

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

Injury No.: 07-004619

Employee: Chris E. Byrd
Employer: Home Services Oil Company
Insurer: American Home Assurance
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 reviewed the evidence, read the parties' briefs, 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.

Findings of Fact

The administrative law judge's award sets forth the stipulations of the parties and the administrative law judge's findings of fact as to the issues disputed at the hearing. We adopt and incorporate those findings to the extent that they are not inconsistent with the modifications set forth in our award. Consequently, we make only those findings of fact pertinent to our modifications herein.

Preexisting conditions of ill-being

Employee suffered a left shoulder injury in 1995 that required surgical intervention. Employee settled a workers' compensation claim arising from the injury for 30% permanent partial disability of the left shoulder, plus 2.5% permanent partial disability of the body as a whole. Dr. Poetz rated employee's preexisting left shoulder injury at 35% permanent partial disability of the left upper extremity at the level of the shoulder.

We acknowledge the evidence that employee's preexisting left shoulder condition did not cause him to miss work or turn down overtime leading up to the primary injury; however, employee credibly testified (and we so find) that he continued to have pain in his left shoulder, and continued to suffer weakness in the left shoulder whenever he overused it. We find that the prior left shoulder injury never completely abated prior to January 10, 2007, the date of the primary injury. We find persuasive and adopt Dr. Poetz's opinion that employee suffered preexisting permanent partial disability referable to the left upper extremity at the level of the shoulder.

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Nature and extent of the primary injury

Dr. Poetz rated the primary right shoulder injury at 50% of the right upper extremity as measured at the right shoulder; Dr. Emanuel meanwhile, rated employee's primary right shoulder injury at 10% permanent partial disability, while Dr. Burns found a 10% physical impairment of the shoulder.

After careful consideration, we find that employee's disability resulting from the work injury amounts to 50% permanent partial disability of the right upper extremity at the 232-week level. We find appropriate and adopt Dr. Emanuel's finding that employee reached maximum medical improvement on March 23, 2010.

Permanent total disability

We understand the administrative law judge's conclusion that the pain associated with the last injury alone renders employee permanently and totally disabled, but we cannot disregard all of the expert opinions on the record finding permanent total disability, which point to a combination of the effects of the work injury and employee's preexisting left shoulder disability.

Both Mr. England and Dr. Poetz opined that employee's inability to compete for work in the open labor market is due to pain associated with the primary injury, in combination with the effects of employee's preexisting left upper extremity problems. Dr. Poetz explained that when one shoulder is disabled to any extent, the other shoulder has to do more work, resulting in greater disability to both shoulders. Mr. England likewise pointed to the fact employee has problems with both upper extremities as the primary consideration leading Mr. England to conclude he is not employable.

We find persuasive and adopt the opinions of Mr. England and Dr. Poetz that employee's permanent total disability results from a combination of the primary injury and employee's preexisting left shoulder injury.

Corrections

On page 12 of his award, the administrative law judge recites a number of findings by Dr. Emanuel concerning range of motion testing of employee's right upper extremity. We note a recurrent typographical error in these findings. For example, in the second sentence of the first full paragraph, the award states: "He demonstrated 1300 of forward flexion, 700 of abduction, 45° of internal rotation and 65° of external rotation." The first two measurements should read 130° and 70°, rather than 1300 and 700. We correct the same error throughout page 12 of the award as follows:

In the second-to-last sentence of the first full paragraph, "1650 of passive range" should instead read "165° of passive range";

In the sixth sentence of the second full paragraph, "1450 of active forward flexion and abduction was 1600 of passive motion," should instead read "145° of active forward flexion and abduction was 160° of passive motion"; and

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In the tenth sentence of the fourth full paragraph, “pendulums to 900,” should instead read “pendulums to 90°”.

On page 27 of his award, in the first sentence of the seventh full paragraph, the administrative law judge states: “Mr. Woods offers evidence that in the Court’s opinion can be interpreted to have segments that support permanency from the last accident alone or in combination.” This appears to be a clerical error, as no witness by the name of Woods testified in this matter. Accordingly, we correct this error by deleting from the award the entire paragraph in which the quoted sentence is found.

Conclusions of Law

Nature and extent of disability resulting from the primary injury

Section 287.190 RSMo provides for the payment of permanent partial disability benefits in connection with employee’s compensable work injury. We have found that employee sustained a 50% permanent partial disability of the right shoulder at the 232-week level as a result of the primary injury. This amounts to 116 weeks of permanent partial disability at the rate of \$376.55. We conclude, therefore, that employer is liable for \$43,679.80 in permanent partial disability benefits.

Second Injury Fund liability

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid in “all cases of permanent disability where there has been previous disability.” As a preliminary matter, the employee must show that he suffers from “a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed...” *Id.* The Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a “hindrance or obstacle to employment”:

[T]he proper focus of the inquiry is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition.

Knisley v. Charleswood Corp., 211 S.W.3d 629, 637 (Mo. App. 2007)(citation omitted).

We have found that employee suffered from a preexisting permanent partially disabling condition referable to his left shoulder at the time he sustained the work injury. We are convinced this condition was serious enough to constitute a hindrance or obstacle to employment. This is because we are convinced employee’s preexisting left upper shoulder condition had the potential to combine with a future work injury to result in worse disability than would have resulted in the absence of the condition. See *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. 1995). This, in fact, is what occurred, as we have credited Dr. Poetz’s opinion and found that employee was forced, as a result of the primary right shoulder injury, to increase the use of his

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previously compromised left arm, which has rendered employee significantly more disabled than he would be in the absence of the preexisting condition.

Having found that employee suffered from a preexisting permanent partially disabling condition that amounted to a hindrance or obstacle to employment, we turn to the question whether the Second Injury Fund is liable for permanent total disability benefits. In order to prove his entitlement to such an award, employee must establish that: (1) he suffered a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with a prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007). Section 287.220.1 requires us to first determine the compensation liability of the employer for the last injury, considered alone. If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, not the Second Injury Fund, is responsible for the entire amount of compensation. "Pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003).

We have found employee sustained a 50% permanent partial disability of the right shoulder at the 232-week level as a result of the primary injury, and credited the expert opinions from Mr. England and Dr. Poetz that employee's permanent total disability results from a combination of his preexisting left shoulder injury with the effects of the primary injury. We find that employee is not permanently and totally disabled as a result of the last injury considered in isolation.

We conclude employee is permanently and totally disabled owing to a combination of his preexisting disabling conditions in combination with the effects of the work injury. The Second Injury Fund is liable for permanent total disability benefits.

Conclusion

We modify the award of the administrative law judge as to the issues of the nature and extent of disability resulting from the primary injury and Second Injury Fund liability.

Employer is liable for permanent partial disability benefits in the amount of \$43,679.80.

The Second Injury Fund is liable for weekly permanent total disability benefits beginning March 23, 2010, at the differential rate of \$260.51 for 116 weeks. Beginning June 12, 2012, the Second Injury Fund is liable for weekly permanent total disability benefits at the permanent total disability rate of \$637.06. The weekly payments shall continue thereafter for employee's lifetime, or until modified by law.

The award and decision of Administrative Law Judge Gary L. Robbins, January 24, 2013, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

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

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

Given at Jefferson City, State of Missouri, this 20th day of September 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Chris E. Byrd Injury No. 07-004619
Dependents: N/A
Employer: Home Services Oil Company
Additional Party: Second Injury Fund
Insurer: American Home Assurance
Appearances: Ray A. Gerritzen, attorney for employee.
Thomas J. Pettit, attorney for the employer/insurer.
Kevin Nelson, attorney for Second Injury Fund.
Hearing Date: October 23, 2012 Checked by: GLR/rm

SUMMARY OF FINDINGS

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease? January 10, 2007.
5. State location where accident occurred or occupational disease contracted: Jefferson County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by law? Yes.

10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident happened or occupational disease contracted: The employee was fueling a caterpillar and injured his right shoulder and body as a whole.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Right shoulder and body as a whole.
14. Nature and extent of any permanent disability: Permanent Total Disability.
15. Compensation paid to date for temporary total disability: \$51,328.84
16. Value necessary medical aid paid to date by employer-insurer: \$95,236.34.
17. Value necessary medical aid not furnished by employer-insurer: \$9,080.00.
18. Employee's average weekly wage: \$955.59.
19. Weekly compensation rate: \$637.06 per week for temporary total and permanent total disability. \$376.55 per week for permanent partial disability.
20. Method wages computation: Wage rates set by the Court.
21. Amount of compensation payable: See Award.
22. Second Injury Fund liability: None. See Award.
23. Future requirements awarded: The employer-insurer was ordered to pay future medical care.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

The Compensation awarded to the employee 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 employee: Ray A. Gerritzen.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW

On October 23, 2012, the employee, Chris E. Byrd, appeared in person and with his attorney, Ray A. Gerritzen for a hearing for a final award. The employer-insurer was represented at the hearing by their attorney, Thomas J. Pettit. Assistant Attorney General Kevin Nelson represented the Second Injury Fund. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a statement of the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS:

1. Home Services Oil Company was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by American Home Assurance.
2. On January 10, 2007, Chris E. Byrd was an employee of Home Services Oil Company and was working under the Workers' Compensation Act.
3. On January 10, 2007, the employee sustained an accident arising out of and in the course of his employment.
4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employer-insurer paid \$95,236.34 in medical aid.
7. The employer-insurer paid \$51,328.84 in temporary disability benefits.
8. The employee had no claim for mileage.
9. The employer-insurer advanced the employee \$8,735.96.

