

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

Injury No.: 03-078784

Employee: Billy J. Castile

Employer: Sander Siding

Insurer: Missouri Employers Mutual Insurance Company

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 10, 2008. The award and decision of Administrative Law Judge Gary L. Robbins, issued July 10, 2008, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 27th day of January 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

**FINAL AWARD**

Employee: Billy J. Castile

Injury No. 03-078784

Dependents: N/A

Employer: Sander Siding

Additional Party: None

Insurer: Missouri Employers Mutual Insurance Company

Hearing Date: May 29, 2008

Checked by: GLR/kh

**SUMMARY OF FINDINGS**

- Are any benefits awarded herein? Yes
- Was the injury or occupational disease compensable under Chapter 287? Yes
- Was there an accident or incident of occupational disease under the Law? Yes
- Date of accident or onset of occupational disease? August 19, 2003
- State location where accident occurred or occupational disease contracted: Cape Girardeau County, Missouri.
- Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
- Did employer receive proper notice? Yes
- Did accident or occupational disease arise out of and in the course of the employment? Yes
- Was claim for compensation filed within time required by law? Yes
- Was employer insured by above insurer? Yes
- Describe work employee was doing and how accident happened or occupational disease contracted: The employee fell off scaffolding. His right foot landed in a cement block and broke his right ankle.
- Did accident or occupational disease cause death? No
- Parts of body injured by accident or occupational disease: Right ankle
- Nature and extent of any permanent disability: 64% permanent partial disability to the employee's right ankle at the 155 level.
- Compensation paid to date for temporary total disability: \$10,094.03
- Value necessary medical aid paid to date by employer-insurer: \$41,448.52

- Value necessary medical aid not furnished by employer-insurer: \$5,390.00
- Employee's average weekly wage: \$454.00
- Weekly compensation rate: \$302.67
- Method wages computation: By agreement
- Amount of compensation payable: \$30,024.86. See Award
- Second Injury Fund liability: None
- Future requirements awarded: Yes. See Award

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

The Compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Chris N. Weiss

## **FINDINGS OF FACT AND RULINGS OF LAW**

On May 29, 2008, the employee, Billy J. Castile, appeared in person and by his attorney, Chris N. Weiss, for a hearing for a final award. The employer-insurer was represented at the hearing by its attorney, Christopher E. Patt. The Court took judicial notice of all of the records contained within the files of the Division of Workers' Compensation. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the statement of the findings of fact and rulings of law, are set forth below as follows:

### **UNDISPUTED FACTS**

- The employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and liability was fully insured by Missouri Employers Mutual Insurance Company.
- On or about the date of the alleged accident or occupational disease the employee was an employee of Sanders Siding and was working under the Workers' Compensation Act.
- On or about August 19, 2003 the employee sustained an accident or occupational disease arising out of and in the course of his employment.
- The employer had notice of the employee's claim.
- The employee's claim was filed within the time allowed by law.
- The employee's average weekly wage is \$454.00 per week. His rate for temporary total, permanent total and death is \$302.67 per week. His rate for permanent partial disability is \$302.67 per week.
- The employee's injury was medically casually related to his accident or occupational disease. The employer-insurer agreed to medical causation for all medical treatment that the employee received excluding massage therapy.
- The employer-insurer paid \$41,448.52 in medical aid.
- The employer-insurer paid \$10,094.03 in temporary total disability benefits.
- The employee has no claim for mileage or other medical expenses under Section 287.140 RSMo.
- The employee has no claim for permanent total disability.

## **ISSUES**

- Past Medical Bills-Whether the employer-insurer is responsible to pay to the employee \$5,390.00 for previously incurred medical bills?
- Future Medical Aid-Whether the employer-insurer is responsible to provide future medical care? The employer-insurer agreed to provide future medical care that is necessary to cure and relieve the employee from the effects of his injury excluding massage therapy.
- Temporary Disability-Whether the employer-insurer is responsible to provide additional temporary disability benefits?
- Permanent Partial Disability-Whether the employer-insurer is responsible to pay permanent partial disability benefits?

## **EXHIBITS**

The following exhibits were offered and admitted into evidence:

### Employee's Exhibits

- Medical records from Southeast Missouri Hospital
- Medical records of Raymond A. Ritter, Jr., M.D.
- Medical records of Gary J. Schmidt, M.D.
- Medical records of Kevin K. Nagamani, M.D.
- Medical records of John Krause, M.D.
- Records of Resource O&P
- Records of Tammy M. Piatt-Message Therapist
- Deposition of Bernard Charles Burns, D.O.
- Deposition of Anthony Zoffuto, M.D.

