

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

Injury No.: 11-032049

Employee: Joan Bush-Glasby
Dependent: Gary Glasby
Employer: City of St. Louis
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have read the briefs, reviewed the evidence, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Discussion

Past medical expenses

Employee claims \$187,007.90 in past medical expenses incurred from June 1, 2011, through September 1, 2011. Employer argues that it has already paid these past medical expenses, and that employee has no further liability on the bills. Section 287.140.1 RSMo provides, as follows:

In addition to all other compensation paid to the employee under this section, 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.

The courts have indicated that an award of past medical expenses is supported when the employee provides (1) the bills themselves; (2) the medical records reflecting the treatment giving rise to the bill; and (3) testimony sufficient to identify the bills as incurred during the course of treatment for the work-related injury. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105, 111-12 (Mo. 1989). Here, employee provided her bills, medical records, and testimony that we deem sufficient to identify the bills as incurred during the course of her treatment for this work-related injury. The burden thus shifts to employer to prove employee has no further liability for the bills. *Farmer-Cummings v. Pers. Pool of Platte County*, 110 S.W.3d 818, 822-23 (Mo. 2003).

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Employer provided testimony from Jacquelyn Morris, the claims adjuster who handled this case on behalf of employer's insurer. Ms. Morris identified a document (attached to the transcript of her deposition as Exhibit K) that includes a list of charges employer had paid on employee's claim for medical expenses as of July 12, 2012. Ms. Morris provided credible testimony explaining how to read this document, and also credibly explained that many of the payments reflected in the document differ from the charges in the bills themselves because employer's insurer was able to negotiate discounts on the bills.

We note that employee testified, at the hearing before the administrative law judge, that she stopped receiving collection notices in connection with her medical bills when employer began paying them. We note also that employee did not provide any testimony that would suggest she is still liable to pay her medical providers \$187,007.90 (or any other amount), or that would otherwise contradict the testimony from Ms. Morris on this issue. In her brief, employee points to indications in employer's documentation that certain payments to the providers were "denied," such as \$3,600.00 in charges from South County Anesthesia. But these very same entries list the charges in a column marked "discount," suggesting that these charges were waived as a result of the negotiated discounts identified by Ms. Morris. See, e.g., *Transcript*, pages 987-88. More importantly, employee has not provided any evidence to show that she still owes South County Anesthesia \$3,600.00, or any other amount.

Given Ms. Morris's credible testimony and the documentation provided by employer, combined with the absence of any testimony or other evidence suggesting that employee nevertheless remains liable for certain amounts despite employer's payments, we find that employer has satisfied all of the bills and charges incurred in the course of employee's past medical treatment for this work injury.

We do note, however, that the bills reflect that employee paid co-pays when she received certain treatments. Specifically, the bills from SSM Physical Therapy suggest employee paid \$120.00 in co-pays, and the bills from ProRehab suggest employee paid \$210.00 in co-pays. The bills from South County Anesthesia contain certain notations that we cannot readily interpret that suggest employee may or may not have paid \$56.28; employee did not provide any testimony to establish what she paid out-of-pocket for services rendered by South County Anesthesia, and therefore we decline to make any findings referable to these notations. Instead, we find that employee paid a total of \$330.00 in co-pays. Employer did not provide any evidence suggesting that employee was ever reimbursed for her out-of-pocket expenses. Accordingly, we find that employee incurred \$330.00 in out-of-pocket expenses during the course of her medical treatment, and that employer has not reimbursed her this amount.

We discern employee's additional arguments concerning the manner in which employer's insurer paid the bills (directly to the providers even after receiving correspondence from employee's attorney indicating a claim for past medical expenses) to constitute a request that this Commission enforce a fee lien in favor of her attorney. Employee points to months of financial hardship that she endured, the considerable efforts of her attorney in securing benefits, and the fact that employer initially denied this claim without adequately

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investigating employee's accident. But these factors are not strictly relevant to our analysis under § 287.140 where the evidence shows that employee's bills have been paid. We note that the parties did not identify any issue with respect to costs under § 287.560 RSMo at the hearing before the administrative law judge.

It is axiomatic that the Commission does not have authority to enforce an award. See, e.g., *Stonecipher v. Treasurer of Mo.*, 250 S.W.3d 450, 452 (Mo. App. 2008). We acknowledge the importance of fair and reasonable attorney's fees in ensuring public access to effective legal representation, but we are aware of no statutory provision that would authorize us to order an employer to pay an employee's past medical expenses twice for the purpose of ensuring that her attorney will receive 25% of the amounts.

