

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

Injury No.: 01-115134

Employee: Michael B. Bennett
Employer: Schneider Electric Company (Settled)
Insurer: Missouri Employers Mutual Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: September 14, 2001
Place and County of Accident: St. Louis, 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 April 25, 2005. The award and decision of Administrative Law Judge Joseph E. Denigan, issued April 25, 2005, is attached and incorporated by this 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 10th day of January 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

SEPARATE OPINION FILED

John J. Hickey, Member

Attest:

Secretary

SEPARATE OPINION
CONCURRING IN PART AND DISSENTING IN PART

I join my fellow commissioners in awarding compensation in this claim. However, I must respectfully dissent from

the portion of the award and decision of the majority of the Commission denying permanent total disability benefits and limiting the award of attorney fees. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be modified to award to employee permanent total disability benefits against the Second Injury Fund and to remove the attorney fee limit.

The administrative law judge correctly found that the employee suffered preexisting conditions that were a hindrance or obstacle to employment and that those conditions combined synergistically with the primary injury to cause a greater overall disability than the simple sum of the disabilities. Accordingly, the administrative law judge awarded permanent partial disability against the Second Injury Fund. The administrative law judge erred in not finding that employee was permanently and totally disabled.

[T]he term "total disability" is "defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident." "It does not require that the claimant be completely inactive or inert."

"To determine if claimant is totally disabled, the central question is whether, in the ordinary course of business, any employer would reasonably be expected to hire claimant in his present physical condition."

Pavia v. Smitty's Supermarket, 118 S.W.3d 228, 234 (Mo. App. 2003)(citations omitted).

The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. Total disability means the "inability to return to any reasonable or normal employment."

Gordon v. Tri-State Motor Transit Co., 908 S.W.2d 849, 853 (Mo. App. 1995)(citations omitted), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224 (Mo. banc 2003).

The determination of whether plaintiff was totally and permanently disabled was a question of fact for the Commission. The Commission does not have to make its decision only upon testimony from physicians, it can make its findings from the entire evidence.

Cochran v. Industrial Fuels & Resources, Inc., 995 S.W.2d 489, 497 (Mo. App. 1999)(citations omitted).

My review of the entire record reveals: Immediately before the primary injury herein employee was missing the tips of two fingers on his left hand; employee suffered from diabetes, and diabetes-related neuropathy and retinopathy; and, employee suffered some hearing loss. It is undisputed that employee suffered a work-related injury and the work-relatedness of the primary injury was not an issue for trial. As a result of the primary injury, employee's left leg was amputated below the knee. Employee testified regarding his many restrictions. The combination of employee's left leg amputation with the lack of sensation in his right leg creates balance difficulties for employee. He cannot sit, stand, or drive for extended periods. He has difficulty tolerating car rides. He has trouble typing. He cannot perform medium or heavy lifting. Employee's post-secondary education is limited to technical training as an electrician.

Employee testified that he has been unable to find employment in his physical condition. Dr. Lichtenfeld, who practices occupational medicine, testified that employee is unable to compete in the open labor market. Dr. Lichtenfeld is the only expert to offer testimony in this matter. Dr. Lichtenfeld testified that the combination of employee's primary injury with his preexisting disabilities rendered employee permanently and totally disabled. The Second Injury Fund offered no evidence to rebut the testimony of employee and Dr. Lichtenfeld. I find both employee and Dr. Lichtenfeld to be very credible.

Based upon my review of all the evidence, I find employee has shown that he is unable to compete in the open labor market and that no employer would reasonably be expected to hire employee in his present physical condition. I conclude that employee is permanently and totally disabled due to the combination of his primary injury with his preexisting conditions.

Apparently, the administrative law judge was unsatisfied with the Second Injury Fund's failure to rebut employee's proof. The administrative law judge went to great lengths to criticize the testimonial performance of Dr. Lichtenfeld. The administrative law judge should consider the evidence as presented by the parties and their counsel, not belatedly supply objections for a party where the party's counsel failed to object. The administrative law judge is certainly entitled to determine issues of credibility, but the supplying of objections on behalf of one party after the record is closed deprives the proffering party of the opportunity to respond and suggests a bias on the part of the fact-finder.