### Employer-Insurer's Exhibits

- Deposition of John D. Graham, M.D.
- Medical record from Cape Imaging dated 6/15/06
- Medical Records from St. Francis Medical Center
- Medical records of Bernard C. Burns, D.O. dated 1/17/08 and 2/27/08
- Medical records of Kevin K. Nagamani, M.D.
- Medical records from HealthSouth

## **STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:**

### **STATEMENT OF THE FINDINGS OF FACT**

Mr. Castile, the employee, is twenty-seven years old, married and a graduate of high school. After high school, he served in the U. S. Marine Corps and received a lot of training as a firefighter. After his discharge from the Marines, Mr. Castile intended to serve in the National Guard and work in the private sector as a firefighter. He testified that before his accident he was in excellent shape and could run three miles in sixteen minutes. He testified that he is no longer able to serve in the National Guard and cannot pass the physical examination to be a full time firefighter. After his accident he started his own construction company and works as a volunteer firefighter for Fruitland Fire Department as a first responder. Mr. Castile testified that his duties as a volunteer firefighter only involve light duty.

The parties stipulated that the employee sustained a compensable accident on August 19, 2003, while working for Sanders Siding. At that time Mr. Castile was working on scaffolding about sixteen to eighteen feet above the ground.

He fell off the scaffold and fell to the ground breaking his right ankle. When he hit the ground, his right ankle actually lodged in one of the holes in a cement block. Mr. Castile testified that his toe was actually touching his leg while it was inside the cement block and that his coworkers had to break the cement block with a sledge hammer to get his foot out.

As a result of his injury, the employee received extensive medical treatment and was receiving pain management treatment/therapy at the time of trial. He has been treated or evaluated by Raymond A. Ritter Jr., M.D., Gary J. Schmidt, M.D., Kevin K. Nagamani, M.D., John Krause, M.D., Anthony Zoffuto, M.D., John D. Graham, M.D. and Bernard Charles Burns, D.O. Dr. Burns is the physiatrist who continues to provide pain management care to Mr. Castile.

As a result of his accident the employee has undergone four surgeries and as many as seven total procedures. He has had extensive physical therapy and prescriptions for orthotics and various medications including narcotic medications.

On August 19, 2003, the date of the accident, Dr. Ritter diagnosed an open fracture "... involving the medial malleolus of his right ankle and a closed fracture of the distal fibula". Mr. Castile had surgery entailing open reduction and internal fixation with plate and screws on the distal fibula fracture and debridement of his wound and internal fixation of the medial malleolar fracture with a compression type screw. The surgical record reports "Open bimalleolar fracture of the right ankle". Dr. Ritter discharged the employee from his care as of December 2003.

Due to continued problems, Dr. Schmidt began care as of January 22, 2004. At that time Dr. Schmidt recommended that Mr. Castile undergo additional surgery. On April 7, 2004 Dr. Schmidt's surgical report documents the employee's second surgery: "Procedure: Repair right non-union medial malleolus. Repair stenosis right tibial anterior tendon".

As of June 15, 2004 Dr. Schmidt reported that one of the screw heads had become prominent and was causing pain. He recommended addition surgery to remove hardware. Surgery was cancelled due to problems between the employee and Dr. Schmidt.

On July 21, 2004, Dr. Nagamani began treating the employee for ankle pain. His "Diagnosis/Assessment was:

1. Right ankle saphenous neuritis
2. Tibial anterior tendonitis
3. Painful lateral hardware".
- 4.

Dr. Nagamani reported that the employee was not at MMI due to saphenous neuritis. He prescribed Lidoderm patches, reported that the employee needed physical therapy, antiinflammatories/Bextra, released Mr. Castile to full duty "for now" and indicated he would need surgery in the future.

On or about October 14, 2004, Mr. Castile had his third surgery for hardware removal. As of December 17, 2004, Dr. Nagamani was treating the employee for pain with medications etc., but due to continued problems he ordered another MRI that was performed on December 29, 2004. The MRI reported "Impression:

1. FINDINGS OF OSTEONECROSIS FELT TO BE PRESENT WITHIN THE DISTAL TIBIAL METAPHYSEAL REGION, EXTENDING THE LAST 4 TO 5 CM TO THE LEVEL OF THE PLAFOND WITH A SMALL AMOUNT OF IRREGULARITY AT THIS LOCATION. NO LOOSE BODY IS SEEN. NO DEFINITE TALAR DOME ABNORMALITY.
2. POST-SURGICAL CHANGES OF THE ANKLE FROM PRIOR SURGICAL FIXATION".

On or about February 25, 2005, Mr. Castile had his fourth surgery. The operative report indicates "Decompression and bone grafting of right tibial osteomyelitis. Bone marrow aspirate".