ISSUES:

1. Average Weekly Wage and Rate.
2. Medical Causation as it relates to the treatment for the employee's neck.
3. Past Medical Bills.
4. Future Medical Care.
5. Additional Temporary Total Disability.
6. Permanent Total Disability as to the employer-insurer.
7. Permanent Partial Disability as to the employer-insurer.
8. Liability of the Second Injury Fund for Permanent Partial or Permanent Total Disability.

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employees Exhibits:

- A. Certified records of the Division of Workers' Compensation.
- B. Job description.
- C1. Photograph.

- C2. Photograph.
- C3. Photograph.
- D. CDL manual.
- E. Deposition of Robert Poetz, D.O.
- E1. Deposition of Robert Poetz, D.O.
- F. Deposition of Rachel F. Feinberg, M.D.
- G. Medical records of Briccio S. Cadiz, M.D.
- H. Deposition of James M. England, Jr.
- I. Wage statement.
- J. 2006 tax documents.
- K. Temporary Total Disability records.
- L. Temporary Total Disability checks.
- M. Records from the Social Security Administration.
- N. Medical records from Orthopedic Associates, LLC/Richard E. Hulsey, M.D.
- O. Medical records from the Missouri Baptist Medical Center.

Employer-Insurer Exhibits:

- 1. Withdrawn.
- 2. Temporary Total Disability payment ledger.
- 3. Deposition of Chris E. Byrd.
- 4. Deposition of Gregory DeClue.
- 5. Deposition of Michael F. Burns, M.D.
- 6. Deposition of James Patrick Emmanuel, M.D.
- 7. Deposition of Robert J. Bernardi, III, M.D.
- 8. Deposition of Delores Gonzalez.
- 9. Letter from Mr. Gerritzen to Mr. Pettit dated September 17, 2012.
- 10. Withdrawn.
- 11. Medical records of Edward R. Habert, M.D.
- 12. Records from ProRehab.
- 13. Medical records of Paul R. Maynard, M.D.
- 14. Medical records of Frank A. Krewet, III, M.D.

The Second Injury Fund did not offer any exhibits.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:

STATEMENT OF THE FINDINGS OF FACT:

The employee and his wife were the only witnesses to personally testify at trial. All other evidence was received in the form of written records, medical records or deposition testimony.

Personal History

Mr. Byrd, the employee was born on March 3, 1959. He lives in Festus, Missouri. He is married and has four children. The youngest still resides at home. His wife is 39 years old and is a nurse.

In the past the employee enjoyed teaching children how to play sports and was an avid fisherman. He also used to like to do yard work. He testified that he has had to give up all these activities because of his physical problems.

Education

Mr. Byrd completed the 11th grade before dropping out of school. He has no additional formal training or education and did not serve in the military. Mr. Byrd was given the Wide-Range Achievement Test, Revision 3. He scored at the post high school level on reading and at the sixth-grade level on math.

Work History

The employee has worked essentially his entire career as a truck driver. He was employed most recently by Home Service Oil Company where he worked from around November 2004 to about July 2007 handling gasoline and later home heating oil delivering it to customers at residences as well as job sites.

He said that in August of 2007 he stopped work to have shoulder surgery and has never really been back to work since then. He testified that he was making about \$16.50 an hour at the time and worked 60-65 hours a week. The employee claimed that he was not paid appropriate temporary benefits after his accident.

The employee's job involved driving up to 250 miles or so per day and involved a combination of physical activity in delivering his product and taking care of his truck. He has indicated that he did not have to do any inventory control, shipping and receiving, scheduling or supervising.

Prior Injuries

Mr. Byrd injured his left shoulder in 1995. He settled that case in 1997 by stipulation for 30% permanent partial disability of the left shoulder and 2½% permanent partial disability of the body as a whole.

In 1994 he lost the index finger on his left hand due to a grinder accident.

The employee testified that despite any of his prior injuries he was able to do his job and did not have any problems with pain before January 10, 2007.

Accident

The employee injured his right shoulder on January 10, 2007. He testified that he was climbing on a caterpillar to refuel it. He indicated that he had the refueling hose in his left hand and was climbing up on the caterpillar. He indicated that he reached up with his right arm to grab the handle to pull himself up on the caterpillar. As he did so he twisted and slipped with the full weight of his body being applied to his right arm. He testified that he felt a pop in his right shoulder. My Byrd testified that he never had any problems with his right shoulder before this accident.

The employee immediately reported his accident to his supervisor. He did not work the rest of the day and went home and applied ice to his shoulder for the pain. Mr. Byrd then began what turned out to be a lengthy course of medical treatment. The employee testified that he continued working after the accident but did so in pain.

Dr. Krewet

Dr. Krewet was the first physician to treat the employee. He treated him shortly after the accident through May of 2007.

The employee was treated conservatively with medication and physical therapy and was given work restrictions of no lifting, pushing, or pulling over five to ten pounds with the right arm. The employee reported continued pain during the course of Dr. Krewet's treatment. As of January 16, 2007, Mr. Byrd still had some pain. Examination revealed some crepitus in the area medial to the scapula. He still had pain with some movements and crepitus throughout January. Mr. Byrd continued to work during this period even though in pain.

Mr. Byrd followed up on April 24, 2007, with pain in the area of the AC joint. Examination revealed slight tenderness in the AC joint area. There was no tenderness posteriorly. With the arm in the horizontal position, external rotation produced some pain with the terminal movements. With the arm in the hanging position, forced external rotation caused pain, though internal rotation did not. The diagnosis was right shoulder strain posteriorly with rotator cuff tear or symptoms. An MRI of the right shoulder was scheduled.

The MRI of the right shoulder was performed on May 1, 2007. It showed a synovial surface partial thickness tear of the supraspinatus tendon and bursal surface partial thickness tear of the infraspinatus tendon associated with osteoarthritis involving the right glenohumeral and acromioclavicular joints. There was a benign-appearing area of marrow edema or cyst along the lateral aspect of the right acromion process. Mr. Byrd followed up with Dr. Krewet on May 3, 2007, and was referred to an orthopedic surgeon due to the partial thickness tear.

Dr. Maynard

Dr. Maynard saw the employee on May 21, 2007. The x-rays and MRI were reviewed. Dr. Maynard assessed Stage II-III impingement with acromioclavicle. Therapy and anti-inflammatory medicine were recommended. Mr. Byrd was put on a work restriction. He was scheduled for physical therapy three times a week for four weeks. Dr. Maynard injected the subacromial space. Mr. Byrd was to continue light duty with no lifting greater than thirty pounds. As of July 20, 2007, the employee had not improved. He had a positive Jobe's, some tenderness in the subacromial region, and tenderness over the acromioclavicular joint. Mr. Byrd continued with therapy reporting no change. He stated that his work duties hurt his shoulder.

On August 2, 2007, Dr. Maynard performed a diagnostic arthroscopy, repair of the PASTA rotator cuff tear, subacromial decompression, bursectomy, and open distal clavicle excision. This was the first of a total of four procedures that the employee would undergo. Mr. Byrd was given medication and another round of physical therapy. Dr. Maynard followed the employee's problems through September and ordered more aggressive therapy and treated with injections. The employee underwent more physical therapy and reported that the physical therapy caused more pain.

The employee was working light duty in November but reported that he was unable to pull the hoses at work without pain and that turning his steering wheel caused pain. As of November 28, 2007, it was felt that the employee reached a plateau with his shoulder. Dr. Maynard felt part of the problem was that his work had put him almost back to full duty and, according to Mr. Byrd, had ignored quite a few of the recommendations. Examination showed limited range of motion. A repeat MRI of the shoulder was recommended. Follow up on December 13, 2007, revealed limited motion and quite a bit of stiffness. The MRI was consistent with tendinosis without any clear tear. Dr. Maynard's assessment was adhesive capsulitis. He requested Mr. Byrd be seen by Dr. Burns. Physical therapy was to stop for awhile, and his previous restrictions were continued.