The administrative law judge's attack on Dr. Lichtenfeld was completely unwarranted. The administrative law judge criticized two of Dr. Lichtenfeld's responses as exceeding the questioning. Second Injury Fund counsel raised no objection to the responses. The administrative law judge criticized as non-responsive Dr. Lichtenfeld's answer, "I'm not sure," to a question regarding whether he saw restrictions in the medical records. Counsel for the Second Injury Fund raised no objection. Counsel for the Second Injury Fund had opportunity to clarify the response through follow-up questions. The administrative law judge's expectation that the non-lawyer witness be familiar with the rules of evidence and the burdens of proof such that he conforms his testimony to them is unreasonable.

The administrative law judge criticized as inexplicable Dr. Lichtenfeld's testimony that employee was not capable of performing keyboard work in a speedy manner because Dr. Lichtenfeld's "detailed history" did not contain employee's keyboard work. This criticism is unfounded for several reasons. First, Second Injury Fund counsel raised no objection and had opportunity to clarify the response through follow-up questions, if she so desired. Second, it is axiomatic that a person missing portions of two fingers on one hand and suffering from a disability of the long finger on the other hand would not perform keyboarding as efficiently and effectively as a person with a full complement of unimpaired digits. Finally, Dr. Lichtenfeld's report describes the history employee provided to Dr. Lichtenfeld regarding his finger amputations:

The patient stated that he has difficulty gripping and grasping items with his left hand. He frequently drops things. He stated that he has a poor ability to perform fine coordinated movements with his left hand. He has difficulty picking up change or turning a key. He also complains of numbness and tingling over his fingertips. The fingertips are very sensitive if he bumps them. They are also sensitive to hot and cold temperatures.

In light of the above history, rather than being "inexplicable," Dr. Lichtenfeld's testimony regarding keyboard work is quite easily explained.

The most ludicrous of the administrative law judge's attacks on Dr. Lichtenfeld is his attack on Dr. Lichtenfeld's inclusion in his report of details regarding the primary injury. The administrative law judge suggests the inclusion of such detail was needless, because the primary injury is no longer at issue. Dr. Lichtenfeld prepared the report in January 2004. Employee and employer/insurer entered into a settlement regarding the primary injury in March 2004. The primary injury was still in issue at the time the report was prepared and Dr. Lichtenfeld's painstaking detail regarding the primary injury was most certainly needed.

The administrative law judge erred in limiting the attorney fee award to employee's counsel to \$1,200.00. He bases the fee cap on perceived deficiencies in counsel's performance. As with his criticisms of Dr. Lichtenfeld, the administrative law judge's criticisms of employee's counsel are largely unfounded. The criticisms are primarily based upon counsel's failure to control and/or rehabilitate Dr. Lichtenfeld at deposition. Many of the matters with which the administrative law judge finds fault were matters about which Second Injury Fund counsel raised no objection at deposition. Basically, the administrative law judge points out objections he thinks the Second Injury Fund *should have made* and then criticizes employee's counsel for failing to cure or respond to them as if they *had been made*. The administrative law judge's limit on the attorney fee award is unreasonable.

I must make clear I find no fault with the handling of this matter by counsel for the Second Injury Fund. I only point out instances where counsel voiced no objection to highlight how the administrative law judge's decision to raise evidentiary objections after the record was closed deprived this employee of an opportunity to defend his evidence.

I must comment on the deposition of Dr. Lichtenfeld, which has come to the Commission for review with permanent marks throughout. (Claimant's Exhibit B.) I reiterate my previously expressed opinion that the addition of any permanent markings or annotations to documents, records, or depositions after their entry in the official record is inappropriate. Any marking, comment, or annotation added to the official record carries with it the possibility to prejudicing subsequent decision-makers. See *Jones v. State Dep't of Public Health & Welfare*, 354 S.W.2d 37, 41 (Mo. App. 1962) ("We cannot assume that the referee's remarks were harmless and without prejudicial effect, since they were present in the record upon which the director made his decision."). If this case is appealed to the Missouri Court of Appeals, I want the appellate judges to know that the markings were not made by any member of this Commission.