We affirm the administrative law judge's conclusion that employee is not entitled to the claimed \$187,007.90 in past medical expenses. Rather, employer is liable for the \$330.00 in co-pays and out-of-pocket medical expenses that employee paid in the course of her treatment.

Corrections

As the Second Injury Fund conceded in correspondence received by the Commission on July 3, 2013, the administrative law judge's award contains a clerical error with regard to the compensation rate for permanent total disability. On pages 2, 12, and 13 of the award, the administrative law judge states that the Second Injury Fund is liable for benefits at the differential rate of \$132.08 for 140 weeks beginning December 17, 2011, and thereafter weekly payments of \$418.58 per week. The latter figure represents the stipulated rate for permanent partial rather than permanent total disability benefits.

Accordingly, we hereby correct the award as follows. The Second Injury Fund is liable for benefits at the differential rate of \$132.08 for 140 weeks beginning December 17, 2011, and thereafter weekly payments of \$550.66.

Conclusion

We modify the award of the administrative law judge as to the issues of past medical expenses and the rate of compensation at which the Second Injury Fund will pay permanent total disability benefits.

Employer is ordered to pay employee \$330.00 in out-of-pocket past medical expenses.

The Second Injury Fund is ordered to pay employee permanent total disability benefits at the differential rate of \$132.08 for 140 weeks beginning December 17, 2011, and thereafter \$550.66 per week. The weekly payments shall continue thereafter for employee's lifetime, or until modified by law.

The award and decision of Administrative Law Judge Kathleen M. Hart, issued June 7, 2013, is attached and incorporated by this reference to the extent it is not inconsistent with our modifications and supplemental findings and conclusions herein.

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We approve and affirm 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 14th day of January 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Joan Bush Glasby

Injury No.: 11-032049

Dependents: Gary Glasby

Before the
**Division of Workers'
Compensation**

Employer: City of St. Louis

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

Additional Party: Second Injury Fund (SIF)

Insurer: Self c/o CCMI

Hearing Date: March 20, 2013

Checked by: KMH

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: April 18, 2011
5. State location where accident occurred or occupational disease was contracted: St. Louis
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 injured her low back when she lifted a cooler in the course and scope of her employment.
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: body as a whole referable to the low back
14. Nature and extent of any permanent disability: 35% body as a whole referable to the low back and permanent and total disability benefits from the SIF as a result of the combination of the primary injury and prior disabilities.
15. Compensation paid to-date for temporary disability: \$8,707.02
16. Value necessary medical aid paid to date by employer/insurer? \$115,914.19

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- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: unknown
- 19. Weekly compensation rate: \$550.66/\$418.58
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

5 1/7 weeks of temporary total disability (or temporary partial disability)	\$2,831.96
140 weeks of permanent partial disability from Employer	\$58,601.20

22. Second Injury Fund liability: Yes to be determined

Permanent total disability benefits from Second Injury Fund:
weekly differential \$132.08 payable by SIF for 140 weeks beginning
December 17, 2011, and, thereafter, \$418.58 weekly as provided by law

TOTAL: TO BE DETERMINED

23. Future requirements awarded: See award

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 Hoffmann

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Joan Bush Glasby

Injury No.: 11-032049

Dependents: Gary Glasby

Before the
**Division of Workers'
Compensation**

Employer: City of St. Louis

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

Additional Party: Second Injury Fund

Insurer: Self c/o CCMi

Checked by: KMH

A hearing was held on the above captioned matter March 20, 2013. Joan Bush Glasby (Claimant) was represented by attorney Jim Hoffmann. City of St. Louis (Employer) was represented by attorney Tom Goeddel. The SIF was represented by Assistant Attorney General Tim Maurer.

All objections not expressly ruled on in this award are overruled to the extent they conflict with this award. Any markings on the exhibits were present when admitted into evidence.

Claimant alleges she is permanently and totally disabled as a result of the combination of her primary injury and her prior injuries and disabilities.