Dr. Burns

Dr. Burns followed up with the employee on January 10, 2008. The employee continued to have discomfort in the shoulder with decreased range of motion both actively and passively. He wanted to proceed with manipulation under anesthesia with injection followed by another course of therapy. The doctor said that if his symptoms persisted after that procedure, then he would be a candidate for an arthroscopic procedure. On January 31, 2008, Dr. Burns performed a right shoulder closed manipulation with injection. The post-operative diagnosis was right shoulder adhesive capsulitis and arthrofibrosis status-post surgery including distal clavicular resection and arthroscopic rotator cuff repair. The employee was returned to light duty with no repetitive gripping, grasping, pushing, pulling, lifting, bending, stooping, squatting and no overhead lifting. His lifting limit was five pounds.

Mr. Byrd followed up with Dr. Burns on March 27, 2008. The manipulation helped with motion, but did not relieve the pain in the shoulder which continued to bother him during the day and at night, particularly with certain lifting or reaching activities.

On April 14, 2008, Dr. Burns performed arthroscopy of the shoulder with shaving and debridement of the glenohumeral joint, resection of adhesions, and arthroscopic subacromial bursectomy. The operative report stated there was evidence of significant residual adhesions within the glenohumeral joint with very mild degenerative changes and some inflammation, as noted by synovitis. This was the third of four procedures.

Records as of May 8, 2008, report that the procedure was of definite benefit, and the employee was noticing continued improvement in motion and less discomfort. He was to continue physical therapy for range of motion and progressive strengthening. His lifting limit was raised to ten pounds. He was to avoid climbing and ladders.

On July 3, 2008, records show that Mr. Byrd reported he was 75-80% better. He felt the Indocin was of benefit, but had to quit because of some GI difficulties. Records report that the employee was virtually asymptomatic and stated for the most part, unless he performed certain activities or put his shoulder in certain motions, he did not have any significant pain.

The employee was to have a short course of Celebrex and return to work with lifting restrictions. On August 8, 2008, Dr. Burns placed Mr. Byrd at MMI and gave him permanent lifting restrictions. He was to lift no more than 70 pounds from the floor to waist or 30 pounds overhead.

Dr. Poetz

Dr. Poetz saw the employee on multiple occasions, issued multiple reports and testified by deposition on two occasions.

Mr. Byrd was seen by Dr. Poetz on August 21, 2008, for evaluation of his work-related injury. Mr. Byrd reported that he had continuous pain in his right shoulder. His range of motion was limited, and the pain increased when he reached overhead or lifted out in front of the body. The shoulder became irritated after performing job duties. Since surgery, he felt like he had pain in the neck as well. At that time, Mr. Byrd denied further treatment for his injuries. He had been released from care, but had not been called back to work due to his permanent restrictions.

Mr. Byrd reported he had had a fractured left ankle which was treated, and the symptoms resolved. He suffered a partial amputation of the tip of his left index finger on a grinder. Mr. Byrd had injured his left shoulder in 1995 and underwent arthroscopic surgery. He indicated his symptoms improved after the surgery, but he was now experiencing some stiffness in the left shoulder which he felt was due to over-compensating for his right shoulder. He denied any other significant previous injuries.

Dr. Poetz's performed a physical examination. His diagnoses were right shoulder stage III impingement with partial articular supraspinatus tendon tear and right acromioclavicular arthrosis, 01/10/07; status post diagnostic arthroscopy and repair of a partial articular surface tendon avulsion, subacromial decompression and bursectomy, and open distal clavicle excision, 01/10/07; right shoulder adhesive capsulitis, 1/10/07; status post closed manipulation, 01/10/07; and status post arthroscopy of the shoulder with shaving and debridement of the glenohumeral joint with resection of adhesions and arthroscopic subacromial bursectomy, 01/10/07. The prognosis was guarded due to the length of time elapsed since the injuries and the continuance of pain in all areas of symptomatology.

Dr. Poetz presented his recommendations. Mr. Byrd was to use warm moist packs and do range of motion exercises. He was to take Cox II non-steroidal anti-inflammatory medication. He was to avoid heavy lifting and strenuous activity, pushing and pulling, overhead use of the upper extremities, excessive and repetitive use of the upper extremities, and use of equipment that created torque, vibration, or impact to the upper extremities. He was to avoid any activity that exacerbated symptoms or was known to cause progression of the disease process. Dr. Poetz opined that Mr. Byrd needed further evaluation and treatment of his right shoulder. He was to undergo another steroid injection. He said that he might also benefit from another manipulation but should have an MRI first.

Dr. Poetz felt the diagnostic testing, surgery and medications were medically necessary in Mr. Byrd's treatment. Based on his evaluation, verbal history and review of the medical records, Dr. Poetz believed Mr. Byrd had not reached maximum medical improvement and was at temporary total disability. He needed further evaluation.

Report of September 22, 2008

Dr. Poetz indicated that the employee reported shoulder pain and pain in neck since surgery. Dr. Poetz opined:

- The employee is not at maximum medical improvement and is temporarily totally disabled.
- The employee needs more care.

Report of December 30, 2008

Dr. Poetz saw the employee on December 22, 2008. He indicated that the employee continued with the same type of complaints. The employee also reported he was denied care by the workers' compensation carrier and has not had any care since his last visit. The employee reported that he has gotten worse. The employee said that he was terminated on December 15, 2008.

At that time Dr. Poetz gave his opinions:

- The employee is not at maximum medical improvement.

- The employee is temporarily totally disabled.
- The employee needs further evaluation.

Report of May 19, 2010

Dr. Poetz saw the employee on April 19, 2010. The employee reported that he was unemployed since August 2, 2007, and that he was terminated on December 15, 2008. Dr. Poetz reported that the employee needs more care, basically meds and injections. He also reported that it is more probable than not that he will require a right shoulder arthroplasty.

Dr. Poetz provided ratings:

- 50% permanent partial disability of the right shoulder from the 2007 accident.
- 35% permanent partial disability of the left shoulder from 1995.
- 20% permanent partial disability of the hand from 1994. This is the finger amputation.

Dr. Poetz suggested that a 20% loading factor should be applied. He further opined that the employee is permanently and totally disabled due to a combination of his January 10, 2007 accident and his pre-existing conditions.

Report of August 17, 2010

Dr. Poetz saw the employee again on July 19, 2010. Dr. Poetz was able to review an MRI of the employee's cervical spine. He said that the MRI showed objective protrusions at several levels. Dr. Poetz indicated that the employee's condition continued to deteriorate. He reported that the employee has significant problems with the right shoulder and ongoing problems with the neck since the injury that has not been addressed. He said that the employee is worse than when he saw him three month ago.

Dr. Poetz indicated that the employee's neck pain started after the January 31, 2008 manipulation. The employee testified that he had no neck problems prior to that time. Dr. Poetz indicated that it is obvious from the reports that the employee had significant pre-existing cervical degenerative disc disease. Dr. Poetz opined that the employee's degenerative condition was likely exacerbated from the awkward positioning during surgery or with anesthesia. Dr. Poetz went on to say that if not for his surgical intervention the employee would not have had additional injury to his neck. Dr. Poetz opined that the employee's work injury of January 10, 2007, was the substantial and prevailing factor leading to the exacerbation of the cervical degenerative disc disease.

Dr. Poetz opined that the employee has an additional 10% permanent partial disability due to the cervical injury. He still maintained that the employee is permanently and totally disabled in combination.

Dr. Poetz also recommended that the employee needed further care.

Report of July 27, 2011

The employee was on social security by the time he was next seen by Dr. Poetz. He had also been seen by Dr. Feinberg on October 29, 2010. Mr. England evaluated the employee on November 2, 2010. Dr. Poetz was also aware that Dr. Bernardi had seen the employee on February 9, 2011, and that Dr. Bernardi opined that:

- The employee has multilevel spondylosis.
- The employee did not suffer a cervical injury at the January 10, 2007 accident.
- The employee did not injure his neck at the time of the shoulder manipulation.
- The employee's periscapular and neck complaints were referred from his shoulder.

Dr. Poetz again recommended future medical care:

- Pain patches.
- Management of depression with Cymbalta.
- Follow up with primary care doctor for management of his complaints.

After reviewing the subsequent information that was provided to him, Dr. Poetz maintained his previous opinions and still opined that the employee was permanently and totally disabled due to a combination of his pre-existing disabilities and the disabilities from the January 10, 2007 accident.

In a letter dated December 1, 2008, Dr. Burns felt Mr. Byrd's lingering complaints were partially related to his degenerative change within the shoulder region. The osteoarthritis was first noted in his MRI of May 1, 2007, and most likely predated any injury. Dr. Burns felt the majority of the residual symptoms could be managed on a conservative basis utilizing medication and exercises and a periodic injection. Dr. Burns did not feel Mr. Byrd was a candidate for further surgery. He recommended a functional capacity evaluation.