Finally, if the administrative law judge made the markings in Dr. Lichtenfeld's deposition, consideration of the markings in conjunction with employee's lost opportunity to defend his evidence at trial, could give rise to the appearance of bias. The mere appearance of bias erodes the public's confidence in the ability of the workers' compensation system to provide an impartial determination of the rights of employees and employers.

Based upon the foregoing, I conclude that the award should be modified to award permanent total disability against the Second Injury and to remove the limit on the attorney fee award. I respectfully dissent from the portions of the award and decision of the majority of the Commission to the contrary.

John J. Hickey, Member

AWARD

Employee: Michael B. Bennett

Injury No.: 01-115134

Dependents: N/A

Before the
Division of Workers'

Employer: Schneider Electric Company (previously settled)

Compensation

Department of Labor and Industrial

Additional Party:

Second Injury Fund
Relations of Missouri
Jefferson City, Missouri

Insurer: Missouri Employers Mutual Ins. Co. (settled)

Hearing Date: February 1, 2005

Checked by: JED:tr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: September 14, 2001
5. State location where accident occurred or occupational disease was contracted: St. Louis, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes

8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant, while on a construction site, stepped on a screw that lodged in his left foot.
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 foot
14. Nature and extent of any permanent disability: 110% of left leg at the 160 week level (amputation); SIF liability for pre-existing diabetes.
15. Compensation paid to-date for temporary disability: \$56,601.00
16. Value necessary medical aid paid to date by employer/insurer? \$196,053.97

Employee: Michael B. Bennett Injury No.: 01-115134

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: Unknown
19. Weekly compensation rate: \$628.90/\$329.42
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

- | | |
|---|-------------|
| 21. Amount of compensation payable: | (settled) |
| | |
| 22. Second Injury Fund liability: Yes | |
| 50.66 weeks of permanent partial disability | \$16,688.42 |
| | |
| TOTAL: | \$16,688.42 |
| | |
| 23. Future requirements awarded: Unknown | |

Said payments to begin 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% (not to exceed \$1200.00) of all payments hereunder in favor of the following attorney for necessary legal services rendered to the Claimant:

Andrew Williams

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Michael B. Bennett Injury No.: 01-115134
Dependents: N/A
Employer: Schneider Electric Company (previously settled)
Additional Party: Second Injury Fund
Insurer: Missouri Employers Mutual Insurance Co. (previously settled) Checked by: JED

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

This case involves a left foot puncture wound and subsequent knee level amputation resulting to Claimant from an accident on September 14, 2001. Employer/Insurer previously settled its risk of liability. The Second Injury Fund remains a party to this case. Counsel represents both parties.

Issues for Trial

1. Medical causation;
2. Second Injury Fund liability.

FINDINGS OF FACT

1. Claimant worked for Employer as a journeyman electrician on the reported accident date. Claimant remains unemployed since the injury.
2. Claimant was injured on Friday, September 14, 2001 when Claimant stepped on a sheetrock screw that pierced his boot and punctured his foot. He did not discover the injury until he tried to remove his shoe at the end of the day and saw the screw. Claimant went home for the weekend and returned to work on Monday.
3. Claimant reported the injury to his Employer on Monday, September 17, 2001. Claimant presented to Forest Park Hospital that same day for treatment. He was discharged the same day and returned to work.
4. Claimant testified at hearing that he sought additional treatment ten days later when he noticed

discoloration around the wound. He reported it to his foreman before going to the emergency room at Forest Park Hospital. He was discharged; however, he was readmitted that same afternoon by Dr. Washington. Claimant further testified that he spent twenty days in the hospital before being discharged.