The employee continued to have problems including pain and was treated with physical therapy and medications etc. As of September 28, 2005 Dr. Nagamani reported that Mr. Castile needed a referral for pain management.

Dr. Graham testified by deposition that was taken on May 1, 2008. He testified that his practice deals with pain management and that he first saw the employee on October 26, 2005. Dr. Graham testified that he examined the employee, took a history and prepared a report.

Dr. Graham performed a physical examination and testified that he found:

- that the employee walked with a limp
- he showed no distress
- he changed positions smooth and fluid without assistance
- his right ankle had healed scars
- he did not detect Tinel's
- there was some skin discoloration at the scarring sites
- the employee had good range of motion in all planes
- minimal swelling
- the employee said swelling was less as he had not worked that day
- neurologically the employee was intact
- right ankle pain status post fracture and subsequent surgeries
- the employee complained he did not like to walk on uneven surfaces or climb ladders with his injured leg.

Based on his assessment he recommended:

- some anti inflammatories, specifically Naprosyn, 500 milligrams twice a day
- supplement with Tylenol Arthritis two capsules every eight hours
- the employee could use Ultram up to 4 times a day.

Dr. Graham felt that Mr. Castile could work without restrictions. He envisioned seeing Mr. Castile every 4-6 months as long as medications were being prescribed. Dr. Graham also felt that Mr. Castile was at MMI but would need ongoing medications. Dr. Graham testified that he had the employee complete a psychologic test and reported that the employee scored a somatization scale in the 99th percentile. Dr. Graham testified that such a score might indicate that it is difficult to find the source of the person's subjective complaints, the person may have complaints that are recalcitrant to treatment, such people have more issues with overuse of narcotics and you cannot necessarily take these people at their word.

As of November 21, 2005, Dr. Graham refused to treat the employee anymore as he indicated that he discharged the employee from his care as his behavior was inappropriate.

As of March 22, 2006, Dr. Graham testified that he was asked by Chris Weiss to provide an opinion as to whether he thought "massage therapy" was appropriate treatment. Dr. Graham testified that he did not see an indication for massage therapy, indicating that massage therapy is a touchy-feely treatment if you can call it treatment. He says that right after a surgery such therapy can be of benefit as what they are doing is getting in and mobilizing the underlying tissue. He testified that this looks like massage but it is not.

He further testified that he looked at the records of Dr. Burns and stated that the regimen of drug prescriptions that Dr. Burns had done over the last two years is not one that he would recommend. He stated that he would not recommend Lidoderm patches and would be particularly concerned about the narcotics for a couple of reasons:

- First there has been an escalation of narcotics. The employee has been allowed upwards of fourteen pills a day and the record suggested that it had not significantly altered the pain-the employee is functioning at the same level. The doctor testified that the drugs have not provided the employee a benefit.
- Secondly he testified that the medical literature has failed to document any substantial benefit for using narcotics for non-malignant pain on a long term basis. There are issues of tolerance and addiction. Chronic narcotics are also of concern in a patient with an elevated somatization scale.

Dr. Graham testified that he is concerned most about the next 40 years. He stated that anti-inflammatories such as

Naprosyn can help the swelling in the employee's ankle.

Under cross examination question by Mr. Weiss, Dr. Graham agreed that the employee's physical complaints are consistent with his injury and subsequent treatment and that pain is subjective and varies from person to person. Dr. Graham also agreed that he last saw Mr. Castile on November 25, 2005, and acknowledged that there was a diagnosis of osteonecrosis at that time.

Upon further questioning, Dr. Graham testified that whether massage therapy is a form of physical therapy depends on how massage therapy is being defined. He stated that some physical therapists may use a routine that appears to the layman to be massage therapy, but it is not. He further stated that the type of therapy that a trained physical therapist gives-particularly for myofascial release-is going to be different than your average massage therapist that works on you because you are stiff and sore. He also agreed that one benefit of physical therapy is to reduce swelling and further agreed that massage therapy can reduce symptoms from an injury such as swelling, but indicated you do not do them long term. In addition he agreed that Mr. Castile will continue to have swelling. Dr. Graham also testified that the only situation where he thinks massage therapy should be used on a continued basis is after breast surgery to treat lymphodemia-it helps drainage as lymph nodes were taken out of the arm.

Dr. Nagamani addressed the issue of massage therapy and Mr. Castile's treatment in several letters. In a letter dated August 23, 2005 he indicated that Mr. Castile should continue to take ibuprofen or Tylenol III/Ultram. He stated that for the most part he believes the employee's pain can be controlled with ibuprofen and reported that everyday high top boots are good enough. He stated that for further pain the employee should see his family doctor.