Mr. Byrd returned to Dr. Krewet on October 10, 2008. He reported that he had significant shoulder pain. He reported neck pain after manipulation under general anesthesia. Dr. Krewet felt further evaluation needed to be done to rule out neck pathology.

In a letter dated March 10, 2009, Dr. Burns reported that Mr. Byrd had attended work hardening, but did not undergo an FCE. Dr. Burns' diagnosis was partial rotator cuff tear with impingement, arthritis and adhesive capsulitis. He opined that the condition had resulted in a 10% physical impairment of the shoulder.

Dr. Emanuel

Mr. Byrd was seen by Dr. Emanuel on August 4, 2009, for an independent medical evaluation. Mr. Byrd reported he was terminated by Home Service Oil in December, 2008. He complained of pain in the shoulder with increased warmth on top of the shoulder. It hurt with movement, and he had pain and weakness lining with his arm away from his body. He had pain at nighttime rolling

on the shoulder. He believed the complaints of neck pain occurred following the manipulation of the shoulder. He had tightness and swelling in his hand and some tingling in the area of the biceps tubercle.

Examination revealed he was in no acute distress. He demonstrated 130° of forward flexion, 70° of abduction, 45° of internal rotation and 65° of external rotation. There was evidence of atrophy of the supraspinatus and infraspinatus musculature. He was non-tender at the sternoclavicular joint, tender at the acromioclavicular joint and tender in the anterior subacromial space. The rotator cuff was weak in abduction and external rotation but had good resistance. The right shoulder was weaker than his left shoulder. The right shoulder showed a positive speed's, positive Yergason test and positive crossover test. Dr. Emanuel was able to get 165° of passive range of motion without crepitus. He had a negative O'Brien test and negative belly test.

Dr. Emanuel's assessments were complete rotator cuff tear, arthritis in the shoulders, subacromial bursitis and frozen shoulder. Dr. Emanuel did not have some of the MRI reports or surgery reports to review. He agreed with Dr. Poetz that Mr. Byrd was not at maximum medical improvement with regards to his shoulder. Dr. Emanuel believed a repeat MRI arthrogram of the shoulder would be beneficial. He felt further surgery of the shoulder would be necessary and would include a revision of the rotator cuff repair with possible graft jacket augmentation.

Mr. Byrd followed up with Dr. Emanuel on October 12, 2009. The MRI scan suggested only a partial tear of the rotator cuff and a small tear of the anterior/inferior labrum. Dr. Emanuel felt neither of the conditions explained the subjective complaints. Examination showed Mr. Byrd was very tender over the acromioclavicular joint and the anterior subacromial space. He demonstrated relatively good strength in external rotation and initiation of abduction against resistance. He showed 145° of active forward flexion and abduction was 160° of passive motion with pain at the extremes. There was a negative speed's test, negative Yergason test, and no crepitus or grinding. He did not demonstrate bursitis with impingement. He had a negative belly press test and negative O'Brien's test. The assessments were rotator cuff syndrome NOS, arthritis of the AC joint, other joint derangement NEC and shoulder pain. Dr. Emanuel wanted to interpret the MRI himself before he recommended further surgery.

On November 24, 2009, the employee followed up with Dr. Emanuel. He stated the pain was overwhelming emotionally at times. The MRI results were discussed. Dr. Emanuel felt there was artifact from previous surgery, and there appeared to be suture material within the rotator cuff from the previous repair. There was evidence of atrophy of the infraspinatus and supraspinatus and mild of the subscapularis muscle. For the rotator cuff syndrome, Dr. Emanuel recommended arthroscopy of the shoulder, joint debridement, and possible re-repair of the rotator cuff that could be massive and might require graft augmentation. This was completed on December 16, 2009. Mr. Byrd followed up on December 22, 2009. Grade 4 changes over 30% of the humeral head were noted with significant arthritic change. Examination showed Mr. Byrd tolerated pendulums to 90° and had passive internal and external rotation to approximately 90°. He had mild discomfort on testing. He was to begin physical therapy and develop a home exercise program. Dr. Emanuel said he would be able to return to work on December 28, 2009, with one arm duty and no use of the right arm.

In therapy on January 10, 2010, Mr. Byrd's shoulder range of motion had improved but remained very limited and painful. He rated his pain at 8/10 with pain radiating to the right elbow and neck. He reported he was unable to comb his hair with the right hand and was unable to lift a 12 ounce soda can to his mouth without pain. He denied any numbness or tingling in the right upper extremity. There was severe tenderness to palpation over his anterior and lateral glenohumeral joint and distal clavicle. He also displayed tenderness over the right rhomboids and trapezius and deltoid musculature.

In a letter dated February 25, 2010, Dr. Emanuel reported he had recommended physical therapy and a functional capacity evaluation for the purpose of determining the physical demand level of Mr. Byrd. Dr. Emanuel believed Mr. Byrd was capable of performing the tests. A functional capacity evaluation was completed on March 16, 2010.

Mr. Byrd returned to Dr. Emanuel on March 23, 2010. He reported he had a difficult time making it through the evaluation and his shoulder began hurting worse during the lifting aspect of the functional capacity evaluation, Dr. Emanuel reviewed the results, which stated variable effort was provided. It was difficult to establish the true abilities or limitations. Dr. Emanuel felt Mr. Byrd had reached maximum medical improvement with regards to his shoulder. No further medical or surgical intervention was recommended and Mr. Byrd was able to return to work with restrictions. He was able to lift occasionally 20 pounds from the floor to the waist, and 10 pounds from the waist to overhead. He was to carry no more than 30 pounds, no pushing greater than 35 pounds, and no pulling greater than 57 pounds. Dr. Emanuel also recommended no repetitive reaching, lifting, pushing, or pulling at shoulder height or above. These were permanent restrictions. Dr. Emanuel believed Mr. Byrd had sustained a 12% permanent disability of the upper extremity as it related to the right shoulder. Of this 12%, 2% was pre-existing arthritic changes. Therefore, 10% was directly and causally related to his work-related injury of January 10, 2007.

Dr. Feinberg

Dr. Feinberg saw the employee on August 31, 2010, for evaluation and treatment of his complex chronic problems directly and causally related to a right shoulder injury at work. Mr. Byrd had been referred by his private physician, Dr. Cadiz. She also testified that in a letter dated August 31, 2010, Chartis advised that they would not pay for treatment as Dr. Emanuel said the employee was at MMI.

Mr. Byrd stated he now had right-sided back pain, pain in the right side of his face and the worst pain since his manipulation. He complained of progressive headache, right biceps numbness, chronic fatigue since the pain and painful joints. Examination revealed he stood pitched forward two inches with a two inch forward head carriage. He also stood flexed forward. He had a thoracic kyphosis and was compressed in the CT junction. His left chest muscles were more contracted than the right, and he had a rotation in the rib on the left side of the chest. There was atrophy of the biceps tendon. Mr. Byrd was hypersensitive to touch over the right anterior chest

with distinct myofascial trigger points in the right pectoralis major and pectoralis minor. He was able to flex the right shoulder to 70° and abduct to 30°. He had poor movement of the scapula.

In the sitting position, he was rotated at C2 and C3 on the right and had significant myofascial dysfunction, right posterior scaling and right middle scaling. There were hypersensitive myofascial trigger points in the right supraspinatus, the right infraspinatus, and the subscapularis. In the supine position, he was hypersensitive over the right subscapularis which was palpably very contracted in the right latissimus dorsi. He had some involvement of the deltoid. In the prone position, he had a thoracic kyphosis. He was fixated at the CT junction with no movement and was compressed in the mid thoracic spine. The right levator scapula, the splenius cervicis, and splenius capitis were contracted. This gave referred pain to the head.

The weight-bearing spine films showed the C7 vertebra was rotated. The lateral view of the cervical spine showed some bone spurring at 5-6 and at 3-4, but the cervical curvature was almost normal. He was compressed in the thoracic spine at T3, T4, and T5 and had a rotation in the lumbar spine at L1 and L2. Lateral view of the thoracic spine did not show any spurring or closure of the bone spurring that would prevent movement of the thoracic spine. Lateral view of the lumbar spine showed some loss of disc space height at L5-S1. Mr. Byrd brought a cervical MRI. It showed some osteophytes at C3-4 causing borderline stenosis, minimal posterior disc protrusion at 5-6 with osteophytes but no major herniated disc.