5. Claimant testified that Dr. Sheehan discovered infection in the foot and, as a result, part of the left foot and toe were removed in January 2002.
6. Claimant testified that he was transferred to St. John's Hospital in Joplin, Missouri, but was subsequently discharged to convalesce at home. While there, Claimant testified that a visiting nurse was provided to help him at home.
7. Claimant testified that Dr. Black performed a below-knee amputation of his left leg on May 20, 2002.
8. Claimant offered the deposition of Dr. Mark Lichtenfeld who evaluated Claimant on September 22, 2003. Dr. Lichtenfeld noted Claimant's complaints of severe [phantom] pain in his left foot, left thigh weakness, restricted movement in left hip and back, right leg pain, left knee pain, left shoulder pain, left arm fatigue, and loss of balance. Claimant cannot sustain much activity because of pain symptoms. Claimant told Dr. Lichtenfeld that he became depressed after losing his leg, but symptoms improved with medication (Celexa).
9. Regarding pre-existing injuries, Claimant told Dr. Lichtenfeld that he had no problems with his left knee, left hip, or left shoulder prior to September 14, 2001. Claimant also denied any prior history of depression nor problems with a sense of balance. Claimant told Dr. Lichtenfeld that he had a prior minor problem with his left lower extremity prior to September 14, 2001 in the form of decreased sensation.
10. Dr. Lichtenfeld assigned a 100% PPD to the primary injury (left knee level amputation) and, in addition, assigned another 25% PPD partial disability at the level of the same left knee. He further rated a 20% PPD at the level of the left hip, a 10% PPD of the body referable to chronic lumbosacral strain, and a 7.5% PPD to the body referable to the chest wall scar and tenderness where a central line catheter had broken off and was surgically removed during treatment of the primary injury.
11. Dr. Lichtenfeld deferred to a clinical psychologist or psychiatrist in order to assess the disability referable to the Claimant's depression.
12. Regarding the pre-existing injuries, Dr. Lichtenfeld rated a 60% PPD of the body referable to diabetes, a 12.5% PPD of the body referable to residual Bell's palsy, a 50% PPD at the level of the left long finger MP joint, a 40% PPD at the level of the left index finger MP joint, a 15% permanent partial disability at the level of the wrist, and a 50% permanent partial disability at the level of the right long finger MP joint. Dr. Lichtenfeld made note of the Claimant's hearing loss but, without audiograms, he did not assign any PPD. He did not rate Claimant's depression.
13. Dr. Lichtenfeld testified that Claimant was permanently and totally disabled and unemployable in the open labor market. Dr. Lichtenfeld agreed that there were no *restrictions* on Claimant prior to the primary injury. Dr. Lichtenfeld also admitted that he was not a vocational rehabilitation specialist, nor had he sampled the open labor market, and would defer to a vocational rehabilitation specialist as to the specifics (Exhibit B).
14. Claimant settled his primary injury with Employer herein for 110% of the left leg at the knee (Exhibit A).^[1] It does not contemplate left hip, left shoulder or depression.
15. Claimant testified that he was working out of his [union] district while in St. Louis and that he would commute from Okalahoma, a distance of approximately 372 miles one-way. Claimant testified that prior to September 14, 2001, he had no trouble driving that distance and that he drove it by himself.

16. Claimant testified that he did not have any prior problems with his left foot between a 1980's motor vehicle accident and September 14, 2001. Claimant testified that he had no restrictions imposed due to his diabetes or his Bell's palsy, nor were there any permanent restrictions imposed due to his left long finger, left index finger, or right long finger. Claimant explained he bought walkie-talkies to enable him to hear better and communicate on the job site. No qualified medical evidence was presented on the hearing loss.
17. Claimant testified that he saw Dr. Samuel Bernstein, a vocational rehabilitation specialist. Claimant testified he discussed the viability of an electrical engineering degree with Dr. Bernstein. No report or testimony of Dr. Bernstein is in evidence.
18. Claimant was very affable and highly verbal in his responses at trial. He answered credibly and in a straightforward manner. His verbal ability was commensurate with his supervisory accomplishments in a highly skilled trade.

RULINGS OF LAW

Medical Causation

While the timetable of the infected foot wound and subsequent amputation seems to suggest a severe *ambulation* disability which is proximate to the reported injury, a closer analysis of medical causation suggests overriding SIF liability. The essential medical evidence in this case is delayed treatment of Claimant's foot puncture wound due to diabetic peripheral neuropathy. Dr. Lichtenfeld testified that the amputation was a result of the reported injury.

Subsequently, inadequate follow-up coupled with ongoing peripheral neuropathy led to delayed treatment of infection and resulting amputation at the knee. The inability to heal may be fairly traced to uncontrolled diabetes diagnosed in the 1980's. Claimant estimated losing fifteen days from work because of his diabetic condition during the years 1994 to 2001.