STIPULATIONS

The parties stipulated to the following:

1. Claimant sustained an injury by accident while in the employment of Employer on April 18, 2011.
2. Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law on the date of injury.
3. Employer's liability was self-insured.
4. Employer had notice of the injury and a claim for compensation was timely filed.
5. Claimant's rate for TTD and PTD is \$550.66. Her rate for PPD is \$418.58.
6. Claimant has been paid \$8,707.02 in TTD benefits covering a time period of July 25, 2011 through November 10, 2011.

ISSUES

The parties stipulated the issues to be resolved are as follows:

1. Arising out of and in the course of employment.
2. Liability for past medical expenses.
3. Future medical care
4. TTD from November 11, 2011 through December 16, 2011
5. Permanent disability
6. SIF liability

FINDINGS OF FACT

Based on the competent and substantial evidence, my observations of Claimant at trial, and the reasonable inferences to be drawn therefrom, I find:

1. Claimant is a 55 year-old married female who attended community college for two years after high school graduation. She began working for Employer in 1987, and worked in various capacities throughout her career. She last worked for Employer as a Corrections Officer in the Control Center of Employer's medium security institution. At the Control Center, Claimant monitored gate keys and identification badges for those entering or exiting, kept a log of daily activities, answered the phone, and monitored security TV screens. She worked five days a week for 40 hours total.
2. Control Center officers were not allowed to leave their post until someone came to relieve them for lunch break. Since the officers could not leave the Control Center, kitchen officers brought them bags of ice for the Control Center cooler so Claimant and her co-workers could have cold drinks. On April 18, 2011, Claimant was lifting what she thought was an empty cooler for the kitchen officer. The cooler was full of water from the prior shift and was heavier than anticipated. As she lifted the cooler, Claimant felt a sharp pain in her back radiating down her left leg. She immediately notified her supervisor and completed an incident report. A co-worker witnessed the accident and also completed an incident report. Claimant's supervisor immediately responded, made notes on the incident reports, and completed a Report of Injury.
3. Employer immediately sent Claimant to Concentra. The doctor noted Claimant's physical exam was consistent with the mechanism of injury, and ordered an MRI and modified work activities. Claimant returned to Concentra April 27, 2011, and learned the MRI showed a disc bulge and herniation at L3-4. The doctor recommended referral to a neurosurgeon and left a voice mail to that effect with the adjuster, Jackie Morris. Employer did not approve a neurosurgeon, did not approve additional treatment, and did not advise Claimant why they would not authorize a referral.
4. Claimant's attorney sent a letter to Ms. Morris requesting treatment on May 3, 2011. On May 13, 2011, Ms. Morris sent a letter to Claimant's attorney acknowledging receipt of the Claim and attaching medical records.

5. Ms. Morris sent a letter to Claimant's attorney May 24, 2011 denying further treatment because Employer believed the accident was questionable. Ms. Morris stated Claimant should pursue treatment through her group carrier. Claimant testified Employer did not ask her about the accident before denying the case.
6. On May 26, 2011, Claimant's attorney sent Ms. Morris a letter indicating he had not gotten a response to his May 3 letter and advising Claimant would seek treatment on her own and later request reimbursement from Employer.
7. Claimant selected Dr. Mirkin as her physician and saw him June 1, 2011. He referred Claimant to Dr. Boedefeld for injections and to SSM Physical Therapy. These treatments failed to relieve Claimant's symptoms. She continued to walk with a limp and have pain in her back radiating down her legs. On June 29, 2011, Dr. Mirkin recommended a decompression and fusion.
8. On June 6, 2011, Claimant's attorney sent Ms. Morris a letter acknowledging her May 24 letter, requesting further explanation as to the basis for Employer's denial of the claim, and again advising Claimant needs treatment. Claimant's attorney also sent a letter that day to Employer's attorney requesting treatment.
9. On July 7, 2011, Claimant's attorney sent Employer's attorney a letter advising Claimant was treating on her own given Employer's denial of the case. Claimant's attorney also advised Dr. Mirkin recommended surgery, and it was scheduled for July 19, 2011.
10. Claimant continued working until her back fusion. On July 26, 2011, Dr. Mirkin performed a fusion at L5-S1 and decompression at L3-4 and L4-5. Claimant had follow up care with Dr. Mirkin and he ordered physical therapy. On August 4, 2011, Dr. Mirkin issued a report stating Claimant's surgery and treatment were related to the injury of April 18, 2011. He opined the 2011 accident caused a large recurrent herniated disc at L5-S1 and smaller disc protrusions at L3-4 and L4-5.
11. Claimant testified she paid the co-pays for treatment with and directed by Dr. Mirkin. She did not receive TTD benefits while she was off work recovering. Since Claimant was not working, her health insurance was cancelled, and she was not able to attend all her physical therapy after surgery.
12. On September 9, 2011, Claimant's attorney sent Employer's attorney a copy of a motion for hardship setting to be heard September 22, 2011.
13. On September 28, 2011, Claimant's attorney sent Ms. Morris a letter acknowledging a phone conversation wherein Ms. Morris advised Employer agreed to accept the claim as compensable and allow Claimant to continue treatment with Dr. Mirkin. Ms. Morris confirmed she would contact ProRehab and Dr. Mirkin regarding payment instructions. Ms. Morris sent a fax to Dr. Mirkin's office indicating they were accepting the claim and responsibility for the bills. Claimant testified at this point she knew Employer had accepted the case and was to start paying medical bills.