Dr. Feinberg understood Mr. Byrd had a titanium clamp used in the surgery. She testified that the titanium clamp changed the motion and balance of the employee's muscles. She indicated that her goal in rehab was to try to lengthen his muscles and balance them as much as possible, but she could not do it against the clamp.

In response to Dr. Bernardi's criticism, she described what she does. She explained that there are pain practices which practice additional manual therapy. She said that her mission was to see if there was anything she could do to give the employee less pain and more function. She described through x-rays how the employee's vertebrae are not positioned right and this is not good for the function of the shoulder. She relates this to the position of the body when the employee was injured.

Dr. Feinberg said that the employee's injury was not confined just to the shoulder but was to the entire torso. She indicated that all of her treatment was related to the accident of January 10, 2007. She also testified that her bill of \$9,080.00 is reasonable as she saw the employee on eighteen occasions.

Dr. Feinberg reported that the employee had some use of his shoulder. He lacked flexion and abduction. He had no internal rotation. His main problem is pain. Dr. Feinberg testified that due to the placement of the clip, the employee does not have normal biomechanics and he is going to have pain the rest of his life. She says the clip was put in as part of a surgical procedure.

Dr. Feinberg testified that the employee's accident caused the rotation in the employee's spine. The injury caused severe pain. The employee could not carry the shoulder in a normal position.

The pain from the shoulder communicates directly to the spine-frequently the lower cervical spine. Overtime the employee gets a “neuropathic windup”.

Dr. Feinberg was asked about exaggeration of pain. She testified that you cannot fake a twist of a vertebra. She indicated that the employee was massively depressed. He was upset that he had to pay. Dr. Feinberg testified that the employee was so distraught by his condition that verbal complaining was not his greatest asset. She said he did everything she asked and he did not get better.

When asked as to what caused the employee’s spine, etc. to be as it was when she examined the employee, she said the twisting accident could be one. She also said that other causes could be slips, falls, repetitive motion, prior accidents, etc.

Dr. Feinberg testified that the employee was not unintelligent. She testified that the employee is physically capable of performing some jobs. She suggested that he could be educated and retrained. She also imposed restrictions, no overhead lifting or repetitive motion of the shoulder.

As to the neck, the doctor reported that the employee has a cervical stenosis. She indicated that the condition of the employee’s shoulder shows that the cervical spine had additional degeneration. She says the additional degeneration is because of the injury. She said she saw nothing to indicate that the employee was faking and that his subjective complaints were backed up by clinical findings and x-ray findings.

Dr. Feinberg recommended integrated manual therapy which would work on mobilization of the cervical spine, thoracic spine, and ribcage as well as some soft tissue release. Mr. Byrd needed myofascial release, muscle energy, neuro-mobilization, and mobilization of the spine. He also needed integrated interventional medicine to modulate the neural signal and facilitate correction in physical therapy. Iliopsoas compartment block would biomechanically decompress the lumbar spine which indirectly would facilitate mobilization of the thoracic spine. Paravertebral facet injection of the thoracic spine would modulate the neural signal from the dorsal ramus to decrease the pain and facilitate mobilization. He needed trigger point injections to treat the myofascial component to the pain. Dr. Feinberg thought antidepressant medications would treat the neuropathic component of the pain. Dr. Feinberg testified that for what she could offer, after she treated the employee, he was at MMI.

On cross-examination Dr. Feinberg agreed that the billing documents say “Private Pay”. She testified that they got a denial from work comp.

Dr. Bernardi

Dr. Bernardi is a neurosurgeon who specializes in spinal neurosurgery. Dr. Bernardi testified he was originally scheduled to see the employee on January 5, 2011, but he did not see him on that date because he refused to sign paperwork. He acknowledged the paperwork did not indicate anywhere that the patient may be required to pay for the Independent Medical Examination.

Dr. Bernardi eventually examined Mr. Byrd on February 9, 2011. Upon physical examination, Dr. Bernardi did not believe the employee's neck symptoms were the result of nerve root irritation. Dr. Bernardi testified to examining an MRI of the employee's cervical spine, and he indicated the MRI did not reveal any signs of rotation between the C2 and C3 levels.

Dr. Bernardi further testified regarding Mr. Byrd's neck symptoms on the date of his evaluation. He acknowledged a pain drawing filled out by the employee that did not demonstrate pain in the employee's neck, though he testified the employee did complain to him about his neck. Dr. Bernardi testified that the employee's neck symptoms were not particularly suggestive of neck pathology.

Dr. Bernardi also reviewed an MRI from August 19, 2010, and indicated there were no acute abnormalities present. He ultimately concluded that the employee suffered from multi-level degenerative disc disease in his neck, as well as right-sided neck and nonradicular arm pain. He testified that the employee's symptoms were primarily related to his shoulder injury, and he did not think his symptoms were referable to the employee's cervical spine.

Dr. Bernardi opined that the employee's shoulder manipulation did not cause any type of injury to the employee's neck. He testified he could not understand how the manipulation could have injured the employee's neck. He also noted that Mr. Byrd's imaging studies did not reveal any kind of acute abnormality, herniated disc or fracture. He found it hard to believe that an aggravation of degenerative disc disease in the employee's cervical spine would cause such persistent pain.

Dr. Bernardi indicated that the employee was at maximum medical improvement, and he did not believe he suffered any permanent partial disability as a result of any alleged neck injury.

Dr. Bernardi additionally testified he did not believe the treatment provided by Dr. Feinberg was reasonable and necessary. He indicated medical science does not suggest that doing injections for someone with employee's symptoms is effective or warranted. He testified he did not believe additional injections would be reasonable.

Mr. England

A portion of Mr. England's report was utilized by the Court in formulating this Statement of the Findings of Fact. Mr. England prepared multiple reports.

Report of November 10, 2010

Mr. England saw the employee on November 2, 2010. He reported that the employee appeared depressed and tired indicating that he was getting four hours of sleep a night due to pain. The employee denied any significant right shoulder problems until the January 2007 accident.

Mr. England pointed out some factual material in his report. He noted that after the April 18, 2008, on July 3, 2008, the employee reported significant improvement. 75-80% better, virtually asymptomatic, unless he performed certain activities he did not have significant pain, virtually

asymptomatic. As of August 8, 2008, Dr. Burns reported that the employee was at MMI. The employee was released with restrictions. As of August 21, 2008, Dr. Poetz saw the employee for evaluation. At this time, the employee had been released from care but was not called back to work due to his permanent restrictions. At this point the employee reported continuous pain in his right shoulder, limited range of motion, pain increasing with extension and has pain in his neck since surgery. The employee reported that he was having some over compensation in his left shoulder. Poetz's exam said that the cervical and lumbar spine had good range of motion. Dr. Poetz reported that the employee's prognosis was guarded due to length of time elapsed since the injury and pain in all areas of symptomatology.

On December 22, 2008, Mr. Byrd returned to Dr. Poetz, reporting that his symptoms worsened. The employee reported he had not had any treatment because it was denied by insurance. Dr. Poetz recommended more care, including, injections and MRI with potential surgery. Dr. Poetz also recommended a cervical MRI and cervical injections. Dr. Poetz said the employee was not at MMI.

On March 10, 2009, Dr. Burns rated 10% permanent partial disability of the shoulder.

Dr. Emanuel agreed with Dr. Poetz that the employee was not at MMI. Dr. Emanuel did the last surgery on December 16, 2009. The FCE was done on March 16, 2010. On March 23, 2010, Dr. Emanuel thought the employee was at MMI regarding the shoulder. He rated the shoulder at 10% with no mention of the neck.

Dr. Poetz reported that the employee continued to deteriorate. He felt the employee had significant pre-existing cervical degenerative disc disease even though he was asymptomatic prior to the accident. He says the degenerative condition was likely exacerbated from the awkward positioning during surgery or with anesthesia which required hyperextension of the neck. Dr. Poetz said that the accident of January 2007 was the prevailing factor for the exacerbation of the cervical disc disease. He adds 10% permanent partial disability of the cervical spine for this. He reported that the employee is unemployable in the open labor market. He also recommended meds and physical therapy for the cervical spine.

Mr. England reported that the employee told him that:

- He sees his primary care physician for medications now.
- Cold and damp conditions are the worst combination for his shoulder and neck pain.
- Vibrations involving the upper extremities are also avoided.
- He has some occasional trouble with constipation, but denied any trouble with urination.
- He is currently taking Hydrocodone which he uses sparingly an average of three times a week for his most severe pain. He said he refuses to take it as often as he could because he doesn't want to become addicted.
- He uses ibuprofen for his day-to-day pain.
- He said that avoiding much use of the right arm helps keep the pain a little more manageable, but the more he tries to use the arm, the more severe the pain becomes. He uses ice and props the arm up on a pillow at times.