In a letter dated April 6, 2006 Dr. Nagamani specifically addressed the question of massage therapy. He stated "This letter is regarding the question of massage therapy for Mr. Billy Castile. Massage therapy may be of benefit to him but I see no indication for the use of such therapy. Therefore, I cannot medically prescribe such massage therapy for long-term treatment".

Dr. Zoffuto evaluated the employee's condition on September 21, 2005. He testified by deposition taken May 10, 2006. Dr. Zoffuto was questioned about massage therapy, and like the other doctors, he provided opinions. He reviewed the records of Tammy Piatt, the massage therapist that had been treating the employee and was asked if the massage therapy was medically necessary. Dr. Zoffuto testified "I believe that there are benefits of massage that help relieve pain and improve mobility, and I think they do that by reducing fluid in the injured joints. Apparently, Mr. Castile has undergone these treatments and is continuing to go and get them. It may be helping him. For that reason, I would think if it is helpful, it should be a reasonable remedy as far as pain". He opined that depending on Mr. Castile and the relief of pain he gets, that would determine the amount of therapy he would need. He stated that the employee should get the therapy as long as the ankle hurts and he is getting relief from it. He said that that if something helps pain, it's generally continued for as long as possible. He also suggested that massage therapy may restore flexibility. On cross-examination Dr. Zoffuto agreed that he had not studied massage therapy and was not familiar with the mechanics of massage therapy.

Dr. Zoffuto provided a disability rating for Mr. Castile and said that he has a disability of twenty-five per cent of the body as a whole. He testified that the ankle was fifty percent impaired. Dr. Zoffuto also testified that the employee should continue to get pain relief and should be under the long term care of an orthopedist to deal with the long term effects of osteonecrosis. He stated that the risks of osteonecrosis are pain, problems with ambulation, and sometimes infection. He stated that these problems will exist for the rest of the employee's life. He testified that the employee already has traumatic arthritis, and if the osteonecrotic bone continues to deteriorate, it could impair the employee's weight bearing ability, his standing ability, his proprioception and that it may increase his pain

Dr. Krause was asked to see the employee for an IME on June 12, 2006. He was apparently aware of the employee's prior treatment history. He reviewed prior MRI records and got new x-rays and indicated-"Assessment:

- History of an open right ankle fracture dislocation, healed.
- Cannot rule out entrapment of the superficial peroneal nerve, minimally symptomatic.
- History of distal tibial osteonecrosis.

- Chronic right ankle pain with degenerative joint disease”.

Dr. Krause recommended:

- A new MRI due to uncertainty of the source of the employee’s pain. He stated that it is unfortunate that the medical malleolar screws were not taken out as they cause an artifact.
- Following the MRI, diagnostic ankle injection to assess what sort of pain relief the employee gets. If short time but no long time relief from injection, it would not be unreasonable to do an arthroscopy of ankle depending on the MRI.
- Entrapment of superficial peroneal nerve does not cause extensive problems or discomfort unless there is direct pressure on it. He did not recommend treatment at that time.
- The employee’s high score on somatization scale is concerning therefore the doctor is cautious about surgery helping the employee.

On July 7, 2006, Dr. Krause injected Mr. Castile’s ankle to see what short term relief he would get. As of July 24, 2006 the employee reported twenty-four hours of pain relief with the pain coming right back. At that time Dr. Krause made further recommendations:

- I do not think the patient would benefit from any further surgical intervention at this point. He may eventually need an ankle arthrodesis in the future.
- Naprosyn
- Short supply of Darvocet
- The doctor sent the employee to Dale Watson to get a solid low profile AFO that he can use at work.

As of August 14, 2006, Dr. Krause provided further opinions as the employee was not happy with the orthotic device:

- Does not recommend another surgery.
- Eventually he will need an ankle arthrodesis. Given his motion at this point I would not recommend that at this point.
- He is best managed with an AFO which will help to limit motion. He would also be managed with pain medications primarily anti-inflammatory plus or minus a low grade narcotic.
- Naprosyn and short prescription for Darvocet.
- The employee should follow up with a pain management specialist. He is at MMI and the doctor did not need to see the employee back.