In summary, Claimant's diabetes was not worsened by the reported injury. Rather, the pre-existing condition of diabetes prevented, initially, detection of symptoms, and thereafter prevented healing and normal recovery from what may be characterized as a minor wound.

Issue of Permanent Total Disability

Dr. Lichtenfeld

Dr. Lichtenfeld testified that Claimant was permanently and totally disabled from the combination of current and pre-existing disabilities. He asserted Claimant was unemployable on the open labor market but acknowledged no expertise and no research thereon in Claimant's case. The SIF offered no opposing opinion.

Dr. Lichtenfeld's testimony, however, revealed inappropriate bias. Consistent with this finding is that most instances were generic comments, unfounded in the record. On cross examination, the effect of Dr. Lichtenfeld's testimony was one of pretense. His means was recurrent non-responsive narratives, sometimes specious, with some variations in form. Some examples follow hereafter.

On pages fourteen to sixteen, Dr. Lichtenfeld twice exceeds the questioning: first, in response to whether he was aware of any pre-accident restrictions or accommodations, he states the restrictions that he would have imposed. Second, after being brought back to the question, he explained that doctors do not always place restrictions in the record because patients want to "earn a livelihood and support their families." He further

volunteered that doctors usually accede to patient's express requests to keep restrictions out of the record for the same reason. Once again, when asked if his exam or review in this case uncovered any such suggestion he stated, "I don't recall." This is specious testimony because he apparently has no impression (no recall) and yet purports to excuse the absence of restrictions in either the medical record or his interview with Claimant.

On pages 16-17, when asked did he "see" any restrictions as a result of interview or records review, he answered, "I'm not sure" ostensibly because the "return-to-work" slips were not included and perhaps may have contained restrictions. Again, this is non-responsive, defensive surmise on the witness' part. This kind of advocacy far exceeds the realm of permissible (records-based) inferences typically made by expert witnesses. Similarly, on page 19, regarding the existence restrictions attendant Claimant's diabetic condition, Dr. Lichtenfeld answered, "I'm not sure. I mean he clearly should have."

On page 18, after admitting his "detailed history" did not contain Claimant's keyboard work (preceding the reported accident), he speculates, with "certain[ty]," that Claimant was not able to perform keyboard work with any speed. This is inexplicable testimony.

On page 21, after being asked rather reasonably whether, regardless of records, was he aware of any *pre-existing* diabetic restrictions or accommodations in place for Claimant, he answered, "Not to my knowledge." He continued with his personal opinion that such "did not surprise [him]" because of the inadequate quality of treatment Claimant received on the *current* injury. Quality of care on the primary injury is not an issue for trial and was not posed for comment by either attorney at the deposition. This testimony is specious since the tender of care for the reported injury has nothing to do with the existence of pre-existing diabetic restrictions, or the question posed, which the witness may have discovered and incorporated into his opinions.

This type of testimony is not useful to the fact-finder. Moreover, it undercuts the reliability of otherwise reasonable testimony elsewhere in the deposition.

Separately, on page eight, Claimant's counsel told the expert that the primary injury was "settled and determined it was work related." For the same reason evidence of settlement is usually inadmissible at trial as against public policy, so is it inappropriate to purport to tell a trial witness the legal consequence of some aspect of the case. Also, use of the word *determined* suggests a judicial finding consistent with Claimant's injuries. Revealing any settlement to a non-lawyer deponent is fraught with the possibility of misinterpretation and misplaced reliance.

* * *

Claimant's evidence does not include the medical records underlying the [more serious] SIF allegations.^[2] This is curiously evident in Dr. Lichtenfeld's report wherein he painstakingly, if needlessly, details the primary injury record, which is no longer at issue, but makes virtually no corresponding detail of medical records underlying pre-existing diabetes and hearing loss. The lack of foundation was noted twice by objection at Dr. Lichtenfeld's deposition and Claimant failed to cure the objection. The objections were not argued and it remains unclear what records of pre-existing disabilities were available at the deposition. These facts may permit an inference that no such records were reviewed.