- His primary problem is pain in the right shoulder going up into his neck and then down the arm to about the elbow. He also has pain going down into his scapula and even further down in his back. He has some pain at times in the left shoulder as well.
- He has some numbness in the right biceps area.
- He can't reach out or upward nor behind himself with his right arm. He can stand around 15 minutes before the weight of his arm begins to hurt more in the shoulder joint and he will normally hook his thumb in the belt loop of his pants to provide some support. He has to be careful when walking to avoid jarring the arm.
- He denied any trouble with seeing, bending at the waist, kneeling, talking, hearing, sitting, stooping or breathing.
- He can lift very limited amount with the right arm particularly if the arm is out away from his body. If the arm is in close to his torso he said he might be able to handle ten pounds briefly.
- He normally lifts with the left arm and does most activities with that arm now.
- If he grips too long with the right hand he has an increase in symptoms as well.
- He is not able to climb using his right arm and said that his balance feels off at times when he experiences a severe muscle spasm in his right shoulder.
- He drives less than daily now and only on short trips around where he lives.
- He admitted to being very depressed and feeling worthless at times.
- He said that he gets perhaps two to three hours of sleep initially and then is awake on and off the rest of the night. He rarely gets more than four hours total sleep and is quite tired as a result the following day.
- He does a little bit of the laundry and may do some occasional grilling. He said he just doesn't participate in much activity because it hurts so much to use his upper extremities.
- He finds himself very depressed over his situation in life and wishes that he were not in so much pain and so tired so that he could try to accomplish something during the day.

After seeing all of the records and evaluating the employee, Mr. England's opinions were:

- Mr. Byrd is a 51-year-old man with a limited education who has worked throughout his career as a truck driver.
- Assuming any of the doctors' restrictions he would not be able to go back to doing his former jobs.
- Assuming only Dr. Emanuel's restrictions there would still be some potential unskilled entry-level service employment that such an individual could perform.
- Assuming, however, the restrictions noted by Dr. Poetz, along with the employee's description of his typical day-to-day functioning and his presentation, I do not believe that he would likely be able to compete successfully with others for competitive employment, nor do I believe that he would be able to sustain it in the long run.
- His presentation alone would be very problematic in that he comes across as a very nice, but obviously tired and depressed individual who keeps his arms in close to his torso. These things would be readily observable by an interviewer and would certainly not help him get picked over alternative job candidates for an unskilled, entry-level position.

- Considering his age, limited education and the effects of his impairments overall on his average day-to-day functioning even there in the home I do not see how he would be able to go out and sustain a work day on a consistent basis.
- I believe that he is likely to remain totally disabled from a vocational standpoint.

Mr. England provided more opinions in a letter dated January 23, 2012. This was prepared after he reviewed the report of Delores Gonzalez and took exception to her opinion that the employee could work as a telephone order clerk, a telemarketer or as an alarm monitor.

He further opined that:

- As I recall from Dr. Feinberg's deposition she stated that she felt he did not have enough fine motor skill in his hands to do line manipulative work.
- Dr. Poetz had also recommended against any repetitive work with the upper extremities. The positions of alarm monitor, telemarketer and telephone order clerk all do involve use of a keyboard and at least basic typing skills. All of these positions involve using a computer throughout the workday.
- Not only does Mr. Byrd not have the ability physically to do this work based on the recommendations of Drs. Feinberg and Poetz, he has no typing or computer skills at all.
- Telemarketers and telephone order clerks both use computers throughout the workday to enter and retrieve data.
- Even alarm monitor positions now also involve being able to keyboard throughout the workday as well. All of these also require someone to be awake and alert. Mr. Byrd does not rest well at night and is tired in the day sometimes dozing off while seated.
- Review of Ms. Gonzalez' s report does not cause me to vary the opinion I expressed in my initial report of November 10, 2010.

Ms. Gonzalez

Ms. Gonzalez met with the employee on October 14, 2011 to assess his employability and potential for vocational rehabilitation.

After testing she reported that:

- Mr. Byrd performed in the below average range in Word Reading with a grade equivalency of 10.2 and in the low range in Sentence Comprehension with a grade equivalency of 8.1.
- He was in the below average range in Spelling with a grade equivalency of 9.6 and in the below Math Computation with a grade equivalency of 6.5.
- He scored in the below average range in the area of Reading Composite and at the 10th percentile.
- Based solely upon the results of his basic academic testing, Mr. Byrd would not be expected to perform successfully in a post-secondary or vocational or college training program.

- Furthermore, based on the results of the academic testing he would not perform well in an entry-level, clerical-type position because of his below average math computation scores.

She also reported that:

- Mr. Byrd does not have transferrable skills to other driving jobs.
- However, Mr. Byrd is still capable of performing sedentary, unskilled work such as surveillance system monitor, telemarketer or an order clerk. These jobs exist in sufficient numbers in the St. Louis Metropolitan Statistical area.

In summary, Ms. Gonzalez reported that “From a vocational perspective, Mr. Byrd is 52 years old with a high school education, low academic skills, and a residual functional capacity which allows for work in the sedentary exertional level of work. If one gives credence to Drs. Feinberg, Emanuel and Poetz, Mr. Byrd is able to perform work at the unskilled, sedentary level with the caveat that he do no overhead lifting or repetitive motion of the shoulder. There are a number of jobs that can be performed within these restrictions including as a surveillance system monitor, an order clerk, and some telemarketing positions that exist in sufficient number within his statistical area as indicated above”.

Gregory DeClue

On March 24, 2009, the deposition of Mr. DeClue, an employee in the Human Resources department of the employer, was taken. Mr. DeClue admitted to signing a letter providing for the termination of the employee’s employment with his employer.

Mr. DeClue acknowledged restrictions imposed by Dr. Burns instructing the employee not to lift over 35 pounds over his head, as well as not to lift 70 pounds “to that point.” He could not recall ever telling the employee that he should not return to work until he was able to work 100%.

Mr. DeClue testified that the employee was offered a position as a transport driver for his employer in October 2008. Mr. DeClue indicated transport drivers deliver fuel to convenience stores. He testified the rate of pay would have been the same as when the employee left, and it would have allowed the employee to only work nights and weekends. He further testified that the employee called him and accepted the offer at some point before October 31, 2008.

Mr. DeClue additionally testified that, on October 31, 2008, he received a phone call from an employee in Dr. Krewet’s office indicating that the employee was not cooperating with regard to his scheduled Department of Transportation physical examination. Mr. DeClue testified that Dr. Krewet’s employee told him the employee refused to sign anything.

Mr. DeClue indicated that the employee presented to his office later that day. Mr. DeClue testified he was trying to figure out what the problem was when the employee removed a tape recorder from his jacket and told Mr. DeClue that if they wanted to continue their conversation they could speak into the tape recorder.

Mr. DeClue testified he did not speak to the employee after October 31, 2008, when the employee removed the tape recorder from his jacket. Mr. DeClue indicated, however, that the job offer still had not been retracted. He testified the December termination letter sent to the employee on December 15, 2008, indicated that the employee had not attempted to contact the employer. He testified he never received a phone call or voicemail from the employee. Mr. DeClue clarified that the employee was terminated because the employee did not contact the employer after the new position was offered to him.

Sandra Byrd

Sandra Byrd, employee's wife, is a case manager and registered nurse at United Health Care. She testified that the employee's left arm has always been weaker than the right, and she indicated he has limitations regarding grip strength.

Mrs. Byrd testified she and her daughter perform all the yard work and take care of their vehicles. When asked whether the employee could be a cashier, Mrs. Byrd replied that depending on the circumstances he could not sit or stand doing a job, he is always up and down. She indicated the employee can figure out numbers in his head, but he could not sit or stand for eight hours each day. When asked whether he could work a part-time job involving periodic sitting and standing, she indicated he may be able to do that. She further testified employee grills once or twice each month during the summer.

Ms. Byrd stated that her husband takes something for pain every day, but he only takes pain pills at night as they make him foggy. She said that he takes them as little as possible. She indicated that he is always pacing around due to his pain. She said he used to be passive and mellow and now he is different. She testified that before the accident her husband worked 60-65 hours a week and now he just watches TV a lot.

RULINGS OF LAW:

Issue 1. Average Weekly Wage and Rate.

Section 287.250.1(4) RSMo. (2005) sets forth the method for calculating an employee's average weekly wage. Under that section,

“If the wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be computed by dividing by thirteen the wages earned while actually employed by the employer in each of the last thirteen calendar weeks immediately preceding the week in which the employee was injured or if actually employed by the employer for less than thirteen weeks, by the number of calendar weeks, or any portion of a week, during which the employee was actually employed by the employer.”