Dr. Burns testified by deposition taken February 4, 2008. He testified that he has been the treating doctor for Mr. Castile since September 27, 2006. The doctor testified about all of the problems that Mr. Castile has resulted from the accident and further testified that these problems will affect him for the rest of his life and that he will need treatment for these problems, including pain for the rest of his life. A partial list of these problems includes necrosis, pain along the tendon sheath, osteomyelitis, degenerative joint disease, nerve disruption, disturbed lymphatic flow and swelling of soft tissues. In addition, Dr. Burns testified that the employee has gait disturbance/an analgic gait due to pain that will put wear and tear on his knee, hip and low back. Dr. Burns also testified that Mr. Castile has been compliant with treatment. He reported that the opinion of MMI in March 2007 was more of an “administrative statement” to let the administrators move on with their paperwork and does not rule out the need for further surgery. He testified that all of the treatment that the employee had before he saw him was reasonable and the expected standard of care for this type of injury, and that he will need to see the employee periodically for medication adjustment. He added that Mr. Castile’s treatment conditions may evolve over the employee’s lifetime. Dr. Burns specifically testified that the employee will have ankle pain, and that this pain will become worse with use. He additionally stated that the ankle pain caused sleep disturbance. He further stated that the employee needs orthotic bracing as he is wearing one out every month or two.

Dr. Burns testified about the medications that Mr. Castile needs to deal with his problems. He testified that the drugs are changed and moved around depending on their effectiveness. He testified that the dosages that the employee takes have increased since treatment first started. A list of some of the medications that the doctor has or is prescribing are:

- Lidoderm patches
- Darvocet
- Lyrica
- several anti-inflammatory medications including Arthrotec
- Norco
- Tylenol

Dr. Burns testified that the use of Hydrocodone can lead to addiction in addition to liver and kidney damage, and that the longer you use drugs the less effective they become. He indicated that he has not moved the employee to long lasting Schedule III drugs as there are more risks with them. Dr. Burns also testified about the benefits of physical therapy, such as regaining strength and mobility, restoring range of motion to a joint and pain reduction. He also testified that an exercise program, the use of ice and heat and compression (the act of applying pressure to an area of the body) can be helpful with pain reduction.

Dr. Burns has opinions and testified extensively regarding the use of massage therapy. He testified that massage therapy is a form of physical therapy that provides benefits such as increased mobility to a joint, increasing the strength of a muscle around a joint and decreased pain and swelling. He further testified that some of the physical therapy that the employee received included massage therapy. Dr. Burns specifically testified that "...there is no doubt in my mind that the massage therapy is helping relieve some of Mr. Castile's symptoms". He stated that medically, massage therapy has helped him keep the heavy workload that he has. In a letter dated March 20, 2007, Dr. Burns testified that he recommended massage therapy for the employee as it was helping him. However in a letter dated April 6, 2007 he stated that massage therapy is not indicated for maintenance for a chronic condition. He testified that the employee's symptoms have responded to massage therapy, especially with pain, and added that "He is very persistent in the view that massage therapist helps him more so than those other things. In fact, to the point of paying for that therapist himself". Dr. Burns also testified that it is possible that massage therapy would lessen the pain medication that Mr. Castile has to take.

Dr. Burns was asked about ankle fusion surgery. He testified that fusion was the opinion of one of the reconstructive guys and he is not sure if he agrees with that. He indicated it is clearly not the right choice now as Mr. Castile wants to maintain a high activity level. He reported that he has a second hand report that fusion will ultimately be necessary and he guesses he cannot disagree with that, but he does not think it is something the employee should have right now. He testified that the employee should wait as long as possible before having that type of surgery as a fused ankle can require more surgery and fusion surgery would set the employee up for a lot more medical treatment.

Dr. Burns stated that a home exercise program including the use of ice, elevation, range of motion therapy along with ace bandage use could provide the same benefit as massage therapy. He testified that in the Cape Girardeau area, in the medical community among doctors, the use of massage therapy for treatment of a chronic condition would not be customary and added that this takes us back to the whole controversy as he has other conditions that he takes care of that are occasionally helped with massage therapy. ex. Fibromyalgia and arthritis. He says massage therapy is gaining in getting included on different insurance panels and is becoming more of a long-term modality for people than it has been in the past.

In summary, Dr. Burns thinks that massage therapy is a viable treatment modality, he has specifically testified that massage therapy has helped relieve symptoms caused by the employee's accident, he recommended massage therapy as of March 20, 2007, but when asked the specific question of whether it was reasonable to recommend that Mr. Castile have massage therapy he responded in part by saying that traditionally massage therapy is lumped into a maintenance or even luxury item that is not universally recognized as an active treatment past a certain point. He stated that he was not able to come down on one side or the other and admitted that he has not prescribed massage therapy for Mr. Castile. Dr. Burns testified that he has been wishy-washy about massage therapy before his deposition and at the deposition, but testified "But in this chronic condition, I think that that may need rethinking. Classically, and I sent a note in April that massage therapy is typically not intended for maintenance of a chronic condition. But I guess the same could be said of medications for pain which are classically used for acute conditions". He reported that

he has prescribed massage therapy for other patients in the past concerning soft tissue swelling but has not typically prescribed massage therapy for a chronic condition.