14. On September 30, 2011, Claimant's attorney sent Employer's attorney a letter advising he had talked to Ms. Morris and she advised Employer was accepting the case. Ms. Morris had viewed the videotape again and saw Claimant lifting the cooler. Claimant's attorney also advised Employer's attorney that during the phone conversation, Ms. Morris advised she would contact Dr. Mirkin and the physical therapist regarding accepting liability and issuing bills directly to Ms. Morris for payment.
15. Employer paid Claimant TTD benefits for July 26, 2011, through September 24, 2011. The check was made payable to Claimant and her attorney.
16. On November 1, 2011, Claimant's attorney sent Ms. Morris a letter requesting the status of payment of medical bills and indicating Claimant was receiving demand notices in the mail. Claimant testified she was getting bills from Dr. Mirkin, Des Peres Hospital, and ProRehab. Employer made multiple payments to Dr. Mirkin and ProRehab beginning November 3, 2011. Claimant testified the demand notices stopped once Employer paid some bills.
17. On November 11, 2011, Dr. Mirkin sent Ms. Morris a letter indicating his understanding the case was accepted by Employer. He advised Claimant was still in therapy and could return to work light duty, lifting no more than 20 pounds and with no repetitive bending. Claimant testified she contacted the Chief of Security who said she could not return to work if she was not fit for full duty. Employer stopped TTD benefits November 11, 2011, but Claimant was not allowed to return to work.
18. Dr. Mirkin released Claimant at MMI December 16, 2011, and imposed a permanent lifting restriction of 30 pounds with a recommendation Claimant avoid repetitive bending and stooping. Claimant testified she could not return to work because Employer would not allow her to work with any restrictions. She has not worked since the date of surgery and has had no further treatment since Dr. Mirkin's release. Dr. Mirkin later rated Claimant's PPD at 25%.
19. On June 25, 2012, Claimant's attorney sent Ms. Morris a letter advising he has a contract to receive a percentage of any sums recovered and advising of his lien. He asked Employer to issue all payments to his office and to place his name on any checks payable to any healthcare provider.
20. On July 12, 2012, Ms. Morris sent Claimant's attorney a letter with a "paid transactions" printout for this case. Ms. Morris stated she received his June 25, 2012 letter, but the bulk of the bills had been paid and printed well before the receipt of his correspondence. The bills had been input months before and were waiting for funding from the City of St. Louis in order to be printed.
21. Claimant testified the back fusion eased some of her pain, but she can no longer function as well as she did before the surgery. Claimant continues to have daily pain in her back that radiates down her left leg and into her foot. She has to rest two to three times a day to ease her pain. She takes pain medication as needed and takes ibuprofen every day. She has reduced range of motion, and can't bend forward to touch her toes. She has

difficulty putting on her shoes and socks. She awakens during the night due to pain. She lifts only ten to twenty pounds at a time. She can't do much housekeeping and can't vacuum. Her husband does most of the cleaning and laundry since this injury. She has difficulty sleeping and wakes up two to three times a night due to pain. Claimant believes she can't work because of her pain. She can't sit or stand very long, and has to switch positions often. Claimant is on social security disability.