At trial, the employee's paycheck stubs were admitted into evidence. Specifically, seven paychecks were admitted representing the pay periods of September 24, 2006 through December

30, 2006. During this period, the employee earned \$12,422.69, resulting in an average weekly wage of \$955.59. This average weekly wage corresponds to a \$637.06 per week rate for temporary total disability, and a \$376.55 per week rate for permanent partial disability.

The employee claimed that the employer-insurer underpaid him. He also submitted his Federal Tax Returns for 2005 and 2006.

The employee testified to working between 60 and 65 hours each week. He further testified he earned \$16.50 per hour, as well as time-and-a-half for each hour worked over 45 hours in a week. The employee's hourly wages are confirmed by the seven paychecks representing the 14 weeks preceding his date of injury.

The employee indicated he earned "well over" \$1,000.00 a week. However, not only could he not recall having seen his paycheck stubs at any point, he testified he had not seen the paycheck stubs entered into evidence by his attorney. He denied ever receiving additional paychecks, and he admitted he was paid every other week. On cross-examination, he admitted he received his income through direct deposit.

The employee's position that he was underpaid and that his pay compensation rate is greater than that presented in the pay records presented by the employer-insurer is totally without merit and is not supported by the evidence. Therefore, based on all of the evidence presented the Court finds that the employee's average weekly wage is \$955.59 per week. This results in a temporary total disability rate of \$637.06 per week and a permanent partial disability rate of \$376.55 per week.

Issue 2. Medical Causation as it relates to the treatment for the employee's neck. Issue 3. Past Medical Bills and Issue 4. Future Medical Care.

The parties agreed that the employee had a compensable accident on January 10, 2007, when he was fueling a caterpillar. The employer-insurer paid all of the medical bills related to the treatment of the employee's right shoulder. The parties disagree as to whether the employee injured his neck in the accident and whether the employer-insurer should be responsible to pay for treatment to the employee's neck provided by Dr. Feinberg. The parties also disagree as to whether the employee is entitled to future medical care.

Once it has been established that a compensable injury was caused by an employee's work activities, the inquiry then turns to determining whether there is a medical causal relationship between those activities and the various injuries which the employee asserts resulted from that injury.

The employee bears the burden of proving that his injury was medically causally related to the accident. *Irving v. Missouri State Treasurer*, 35 S.W.3d 441, 445 (Mo. App. W.D. 2000). The burden of proof is on the employee to prove not only that an accident occurred and that it resulted in an injury, but also that there is a medical causal relationship between the accident, the injuries, and the medical treatment for which he is seeking compensation. *Dolen v. Bandera's Café and Bar*, 800 S.W.2d 163 (Mo. App. E.D. 1990). The employee has the burden of proving that there

is a medical causal relationship between the accident, the injuries and the medical treatment for which compensation is being sought. *Griggs v. A. B. Chance Company*, 503 S.W.2d 697 (Mo. App. 1973). In order to prove a medical causation relationship between the alleged accident and medical condition, the employee in cases such as this involving any significant medical complexity must offer competent medical testimony to satisfy his burden of proof. *Brundige v. Boehringer Ingelheim*, 812 S.W.2d 200 (Mo. App. 1991).

Section 287.140.1 RSMo. provides that an employer shall provide such medical, surgical, chiropractic, ambulance and hospital treatment as may be necessary to cure and relieve the effects of the work injury. A sufficient factual basis exists to award payment of medical expenses when medical bills and supporting medical records are introduced into evidence supported by testimony that the expenses were incurred in connection with treatment of a compensable injury. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo.banc 1989).

The workers' compensation law states that an injured worker is free to seek medical care from physicians of his own choosing if the employer fails or refuses to provide such care. *Farmer-Cummings v. Future Foam, Inc.*, 44 S.W.3d 830 (Mo.App. 2001). Once claimant establishes his liability for the medical bills, employer then has the burden of proving that claimant's liability for the bills was extinguished. *Farmer-Cummings v. Personnel Pool*, 110 S.W.3d 818 (Mo.banc 2003). This burden requires a showing that Claimant is not required to pay the bills, that Claimant's liability for the bills is extinguished, and that the reason his liability is extinguished does not fall within the provisions of §287.270 of the Missouri workers' compensation law. *Id.*

Medical aid is a component of the compensation due to an injured worker. *Mathia v. Contract Freighters*, 929 S.W.2d 271,277 (Mo.App.S.D.1996). It is the employee's burden to prove that he is entitled to receive compensation for past medical expenses. *Sams v. Hayes Adhesives*, 216 S.W.2d 815,820 (Mo.App.E.D.1953). The medical fees for which reimbursement is sought must be reasonable and necessary to treat a work-related injury. *Jones v. Jefferson City School District*, 801 S.W.2d 486-490 (Mo.App.W.D.1990). For past medical expenses to be awarded, the medical care must flow from a work-related accident or injury. *Modlin v. Sunmark*, 699 S.W.2d 5, 7 (Mo.App.E.D.1985).

A sufficient factual basis is created for an award of past medical expenses where the medical bills are introduced into evidence, and the employee testifies that those bills were incurred in connection with treatment for a compensable injury, and when the bills relate to the professional services rendered, as shown by the medical records in evidence. Where an employee fails to offer into evidence the itemized medical bills in question, or to testify that those bills were related to his work injury, the employee fails to make a sufficient factual showing to recover his past medical expenses. *Martin v. Mid-America Farm Lines*, 769 S.W.2d 105, 111-112 (Mo.banc.1989).

To be recoverable, medical fees and charges must be fair and reasonable. RSMo. §287.140.3. The medical fees and charges compensable under Section 287.140 refer only to an employee's actual expenses – those paid out-of-pocket by the employee, expenses for which the employee will actually be held responsible in the future, and fees for which a Medicare or Medicaid lien

exist. Write offs and adjustments that extinguish the liability of an injured employee are not fees and charges within the contemplation of Section 287.140. *Farmer-Cummings v. Personnel Pool of Platte County*, 110 S.W.3d 818,820 (Mo.banc.2003).

Under Section 287.140.1 RSMo., “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”.

Under Section 287.140 RSMo., the employer is given the right to select the authorized treating physician. Subsection 1 also provides that the employee has the right to select his own physician at his own expense. The employer, however, may waive its right to select the treating physician by failing or neglecting to provide necessary medical aid. *Emert v. Ford Motor Company*, 863 S.W.2d 629 (Mo.App. 1993); *Shores v. General Motors Corporation*, 842 S.W.2d 929 (Mo.App. 1992) and *Hendricks v. Motor Freight*, 520 S.W.2d 702, 710 (Mo.App. 1978).

The standard of proof for entitlement to an allowance for future medical aid cannot be met simply by offering testimony that it is “possible” that the claimant will need future medical treatment. *Modlin v. Sunmark, Inc.*, 699 S.W.2d 5, 7 (Mo.App. 1995). The cases establish, however, that it is not necessary for the claimant to present “conclusive evidence” of the need for future medical treatment. *Sifferman v. Sears Roebuck and Company*, 906 S.W.2d 823, 838 (Mo.App. 1995). To the contrary, numerous cases have made it clear that in order to meet their burden, claimants are required to show by a “reasonable probability” that they will need future medical treatment. *Dean v. St. Luke’s Hospital*, 936 S.W.2d 601 (Mo.App. 1997). In addition, employees must establish through competent medical evidence that the medical care requested, “flows from the accident” before the employer is responsible. *Landers v. Chrysler Corporation*, 963 S.W.2d 275 (Mo.App. 1997).

There is no question that the employee injured his right shoulder in the January 10, 2007 accident. The employee maintains that the employee also injured his neck in or as a result of that accident. There is evidence on this matter under several theories:

- The employee had degenerative cervical disease prior to January 10, 2007.
- The nature and mechanism of the accident aggravated and caused the degenerative disc disease to become symptomatic requiring medical care.
- The employee underwent a manipulation procedure on January 31, 2008, and his neck was injured in that procedure.

All of these theories are supported by objective evidence and medical opinion depending on which doctor’s opinion is found to be more credible. Dr. Bernardi says the employee’s neck is not compensable under any theory. The Court rejects this position as not being credible. Looking backward at all of the medical treatment, examinations, objective evaluations and medical opinions, the Court finds that the employee neck was injured by the accident of January 10, 2007, and/or was injured in the various treatment modalities that were provided to the employee after his initial injury. Dr. Poetz’s testimony supports this position as well as the

testimony of Dr. Feinberg. As to this matter the Court finds the opinions of Drs. Poetz and Feinberg to be more credible than the opinion of Dr. Bernardi.

Based on a consideration of all of the evidence the Court finds that the employee's problems with his neck was medically causally related to the accident of January 10, 2010.