Mr. Castile testified that he is currently being treated by Dr. Burns for pain management, and has been a patient of Dr. Burns for the last one and one half years. He indicated that the treatment he is getting consists of anti-inflammatories, pain killers, Lorcet, OxyCodone, Lidoderm patches and orthotics. He indicated that he uses at least one and sometimes two Lidoderm patches a day. He further testified that Dr. Burns allows him to take as many as six Lorcets a day and two OxyCodones at night.

At the time of his accident, the employee was working in construction. He testified that he now mostly does construction as he did in the past. However, he indicated that no one would hire him due to his injury and he therefore has to start his own construction business. He testified that the accident has caused him to be far in debt and that he is still digging himself out.

Mr. Castile testified about the affects of the accident and the physical problems he has with his right ankle. He testified that on a normal day he gets up at 5:15 AM and takes a Lorcet. He then lays back down until about 6AM. When he gets up he has to stretch and physically draws the letters of the alphabet with his big toe. He completes this process three times every morning. He testified that his foot is inconstant pain in that every step he takes cause pain. Mr. Castile works construction and indicated that anytime his ankle is on an incline he has greater problems. He further testified that he has muscle cramps in the instep that travels up his leg to the knee and hip. He also indicated that he has problems with his opposite leg.

As to the degree of ankle pain, the employee testified that when he is sitting such as he was at trial, pain is a 3-4, when walking the pain is a 5 and when he works on inclines the pain is at a 7. He testified that ladders are especially difficult for him. He further testified that the doctor had to increase the medications he takes as the pain was so bad that it was keeping him up at night. He indicated that swelling is a continuing problem as well as popping and grinding at the ankle due to bone on bone contact. He testified that his ankle swells so bad that it hangs over the top edge of his work boots by as much as three quarters of an inch to an inch. Swelling is greater after working, therefore when the employee comes home from work he keeps his foot elevated by sitting in a recliner.

Mr. Castile testified that he receives massage therapy treatments from Tammy Piatt which mostly helps the swelling, pain and cramping. He stated that he saw Ms. Piatt about 2-3 times as week for sessions lasting one half hour to one hour. He indicated that he had to discontinue the massage therapy treatment due to the cost. Mr. Castile testified that the therapy helped a great deal as the pressure point therapy works out the toxins from the swelling. He said this has a lot of benefits as the swelling goes down and he has a 50% improvement the next day. In addition, the medications mask the pain, but the therapy provides pain relief. He takes six Lorcets in the day time and two OxyCodones at night. Mr. Castile says that the massage therapy allows him to reduce the amount of medication he takes which in turn provides additional benefits as the medications are hard on his kidneys and liver. He testified that the relief from the massage therapy is ten times greater than the relief from taking the medications.

Mr. Castile is asking for benefits including permanent partial disability, that his message therapy bills be paid, that he receive future medical care as indicated by the doctors, including temporary total disability benefits for future surgery and that the care include massage therapy as provided by Tammy Piatt. He testified that he needs to see Ms. Piatt three to four times a week as it will help his liver in the future, but he could live with two times a week. He further testified that the massage therapy treatment have helped so much that in the past he paid Tammy Piatt out of his pocket- he knows it helps-it cures and relieves. In addition he testified that the massage therapy is good for his attitude with his family, it helps pain and swelling and is good for his body as he would have to take less medication. In addition the employee testified that he wears his work boots and brace almost constantly and that he wears out his orthotics about every month or two.

Juanita Castile, the employee's wife also testified at trial. She confirmed the employee's testimony about the massage therapy and the physical relief it provides. She listed the benefits that the massage therapy provides as:

- reduced swelling of the ankle

- the therapy cause her husband to get such pain relief that he is in a better mood so that sometimes they can go out to dinner
- he is more comfortable and takes less medication
- he has more energy after the therapy
- he walks better after the therapy.

Tammy Piatt is the massage therapist that has been treating the employee from June 2005 to May 2008-about 248 sessions. She provided her treatment records in Employee Exhibit G and recommends that the employee should have massage therapy at least two times a week. She testified that the costs for her massage therapy sessions are \$60.00 per hour. The employee is seeking reimbursement for \$5,390.00 that he spent for massage therapy.

## **RULINGS OF LAW-**

### **Prior Medical Bills for Massage Therapy-**

The employee has requested that the employer-insurer be ordered to pay to the employee \$5,390.00 to reimburse the employee for bills that he incurred for massage therapy treatments from Tammy Piatt. The massage therapy treatment that the employee received from Tammy Piatt was procured by the employee at his own as the employer-insurer refused to provide such therapy. The employer-insurer is disputing these bills with regard to authorization, reasonableness, necessity and causal relationship.