The absence of supporting records for complex medical conditions limits an understanding of Claimant's SIF allegations. It is important to note that Claimant's hip and shoulder pain did not predate the reported injury and cannot be the basis for SIF liability. This is particularly important in view of Claimant's brief direct examination. Expert deposition is the opportunity to explain Claimant's assertion of unemployability and defend any challenges to the doctor's analysis. Certified medical records are reliable evidence which often resolve defects in expert testimony. The absence of the hearing loss medical records in evidence does not permit independent Division review of what occurred.

Permanent Partial Disabilities

Claimant settled his primary injury for 110 percent PPD of the left lower extremity at the level of the knee (176

weeks). An unrelated pathology also pre-existing the reported accident was *hearing loss*. According to Claimant, the hearing loss and losing time for diabetes complications were his only obstacles prior to the reported injury. Claimant worked large construction sites with large crews. Claimant's hearing loss and pre-existing diabetic condition were not documented at trial.

Claimant had to communicate with others throughout the day. He accommodated his hearing deficit by purchasing walkie-talkies and using them on the job. Claimant gave unusual and probative testimony about his self-financed walkie-talkies that facilitated his communications on-the-job. Hearing is imperative to communication in most workplaces and probably *all* manual labor workplaces. Accordingly, it seems axiomatic that communication deficits, or accommodations, are emblems of diminished productivity. This testimony was un rebutted. The lay evidence suggests significant PPD.

However, with no basis to measure the percentage loss together with Claimant's ability to hear effectively indoors [at trial], no PPD may be awarded. These circumstances are not within the common knowledge or experience of lay understanding and must be established by scientific or medical evidence. McGrath v. Satellite Sprinkler's Sys., 877 S.W.2d 704, 708 (Mo. App. 1994). In addition, such expert opinion must be founded on proper evidence, including audiograms. Dr. Lichtenfeld deferred a PPD assignment absent audiograms. A medical expert's opinion must be supported by facts and reasons proven by competent evidence that will give the opinion sufficient probative force to be substantial evidence. Silman v. Wm. Montgomery & Assoc., 891 S.W.2d 173, 176 (Mo.App. 1995), *citing* Pippin v. St. Joe Mineral Corp., 799 S.W.2d 898, 904 (Mo.App. 1990).

The diabetic condition is self-evident in the unfortunate scenario of delayed notice of injury to Claimant himself and thus delayed treatment. In addition, his condition required him to lose time from work presumably to readjust his medications. This is routine for serious diabetics and disabling symptoms run the gamut including fainting, fatigue and dizziness if not properly medicated. It is also well-known that skipping or delaying meals on the job is problematic for diabetics but often an earmark of the workplace. Again, like hearing (or communication), unstable metabolism prevents normal bodily function and thus, episodically, easily combines with other disabilities. These hindrances suggest a PPD in the range of ten percent PPD of the body as a whole (40 weeks).

While significant, these disabilities do not, *per se*, form the basis of permanent total disability. The medical evidence is not overwhelming inasmuch as Claimant has good use of his upper extremities and ambulated slowly but ably into the courtroom. This physical capability coupled with a supervisor/electrician skill set make determination of permanent total disability without vocational and/or psychiatric evidence very difficult. Claimant apparently does not experience sleeplessness and is able to drive some long distances without significant difficulty.

Second Injury Fund Liability

In order to recover against the SIF, an employee must demonstrate pre-existing conditions that interfered with employment. Section 287.220.1 RSMo 2000. Of the many SIF allegations here, only Claimant's hearing loss and diabetic condition may be viewed as pre-existing obstacles to employment and productivity on-the-job. The obstacles are self-evident and easily understood. In addition, each demonstration is partially within the scope of lay opinion; Claimant's testimony regarded permanent disability not causation.

Hearing loss easily satisfies the requirement that any SIF allegation be a hindrance to employment. Equally so is the combination of hearing loss with an orthopedic disability, i.e. Claimant's amputation. While still ambulatory and communicative (in the quiet of the courtroom atmosphere), it is the diminished communication ability and the diminished walking, standing, climbing and lifting abilities that combine to give real weight to the degree of overall ability to be productive, or his overall disability. The communication is particularly important to someone with his skill level and concomitant supervisory responsibilities.