22. Claimant had a number of injuries before to the primary injury. She injured her low back and received PPD settlements for injuries in 1990, 2005, 2006, and 2007. These settlements total 42.5% PPD to the lumbar spine. She had extensive conservative treatment as a result of these injuries, and had an L5-S1 discectomy in 2007 related to her 2006 back injury. She returned to work without restrictions after her surgery, but continued to have daily back pain. She occasionally had to lie down to ease her pain, but could not do this while working. She moved more slowly and had more pain and fatigue at the end of the work day. She had left lower extremity weakness and felt like her left leg gave away sometimes. After her 2007 low back injury, she was assigned to the Control Center where her duties were at a lighter level of exertion. She was not able to do all her household chores, and restricted many of her activities.
23. Claimant had pain management for her back through 2009 and eventually Dr. Dave performed a neuroablation. Claimant testified her back felt great after this procedure. She had no pain because her back was numb, and she had no left leg pain or instability. She had no back treatment between December 2009 and the primary injury, and she continued to work in the lighter duty job in the Control Center.
24. Claimant injured her left knee in 1990 when breaking up a fight at work. She dislocated her knee and had physical therapy. She continues to have pain, popping, and swelling in her knee. She avoids kneeling and squatting and occasionally limps due to knee pain. She settled this case with Employer for 15% PPD of her left knee.
25. In 2003 Claimant injured her right hand and was diagnosed with a sprain. She had some physical therapy and had ongoing stiffness and soreness in her hand. In 2010 she developed pain and tingling in her right hand. She had a carpal tunnel release and trigger finger release. Claimant continues to have diminished grip strength and numbness in her right hand and has difficulty with pinch and fine motor skills. Her settlements for her right hand injuries total 15% of the right hand.
26. Dr. Mirkin testified for Claimant. He opined Claimant should be evaluated every year for four to five years after surgery. She may have to take anti-inflammatories and may need epidural steroid injections. He opined there is a significant chance Claimant will need surgery in the future. A fusion stops motion at the fused level, but it places stress on the disc space above the fusion putting the patient at increased risk for developing degenerative changes and recurrent herniated discs at the level above.
27. Claimant's medical expert, Dr. Volarich, reviewed the medical records and examined Claimant in 2007 and 2012. He rated Claimant's disabilities, issued permanent restrictions, and opined she is permanently and totally disabled as a result of the primary

injury in combination with her preexisting conditions. He testified her total disability is mostly from her prior injuries to her back, left knee and right hand. Although the primary injury resulted in a fusion, she has more disability in her back from her prior injuries than the primary. He testified she will require ongoing medical care and will likely require another surgery as a result of adjacent level breakdown following a fusion.

28. Claimant's vocational expert, Tim Lalk, interviewed Claimant, reviewed the records, and issued a report in May 2012. Claimant has no vocational, technical, or keyboard training and no computer experience. She spent the bulk of her career working in corrections for Employer. He testified Claimant's last job with Employer fits within the light level work restrictions imposed by Dr. Mirkin, but Claimant is unable to control her symptoms by simply changing positions and needs to lie down throughout the day. An employer would not be able to accommodate this need. In addition, Claimant appears in discomfort and has difficulty simply sitting, which will cause an employer to be concerned she would not be a reliable employee. Based on these factors and the medical records, Mr. Lalk opined Claimant is not employable in the open labor market. She had low back restrictions and symptoms that substantially limited her functional capabilities and access to employment before the primary injury, and is unable to work due to her preexisting conditions and primary injury together.

29. Claimant is credible.

RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented and the applicable law, I find the following:

1. Claimant's April 18, 2011 accident occurred while in the course and scope of her employment.

There is no dispute Claimant injured her back as a result of the accident that occurred while lifting the cooler at work. Although Employer paid a substantial amount of medical bills and stated they accepted the case, they now deny the accident arose out of and in the course of employment.

In determining whether an injury by accident is compensable, §287.020.3(2) (RSMO 2005) provides an injury shall be deemed to arise out of and in the course of the employment only if:

- (a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and

- (b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

The medical experts agree the accident was the prevailing factor in causing the injury. I find Claimant has also established the injury did not come from a hazard or risk unrelated to the employment.

Employer's initial denial of the case was based on their mistaken belief that no accident occurred. Once Employer reviewed the video for a second time, they saw the accident, and accepted liability. Employer did not question the issue of course and scope of employment until the date of hearing, but presented no evidence to establish Claimant was equally exposed, outside of and unrelated to her employment, to the risk that caused her injury.