In the statement of the findings of fact the Court went to a lot of effort to set out the testimony of the medial providers in this case and specifically included all of the opinions about massage therapy-pros and cons. There is no question that there are multiple medical opinions that the massage therapy provided to the employee did provide “relief” from the affects of his accident. Dr. Burns provided specific testimony and testified that there is no doubt in his mind that massage therapy is relieving some of the employee’s symptoms. Despite the positive statements of Dr. Burns, he further stated that he has not prescribed massage therapy as a treatment modality for Mr. Castile. As of May 29, 2008, no physician had prescribed massage therapy as a needed treatment modality to cure or relieve the employee from the effects of his accident. However, Dr. Burns did testify that the issue of massage therapy may need rethinking.

Based on the specific evidence presented in this case where no physician has ordered massage therapy, there is not sufficient evidence to convince the Court that the employer-insurer is responsible to provide and pay for massage therapy treatment that the employee procured on his own. The employee’s request to be reimbursed \$5, 390.00 that he paid for massage therapy treatments is denied.

### **Future Medical Care-**

Under Section 287.140 RSMo., the employee is entitled to receive all medical treatment that is reasonably necessary to cure and relieve him from the effects of his injury. That section specifically states that “the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial care, ambulance, and medicines as may reasonably be required ...to cure and relieve from the effects of the injury”. It has also been determined that if treatment will give the employee relief, the employer-insurer has to provide treatment irrespective of the inability of the treatment to cure the employee. The employer may also be required to furnish the employee with artificial legs, arms, hands, surgical orthopedic joints, or eyes, or braces as needed for life. Among other things the Courts have also required the employer to provide modifications to dwellings and motor vehicles.

In addition to medical treatment as may be reasonably required to cure and relieve the effects of the injury, Missouri also allows an award of future medical treatment. The standard of proof of entitlement of future medical treatment is that claimants must show by a “reasonable probability” that they will need future medical treatment.

The employer-insurer stipulated that the employee’s injury was medically causally related to his accident. In addition, the employer-insurer stipulated that they would provide all future medical care that is necessary to cure and relieve the employee from the effects of his accident. The employer-insurer specifically excluded massage therapy from this

stipulation.

There is no question that the employee had a serious accident, has received substantial medical care and will be in need of future medical care for the rest of his life. Multiple physicians have testified that the employee will need future medical care for the rest of his life and that the type of medical care that he will need will evolve and change as the effects of the employee's accident will evolve and change over his lifetime.

The evidence in this case convinces the Court that massage therapy does provide a medical benefit that at a minimum provides relief to the employee from the effects of his accident. Dr. Graham testified that one benefit of physical therapy is to reduce swelling and further agreed that massage therapy can reduce symptoms from an injury such as swelling. In addition he testified that Mr. Castile will continue to have swelling. Dr. Nagamani testified that massage therapy may be of benefit to the employee. Dr. Zoffuto testified "I believe that there are benefits of massage that help relieve pain and improve mobility, and I think they do that by reducing fluid in the injured joints. Apparently, Mr. Castile has undergone these treatments and is continuing to go and get them. It may be helping him. For that reason, I would think if it is helpful, it should be a reasonable remedy as far as pain". He opined that depending on Mr. Castile and the relief of pain he gets, that would determine the amount of therapy he would need. He stated that the employee should get the therapy as long as the ankle hurts and he is getting relief from it. He said that that if something helps pain, it's generally continued for as long as possible. He also suggested that massage therapy may restore flexibility. Dr. Burns testified that all of the treatment that the employee had before he saw him was reasonable and the expected standard of care for this type of injury. In addition he testified that massage therapy is a form of physical therapy that provides benefits such as increased mobility to a joint, increasing the strength of a muscle around a joint and decreased pain and swelling. He also testified that some of the physical therapy that the employee received included massage therapy. **Dr. Burns specifically testified that "...there is no doubt in my mind that the massage therapy is helping relieve some of Mr. Castile's symptoms"**. (emphasis added). He stated that medically, massage therapy has helped him keep the heavy workload that he has. Dr. Burns opined that the employee's symptoms have responded to massage therapy, especially with pain, and added that "He is very persistent in the view that massage therapist helps him more so than those other things. In fact, to the point of paying for that therapist himself". Dr. Burns also testified that it is possible that massage therapy would lessen the pain medication that Mr. Castile has to take. Dr. Burns opined that massage therapy is gaining in getting included on different insurance panels and is becoming more of a long-term modality for people than it has been in the past. Dr. Burns finally stated that he was wishy-washy about massage therapy before his deposition and at the deposition, but testified "But in this chronic condition, I think that that may need rethinking. Classically, and I sent a note in April that massage therapy is typically not intended for maintenance of a chronic condition. But I guess the same could be said of medications for pain which are classically used for acute conditions".