Thus, while Claimant had no formal permanent restrictions imposed on him for any injuries or conditions leading up to the reported injury, he nevertheless had the stated disabilities attendant hearing loss and diabetes. With his walkie-talkies available and his medication adjusted Claimant was able to perform all of his work duties prior to the reported injury. These pre-existing disabilities combine with the primary injury to create an increased overall disability of sixty-six and two-thirds percent PPD of the body (266.66 weeks).

Conclusion

Accordingly, on the basis of the substantial competent evidence contained within the whole record, Claimant's petition for permanent total disability fails but he is, nevertheless, found to have sustained an additional 50.66 weeks PPD from the SIF as a result of the combination between the primary injury and the pre-existing hearing loss and diabetic condition.

Attorney Fees

While Claimant is highly skilled and very articulate, he nevertheless sought permanent total disability benefits. However, Claimant's attorney did not present conventional evidence of permanent total disability. The Division is charged with approving reasonable attorney fees. Section 287.260.1 (RSMo (2000)).

The factors to be considered in determining reasonable value of attorney's fees in Missouri are time, nature, character and amount of services rendered, nature and importance of the litigation, degree of responsibility imposed on or incurred by the attorney, the amount of money or property involved, the degree of professional ability, skill and experience called for and used, and the result achieved. See Cervantes v. Ryan, 799 S.W.2d 111, 115 (Mo.App. 1990).

Given the amount of skilled required and the skill utilized an attorney fee in the amount of 25% is awarded, not to exceed \$1200.00. This attorney fee is allowed for the following reasons:

- a) The expert opinion evidence was inadequate due to the failure to develop points at deposition. Of particular note is the *de minimis* substantive inquiry on direct examination (pp.8-13). Threshold objections to foundation were not defended or cured. The expert witness was very adversarial on cross-examination to the detriment of Claimant's case and no control was exercised over the witness.
- b) No vocational evidence was offered despite Dr. Lichtenfeld's deferral to a vocational expert (p. 29). He further stated his three years experience at BarnesCare assigning return-to-work restrictions enabled him to make the determination of Claimant's ability to compete in the open labor market (p.29). This statement is inexplicable since vocational experts never have the opportunity to impose prior medical restrictions; vocational experts are typically licensed counselors with specific qualifications and experience. Preliminary to this he referenced "educational background" and "vocational history" in his opinion of Claimant's unemployability (p. 13). This is inexplicable in context with his deferral to a vocational expert. No rehabilitation was attempted.

With Claimant's high skill level and supervisory experience, vocational evidence was particularly wanting here. Indeed, Claimant volunteered that he discussed electrical engineering with Dr. Bernstein, a recognized vocational counselor locally. No report or testimony from Dr. Bernstein is in the record.
- c) The medical records underlying the more serious pre-existing disabilities of hearing loss and that attendant diabetes were not placed in evidence. Beside the diabetes, hearing loss is the only convincing pre-existing disability. While poignant, Claimant's testimony alone is not sufficient to find greater hearing loss disability.
- d) In addition Claimant's attorney elected not to file proposed findings which may have permitted a deeper understanding of the brief record. As it is, no meaning may be gleaned even with examination *sua sponte*.
- e) Evidence of depression was not offered despite Dr. Lichtenfeld's note and diagnosis. Dr. Lichtenfeld deferred

to treating experts as he purported to do with vocational opinion.

Date: _____

Made by: _____

Joseph E. Denigan
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation

[\[1\]](#) Note is made of the full 25% attorney fee allowed on settlement which places PPD at the level of the amputation. For amputations, employers are *required* to pay PPD according to the schedule plus ten percent. For this reason, and others, custom in the St. Louis office provides that, in cases of undisputed liability, attorney fees are limited to ten or fifteen percent from the customary 25% contingency fee contracts, depending on the circumstances. See Sections 287.190.2 and 287.260.1 RSMo (2000).

[\[2\]](#) The primary injury treatment record is understandably enormous and its filing neither reasonable nor necessary to the analysis herein. The many surgeries and amputation (and \$196,053.97cost) are indisputable and, in addition, the outcome of the primary injury was within the scope of lay opinion.