The video and credible testimony establish Claimant injured her back when she leaned over a contractor's equipment to lift the cooler. Claimant's credible testimony establishes Corrections Officers used the cooler because they could not leave their post, and Employer supplied the ice for the cooler. There was no testimony to establish this was simply a matter of personal comfort for Claimant, and there was no testimony elicited to establish Claimant was equally exposed to the risks created by lifting a cooler in her nonemployment life.

I find Claimant met her burden and established her injury by accident arose out of and in the course of her employment and is medically and causally related to the work accident.

2. Employer is liable for TTD benefits from November 11, 2011 through December 16, 2011 when Claimant reached MMI.

TTD benefits are intended to compensate a claimant's healing period until such time as he can return to work or has reached MMI.

Employer paid TTD benefits through November 10, 2011, when Dr. Mirkin released Claimant to return to work light duty with restrictions. Claimant's uncontradicted testimony establishes Employer was not able to accommodate those restrictions, and Claimant was not allowed to return to work. Dr. Mirkin released Claimant at MMI with a permanent 30 pound lifting restriction and no repetitive bending or stooping on December 16, 2011.

Claimant has not worked since her surgery, and she is entitled to TTD benefits until the date of MMI. Employer is ordered to pay TTD benefits for the time period of November 11, 2011 through December 16, 2011. At Claimant's compensation rate of \$550.66, she is entitled to an additional \$2,831.97.

3. Liability for past medical expenses

Claimant's attorney asserts he had a lien on the medical bills, Employer ignored his lien, and Employer should be ordered to pay the \$187,536.00 in medical bills to Claimant. Employer's attorney states Employer paid \$115,914.19 in medical bills, and has no further liability for past medical expenses.

In *Lake v. Levy*, 390 S.W.3d 855 (Mo.App. W.D. 2013), the court found an attorney lien arises at the time he filed the workers' compensation claim seeking a medical expense award because of the attorney's work in procuring the award. Therefore, in the present case, Claimant's attorney lien arose at the time he filed the claim.

Section 287.260.1 (RSMo 2005) provides the division may allow as "lien on the compensation, reasonable attorney's fees for services in connection with the proceedings for compensation if the services are found to be necessary". Attorney fees may be based on an award of medical expenses if the services are found to be necessary, and an attorney has the burden to prove his services were necessary.

While I believe Claimant's attorney made considerable efforts to get Employer to accept the case, it is not clear to me his work convinced Employer to pay the bills. Ms. Morris testified she viewed the video again, voluntarily accepted the case because she saw the accident, and began making payments pursuant to the agreement reached during the phone conversation. It is unknown why she reviewed the video.

Clearly there was a misunderstanding between the two parties following the September 28, 2011 phone conversation. It is unclear as to whether the parties had reached an agreement concerning the past medical bills or bills for future treatment, or both. Mr. Hoffmann asserts he advised Ms. Morris to honor his lien and include his name on the payment of past medical expenses. Ms. Morris testified that is not her recollection and their agreement during that conversation was she would contact the medical providers and begin making payments directly to the providers. She ordered payments on a number of bills in October 2011 and again after Mr. Hoffmann's November 2011 letter requesting the status of payment of bills.

Claimant's attorney asserts Employer paid the bills behind his back. I find Ms. Morris paid the bills based on her understanding of the parties' agreement during the phone conversation. I do not believe her conduct rises to the level required to assess penalties allowed in Chapter 287.

This court can award a lien on benefits to be paid. The medical bills have been paid, there are no bills in issue for me to award, and this court no longer has jurisdiction over the bills. Had the bills been before me as unpaid, I would have jurisdiction to award payment with an attorney lien. This does not relieve Employer's liability for the lien. There are other remedies Claimant's attorney can pursue outside the jurisdiction of the Division of Workers' Compensation.

4. Claimant is entitled to future medical care.

Section 287.140.1 entitles an injured worker to medical treatment as may reasonably be required to cure and relieve from the effects of the injury. It is sufficient to award future medical benefits if the claimant shows by reasonable probability that he is in need of additional medical treatment by reason of his work-related accident. *Bock v. Broadway Ford Truck Sales, Inc.*, 55 S.W.3d 427, 437 (Mo.App. E.D. 2001).