The medical evidence in this case is uniform and documents that the employee will need future medical care. The medical evidence also is consistent and documents that type of medical care that the employee will need including but not limited to:

- orthotics
- ankle fusion surgery
- on going medications that will change and evolve over time to include anti inflammatories, pain killers, Lorcet, OxyCodone, Lidoderm patches etc.
- long term care of an orthopedist to deal with the long term effects of osteonecrosis.
- long term care from a pain management specialist.

The Court notes that Dr. Burns is the pain management specialist that was retained by the employer-insurer to provide long term medical care to the employee. Dr. Burns has been the employee's treating physician for the last one and one half years and was treating the employee at the time of trial. The employee is generally satisfied and compliant with the care that is being provided by Dr. Burns. Given the unusual circumstances of this case, the Court finds that the testimony and medical opinions of Dr. Burns and Dr. Zoffuto are more credible than the testimony and medical opinions of Dr. Graham and Dr. Nagamani on the issue of the benefits of massage therapy, and whether massage therapy will cure and relieve the employee from the effects of his accident. Dr. Burns's testimony lays out the positive

effects of massage therapy given the medical condition of Mr. Castile. He points out that massage therapy is a form of physical therapy. While he stated that massage therapy has not been traditionally used in a chronic condition such as that of Mr. Castile, he made an analogy about the use of drugs in a chronic situation. Drugs are used to provide pain relief in chronic situations. In this case the employee is being prescribed drugs to provide relief from chronic pain. The credible evidence is that the massage therapy is providing greater relief than the pain medications or at least potentially reduces the reliance on pain medications that have debilitating side effects.

After a consideration of all of the evidence in this case, including the stipulation of the employer-insurer that the employee is in need of future medical care and that they will provide future medical care, the Court orders that the employer-insurer provide future medical care to cure and relieve the employee from the effects of his accident. Such medical care shall include but not be limited to orthotics, ankle fusion surgery, on going medications that will change and evolve over time to include anti inflammatories, pain killers, Lorcet, OxyCodone, Lidoderm patches etc., long term care of an orthopedist to deal with the long term effects of osteonecrosis and especially long term care from a pain management specialist. In addition, the Court orders that the employer-insurer provide future medical care including massage therapy as long as said massage therapy sessions are ordered and prescribed by Dr. Burns or any other treating physician or pain management specialist. The treating physician who prescribes the massage therapy sessions shall determine the location, quantity and duration of such sessions. Given the history and special facts in this case, it is not the intent of the Court that the employer-insurer replace Dr. Burns with another treating physician in an attempt to escape the requirement of providing massage therapy treatments.

### **Temporary Total Disability-**

The employee has made a request for temporary total disability payments in the event that he has to undergo surgical intervention in the future.

The employee's request is denied in that it is too speculative to order the employer-insurer to pay unknown temporary total disability benefits with an unknown beginning and ending date. However, should the employee have to undergo surgical procedures in the future, and the treating physician orders that he cannot work while recovering from the procedure; the employee should at that time renew his request for temporary total disability payments as appropriate.

### **Permanent Partial Disability-**

The employee testified about the disability that he has incurred as a result of his accident. His testimony was credible and consistent with the medical evidence outlining his care and recovery.

The only opinions that were offered about the employee's permanent disability were those of Dr. Zoffuto. He testified that Mr. Castile has a disability of twenty-five per cent of the body as a whole and further opined that his ankle was fifty per cent impaired.

There is no question that the employee had a serious injury to his right ankle that will affect him for the rest of his life. In addition, there is the possibility that the problems with the employee's ankle may affect other body parts at some point in his life. There is also no question from the evidence, and the Court finds and believes that the employee endures significant pain that affects his ability to walk and work as a consequence of his injury. The Court specifically rejects any opinion to the contrary. Based on all the evidence presented in the case, the Court finds that the employee sustained a sixty-four percent permanent partial disability of his right ankle at the 155 level. The Court orders the employer-insurer to pay to the employee \$30,024.86. ( $155 \times 64\% = 99.20$ .  $99.20 \times \$302.67 = \$30,024.86$ ).

### **ATTORNEY'S FEE**

Chris N. Weiss, 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.

Date: \_\_\_\_\_ Made by:

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

A true copy: Attest:

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Mr. Jeffrey W. Buker  
*Division Director*  
*Division of Workers' Compensation*

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