rendered as shown by the medical records in evidence, a sufficient factual basis exists for the commission to award compensation." ***Id. at 111-112***. The Court went on to further hold that, "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." ***Id. at 112.***

Applying the Supreme Court's standard in ***Martin***, Claimant has failed to meet his burden of proof regarding the medical bills in this case because employee did not identify the bills or relate them to his injury, all of the bills were not properly put into evidence and there were no accompanying medical records placed in evidence.

Claimant also cannot rely solely on his rating physician, Dr. Hoffmann, to review the medical records and bills, in the absence of the records and bills themselves being in evidence. Although the physician's testimony can replace employee's testimony in terms of identifying and relating the bills, it still does not absolve Claimant of the burden of putting the medical records and the bills themselves into evidence in order to meet his burden of proof.

In an analogous situation involving the payment of medical bills under the medical fee dispute section of the workers' compensation statute, the Court held that once a health care provider presents sufficient factual basis for payment of the medical bills through testimony and evidence relating the medical bills or treatment to employee's work related injury, and places in evidence accompanying medical bills and records, the burden of going forward with evidence shifts to employer to prove that the medical bills are unreasonable and unfair. ***Esquivel v. Day's Inn of Branson***, 959 S.W.2d 486 (Mo. App. S.D. 1998) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). In other words, the testimony of a physician can replace the employee's testimony contemplated by the Court in the ***Martin*** case, but the physician's testimony must be accompanied by the medical bills and records in order to meet the burden of proof.

Even applying the ***Esquivel*** standard, Claimant still fails to meet his burden of proof since he did not put all of the medical bills or any of the medical records into evidence. Additionally, Dr. Hoffmann, who identified the bills for Claimant, admitted on cross-examination that some of the bills he reviewed were undoubtedly for treatment for the COPD, unrelated to the accident. He did not divide out which of the bills were unrelated to the accident and related instead to the COPD, so even Dr. Hoffmann's testimony did not clearly relate all of the bills he reviewed to the accident. This is yet another reason why Claimant has failed to meet his burden of proof regarding the medical bills in this case.

Finally, even for the medical bills that Claimant did put into evidence, he still fails to meet his burden of proof by not placing the accompanying medical records into evidence as well. In ***Meyer v. Superior Insulating Tape***, 882 S.W.2d 735 (Mo.App. E.D. 1994) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003), the Court held that the Commission properly found the employer was not responsible for the unpaid medical bills when employee failed to show the bills related to professional services because medical records were not in evidence. In that case, employee provided testimony that the bills were related to the injury and placed the bills into evidence, but did not place the medical records into evidence.

A similar situation exists in the case at bar. Claimant has offered physician testimony to relate the bills to the injury, and has also placed some of the bills into evidence, but none of the medical records. Therefore, applying the holding in ***Meyer***, the employer (and Second Injury Fund) is not responsible for the unpaid medical bills without the medical records in evidence.

Since Claimant failed to prove that Employer and the Second Injury Fund are responsible for the payment of the medical bills, the only other question is whether Claimant has successfully proven the nature and extent of permanent partial disability, and Second Injury Fund liability for a combination of primary and pre-existing disabilities.

After a thorough review of the evidence and specifically the testimony of Dr. Hoffmann, I find that Claimant has failed to prove the nature and extent of permanent partial disability on the primary left femur and left hip replacement, and further has failed to prove his claim for permanent disability from the Second Injury Fund.

Under **Mo. Rev. Stat. § 287.190.6**, "'permanent partial disability' means a disability that is permanent in nature and partial in degree…" The claimant bears the burden of proving the nature and extent of any disability by a reasonable degree of certainty. ***Elrod v. Treasurer of Missouri as Custodian of Second Injury Fund***, 138 S.W.3d 714, 717 (Mo. banc 2004). Proof is made only by competent substantial evidence and may not rest on surmise or speculation. ***Griggs v. A.B. Chance Co.***, 503 S.W.2d 697,703 (Mo.App. 1973). Expert testimony may be required when there are complicated medical issues. ***Id*** . at 704. When determining Second Injury Fund liability, nature and extent of pre-existing permanent partial disability has to be proven by expert opinion evidence by a reasonable degree of certainty. ***Messex v. Sachs Electric Company***, 989 S.W.2d 206 (Mo.App. E.D. 1999) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003).

While Claimant seeks a finding on the nature and extent of permanent partial disability, Claimant has offered no medical records, and no specific rating of disability from his examining physician. Dr. Hoffman's first, undated report was simply based on a review of medical records
with no physical examination. He provides an opinion that Claimant is not employable in the open labor market, but does not provide a rating of disability based on the left femur fracture and hip replacement, nor any specific opinion of pre-existing disability related to the COPD. Although his second report apparently came after an examination of Claimant, there are no findings from that physical examination contained in his report, nor much detail of any kind for that matter. There are still no opinions on primary or pre-existing disability.

Without any medical treatment records, any findings on a physical examination, or any specific ratings of disability from a physician, I find Claimant failed to prove the nature and extent of disability related to the primary injury.

Regarding the alleged pre-existing disability related to the COPD, it is especially important to Claimant's burden of

proof in this case, that the doctor provide an opinion on the pre-existing disability for the COPD, because Claimant testified that the COPD got quite a bit worse since the 1999 injury. In light of that testimony, Claimant needed to prove what amount of the COPD disability pre-existed the 1999 injury and what amount of that disability came from an unrelated subsequent deterioration of his COPD condition. In the absence of any proof from Dr. Hoffmann in that regard, Claimant also has failed to meet his burden of proof on his disability claim against the Second Injury Fund.

CONCLUSION:

Claimant successfully proved that he was an employee of Employer. He proved that he sustained an accident in the course and scope of his employment, and also proved the appropriate rate for this injury. However, Claimant failed to meet his burden of proving that Employer received proper notice of the injury. Claimant also failed to meet his burden of proof regarding the past medical bills, the nature and extent of permanent partial disability, and Second Injury Fund liability. Accordingly, the Claim for Compensation is denied.

Date: _____ Made by: _____

JOHN K. OTTENAD
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

_____

Patricia "Pat" Secrest
Director
Division of Workers' Compensation