The uncontroverted medical evidence establishes Claimant will need additional medical treatment. Dr. Mirkin recommended continued annual evaluations, anti-inflammatories, and possible epidural steroid injections. He testified there is a significant chance Claimant will need surgery in the future because of the stress a fusion puts on adjacent disc spaces. Dr. Volarich agreed Claimant will require ongoing medical care and possibly additional surgery.

I find Claimant has established by reasonable probability that she will need future medical treatment related to the primary injury. Accordingly, Employer is directed to provide future medical treatment to cure and relieve the effects of the injury.

5. Claimant sustained 35% PPD to the body as a whole referable to her low back as a result of her primary injury, and she is entitled to \$58,601.20 in compensation from Employer.

A permanent partial disability award is intended to cover claimant's permanent limitations due to a work related injury and any restrictions his limitations may impose on employment opportunities. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641,646 (Mo.App.1991)(overruled in part).

Claimant had several low back injuries before the primary injury, and that prior disability is presumed to continue. Based on the medical evidence and Claimant's testimony regarding her ongoing symptoms related to the primary injury, I find she has sustained an additional 35% PPD to the body as a whole referable to her low back as a result of her primary injury, and is entitled to \$58,601.20 in compensation from Employer.

6. Claimant is permanently and totally disabled as a result of the combination of her primary and prior injuries and disabilities.

Section 287.220 RSMO (2005) provides that in cases of permanent total disability against the Second Injury Fund, there must be a determination of the following:

- the percentage of disability resulting from the last injury alone;

- that there was a pre-existing permanent disability that was a hindrance or obstacle to employment or to obtaining re-employment;
- that all of the injuries and conditions combined, including the last injury, have resulted in the employee being permanently and totally disabled.

Claimant had a number of pre-existing injuries and disabilities. She had ongoing symptoms in her left knee and her right hand. Although at some points Claimant relates much of her pain to her 2011 injury, she has a history of multiple back injuries, courses of physical therapy, and restrictions. She had ongoing complaints in her low back and leg leading up to the primary injury. After her 2007 back injury, Employer accommodated Claimant's restrictions and transferred her to the Control Center because it was light duty work. The medical experts agree Claimant had significant problems with her low back leading up to the primary injury.

Each of Claimant's prior injuries and conditions limited her ability to work. I find Claimant's preexisting injuries and disabilities were a hindrance or obstacle to employment or to obtaining re-employment.

The final question is whether the combination of Claimant's injuries rendered her permanently and totally disabled. The test for total disability is whether Claimant is able to adequately compete in the open labor market. The question is whether any employer in the usual course of business would reasonably be expected to employ Claimant given her condition.

Dr. Volarich is the only physician who examined Claimant regarding all of her injuries. Dr. Volarich imposed restrictions and opined Claimant is permanently and totally disabled due to a combination of her disabilities. The only vocational evidence was the credible opinion and testimony of Mr. Lalk. He opined Claimant is totally disabled due to a combination of her disabilities, and she is not able to compete for or sustain employment in the open labor market.

Based on my observations of Claimant and the vocational and medical evidence, I find Claimant is permanently and totally disabled as a result of the combination of her primary and prior injuries and disabilities. It is not the last injury alone that totally disabled her, and it is not the subsequent deterioration of her prior conditions that totally disabled her. Although she was working full time before 2011, she credibly testified she was not able to work some jobs because of her prior injuries. The medical records corroborate the testimony that she had limitations and restrictions prior to her 2011 injury. Claimant is no longer able to compete in the open labor market and no employer in the usual course of business would reasonably be expected to employ her.

Claimant reached MMI December 16, 2011. The SIF is hereby ordered to pay permanent total disability benefits at a differential rate of \$132.08 per week for 140 weeks beginning December 17, 2011, and thereafter, \$418.58 weekly and continuing for as long as provided by law.

Conclusion

Claimant is permanently and totally disabled as a result of the combination of her primary injury and prior disabilities. Employer is ordered to pay Claimant TTD benefits of \$2,831.96 and PPD benefits of \$58,601.20. Employer is ordered to provide future medical treatment as needed to cure and relieve the effects of the injury. The SIF is liable for PTD benefits at the differential rate of \$132.08 for 140 weeks beginning December 17, 2011, and thereafter, \$418.58 per week as provided by law. Claimant's attorney is awarded a fee of 25% of all payments awarded.

Date: _____

Made by: _____

KATHLEEN M. HART
Administrative Law Judge
Division of Workers' Compensation