The only medical bills in question are those of Dr. Feinberg. The employee claims that he is to be reimbursed in the amount of \$9,080.00. The employer-insurer denies responsibility of these bills on issues of authorization, reasonableness, necessity and causal relationship. Both Drs. Feinberg and Poetz have addressed these matters. The Court has already ruled there is a causal relationship between the accident and the care provided for the cervical spine. Based on a consideration of all of the evidence, the Court finds that the medical bills of Dr. Feinberg are reasonable and were necessary to cure and relieve the employee from the effects of his January 10, 2007 injury. The credible evidence before the Court is that the employee was referred by Dr. Cadiz to Dr. Feinberg after the employer-insurer had refused to provide additional medical care. Based on this evidence the Court further denies the employer-insurer's claim that the treatment was obtained without authorization. The Court orders that the employer-insurer pay \$9,080.00 in medical bills that was incurred due to treatment provided by Dr. Feinberg to cure and relieve that employee from the effects of his January 10, 2007 accident.

The employee is also claiming that he is entitled to future medical care. Again there are medical opinions that say that the employee does not need any additional care and there are medical opinions that say that the employee needs additional medical care. The Court finds that those opinions indicating that the employee needs additional or future medical care are more credible than those opinions that say that no additional medical is needed. There is no question that at a minimum the employee needs maintenance due to his January 10, 2007 accident. Without specifically indicating the nature of the medical treatment to be provided, the Court orders the employer-insurer to provide such medical care as is necessary to cure and relieve the employee from the effects of his January 10, 2007 accident.

Issue 5. Additional Temporary Total Disability.

The employee has advanced a position that he is entitled to additional temporary disability compensation utilizing wage rates that he suggested. The Court has already rejected the employee's position on wage rates and found that the proper rate for temporary total disability is \$637.06 per week.

The parties stipulated that the employer-insurer already paid \$51,328.84 in temporary disability compensation. They further stipulated that the benefits were paid for 80 4/7 weeks covering the periods:

- August 8, 2007 to November 14, 2007.
- December 13, 2007 to December 3, 2008.
- December 16, 2009 to March 23, 2010.

The burden of proving entitlement to temporary total disability benefits lies with the employee. *Boyles v. USA Rebar Placement*, 26 S.W.3d 418, 424 (Mo. Ct. App. 2000). The purpose of a temporary total disability award is to cover the employee's healing period from a work related injury. *Tilley v. USF Holland*, 325 S.W.3d 487, 492 (Mo. Ct. App. 2010). Temporary total disability awards are owed until the employee can find employment or the condition has reached the point of maximum medical progress. *Id.* An award of temporary total disability is not appropriate for a disability for which further improvement is not expected. *Williams v. Pillsbury Co.*, 694 S.W.2d 488, 489 (Mo. Ct. App. 1985).

At trial, the employee argued there were three separate periods for which he was underpaid temporary total disability benefits. Specifically, the employee alleged he was underpaid \$1,063.53 for the period of August 2, 2007 through November 11, 2007. However, during that period, employee was paid \$9,555.90, representing 15 weeks of temporary total disability benefits at a rate of \$637.06 per week. It is unclear as to exactly the basis for the employee's argument that he was underpaid \$1,063.53 during this period as the employer-insurer clearly demonstrated that employee was paid proper benefits for those 15 weeks.

The employee further argued he is entitled to \$149,524.96 in unpaid temporary total disability benefits for the period of November 17, 2007 through November 17, 2011. Dr. Emanuel placed employee at maximum medical improvement on March 23, 2010. Based on a consideration of all of the evidence, the Court finds that the employee reached maximum medial improvement as of March 23, 2010. Therefore, the employee was not entitled to temporary total disability benefits after March 23, 2010.

From November 17, 2007 through March 23, 2010, the employee was paid \$41,772.94, representing 65 4/7 weeks of temporary total disability at a rate of \$637.06 per week. The employee was not paid temporary total disability benefits from December 4, 2008 through December 15, 2009 as the employee was offered a position as a transport driver for his employer in October 2008. When he did not accept this position, and did not contact the employer regarding the offer of employment, he was terminated on December 15, 2008. However, when the employee subsequently underwent an arthroscopy on his right shoulder on December 16, 2009, the employer-insurer reinstated the payment of the employee's temporary total disability benefits.

The testimony of Gregory DeClue demonstrated that the employer was willing to accommodate the restrictions imposed on the employee during the period in which the employee has alleged he was temporarily totally disabled. Mr. DeClue acknowledged the restrictions imposed by Dr. Burns instructing the employee not to lift over 35 pounds over his head, as well as not to lift 70 pounds "to that point." The employer demonstrated a willingness to accommodate those restrictions, and the employee refused to accept employment. As such, the employee has not met his burden of proving he was temporarily totally disabled from December 4, 2008 through December 15, 2009.

Furthermore, the employee has alleged he is entitled to \$30,192.54 in temporary total disability benefits for the period of November 17, 2011 through September 17, 2012. However, as discussed above, the employee was placed at maximum medical improvement on March 23,

2010. Therefore, as he has reached the point of maximum medical progress, he was not entitled to temporary total disability benefits for this period.

Based on a consideration of all of the evidence, the Court finds that the employee reached maximum medical improvement as of March 23, 2010. He is not entitled to temporary total disability benefits per se after that date. The Court finds that the employer-insurer has properly paid the employee temporary total disability benefits at the proper rate from January 10, 2007 to March 23, 2010.

Issue 6. Permanent Total Disability as to the employer-insurer. Issue 7. Permanent Partial Disability as to the employer-insurer. Issue 8. Liability of the Second Injury Fund for Permanent Partial or Permanent Total Disability.

Depending on the placement of credibility, the analysis of evidence in this case can certainly result in different findings. Credibility assessment depends on the lack of interest or bias and a consideration of a totality of the evidence in arriving at a decision.

One possible finding is that the employee is still able to work and is not permanently and totally disabled. There is no question that the employee cannot return to the type of employment that he has engaged in for most of his working career. The evidence is clear that the employee will have to be employed in some sort of a sedentary capacity. This finding envisions that the employee has the capacity and can be retrained and educated. Portions of the evidence from Dr. Bernardi, Ms. Gonzalez, Dr. Burns and Dr. Feinberg can be utilized to support this conclusion.

Another potential finding is that the employee is permanently and totally disabled and not employable in the open labor market. This finding splits in two. The employee could be permanently and totally disabled due to the last accident alone. Or he could be permanently and totally disabled due to the disabilities resulting from the last accident in combination with his pre-existing disabilities that includes his left shoulder, his left hand and some would say his intelligence.

A finding of permanent total disability from the last accident alone results in liability to the employer-insurer. A finding of permanent total disability in combination results in liability to the Second Injury Fund.

Mr. Woods offers evidence that in the Court's opinion can be interpreted to have segments that support permanency from the last accident alone or in combination. He says that if you consider this doctor's opinions and restrictions that the employee could work at some unskilled positions. He also says that if you consider another doctor's opinions and restrictions then the employee could not work.

In the Court's opinion, what separates permanent total disability from the last accident alone and permanent totally disability in combination is the concept of pain. The record is clear that prior to January 10, 2007, there was no component of pain that prevented the employee from completing all aspects of his job. The evidence is that the employee was asymptomatic for pain

as to his right shoulder, his neck and his left shoulder. Dr. Feinberg was the last physician who treated and evaluated the employee for pain. While she suggested a strong pain component, she felt that with retraining the employee could be reemployed. The employee's testimony regarding his pain components was found to be credible. Throughout the case and throughout the treatment process the employee reported various pain components to each treating doctor. Despite different assessments of MMI the employee went on to complain of pain and have a total of four invasive procedures. The employee continues to receive narcotic medication to treat his pain.

The Court finds the body of evidence that supports permanent total disability to be more persuasive and more credible than the body of evidence that says that the employee can work and is only permanently and partially disabled. The Court further finds that the employee's pain component is what really keeps him from being retrained or reeducated in order to work in a sedentary type position. The Court further finds that the employee had no aspects of pain that impaired his ability to work; he was asymptomatic as to pain before January 10, 2007. The Court also finds that the development and continuing pain originated after January 10, 2007, and was a result of either the accident on that day or as a result of the treatment that he received in order to cure and relieve him from the effects of his accident. With this analysis, the Court finds that the employee is permanently and totally disabled and unemployable in the open labor market due entirely to the accident of January 10, 2007. The employer-insurer is ordered to pay permanent total disability benefits to the employee effective March 23, 2010, as provided by law. The Second Injury Fund is not ordered to pay any benefits to the employee.

The employer-insurer will get credit for any money that they have advanced the employee/\$8,735.96.

ATTORNEY'S FEE:

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

INTEREST:

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

Made by:

Gary L. Robbins
Administrative Law Judge
Division of Workers' Compensation