

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

Injury No.: 08-088377

Employee: Brian Dalton

Employers: 1) Select PEO, Inc./ELS HR Solutions
2) Heimburger Construction

Insurers: 1) Providence Property and Casualty
2) Continental Western Insurance

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

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 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 Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated March 8, 2013. The award and decision of Administrative Law Judge Margaret Ellis Holden, issued March 8, 2013, 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 19th 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

AWARD

Employee: Brian Dalton Injury No. 08-088377

Dependents: N/A

Employer: Select PEO Inc. /ELS HR Solutions,
And Heimbürger Construction Inc.

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

Insurer: Providence Property and Casualty for Select PEO Inc./ELS HR Solutions, and
Continental Western Insurance for Heimbürger Construction Inc.

Hearing Date: 12/4/12 Checked by: MEH

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? YES
2. Was the injury or occupational disease compensable under Chapter 287? YES
3. Was there an accident or incident of occupational disease under the Law? YES
4. Date of accident or onset of occupational disease: 8/27/08
5. State location where accident occurred or occupational disease was contracted: TEXAS COUNTY, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? YES
7. Did employer receive proper notice? YES
8. Did accident or occupational disease arise out of and in the course of the employment? YES
9. Was claim for compensation filed within time required by Law? YES
10. Was employer insured by above insurer? YES
11. Describe work employee was doing and how accident occurred or occupational disease contracted: WHILE LIFTING A LARGE PIECE OF SHEET METAL IT HIT A PIPE AND SUDDENLY JERKED HIS RIGHT ARM BACKWARDS BEHIND HIS HEAD, INJURING HIS RIGHT SHOULDER
12. Did accident or occupational disease cause death? NO Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: RIGHT UPPER EXTREMITY
14. Nature and extent of any permanent disability: 75%
15. Compensation paid to-date for temporary disability: UNKNOWN
16. Value necessary medical aid paid to date by employer/insurer? UNKNOWN

Employee: Brian Dalton

Injury No. 08-088377

- 17. Value necessary medical aid not furnished by employer/insurer? \$269.60
- 18. Employee's average weekly wages: \$1,131.94
- 19. Weekly compensation rate: \$754.63/\$404.66
- 20. Method wages computation: BY AGREEMENT

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Unpaid medical expenses: \$269.80

0 weeks of temporary total disability (or temporary partial disability)

174 weeks of permanent partial disability from Employer

0 weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning N/A, for Claimant's lifetime

FUTURE MEDICAL TREATMENT

- 22. Second Injury Fund liability: Yes No Open

0 weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits: N/A

Permanent total disability benefits from Second Injury Fund:
weekly differential \$349.97 payable by SIF for 174 weeks, beginning 1/27/10
and, \$754.63 thereafter, for Claimant's lifetime

TOTAL: SEE AWARD

- 23. Future requirements awarded: FUTURE MEDICAL TREATMENT

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

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

KENNETH SEUFERT

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Brian Dalton Injury No. 08-088377

Dependents: N/A

Employer: Select PEO Inc./ELS HR Solutions,
and Heimburger Construction Inc.

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

Insurer: Providence Property and Casualty for Select PEO Inc./ELS HR Solutions, and
Continental Western Insurance for Heimburger Construction Inc.

Hearing Date: 12/4/12 Checked by: MEH

The parties appeared before the undersigned administrative law judge on December 4, 2012, for a final hearing. The claimant appeared in person represented by Kenneth Seufert. The employer and insurer Heimburger Construction Inc. appeared represented by Mark Kornblum and Sarah Reichert. The record was left open until December 18, 2012, for the parties to provide the amount of benefits paid to date, if available. The Second Injury Fund appeared represented by Cara Harris. Memorandums of law were filed by January 18, 2013.

The parties stipulated to the following facts: On or about August 27, 2008, Select PEO Inc./ELS HR Solutions, and Heimburger Construction Inc. were employers operating subject to the Missouri Workers' Compensation Law. The employer Select PEO Inc./ELS HR Solutions' liability was fully insured by Providence Property and Casualty Insurance and Heimburger Construction Inc.'s liability was fully insured by Continental Western Insurance Company. On the alleged injury date of August 27, 2008, Brian Dalton was an employee of the employers. The claimant was working subject to the Missouri Workers' Compensation Law. On or about August 28, 2008, the claimant sustained an accident which arose out of and in the course and scope of employment. The accident occurred in Texas County, Missouri. The claimant notified the

employer of his injury as required by Section 287.420 RSMo. The claimant's claim for compensation was filed within the time prescribed by Section 287.430 RSMo. At the time of the alleged accident, the claimant's average weekly wage was \$1,131.94, which is sufficient to allow a compensation rate of \$754.63 for temporary total disability compensation, and a compensation rate of \$404.66 for permanent partial disability compensation. Temporary disability benefits have been paid to the claimant. The employer and insurer have paid medical benefits. The amount of temporary total disability paid and the amount of medical benefits paid is unknown. The parties agree no temporary disability benefits are due. The attorney fee being sought is 25%. Heimbunger Construction Inc. and Continental Western Insurance Company agree to be liable and pay any benefits awarded to the claimant from the employer and insurer. Continental Western Insurance Company reserves the right to pursue reimbursement from Select PEO Inc./ELS HR Solutions. The parties also agree that the claimant reached maximum medical improvement on January 26, 2010. They agree no temporary total disability benefits are owed.

Objections contained in Exhibit B-3 pages 27-31 are ruled on: All objections to leading questions contained in pages 27-31 are sustained. The answers to these questions will not be considered. The answers to non objected questions on these pages will be considered.

Objections contained in Exhibit B-3 pages 51 – 54 are ruled on: All objections to leading questions contained in pages 51 - 54 are sustained. The answers to these questions will not be considered. The answers to non objected questions on these pages will be considered.

ISSUES:

1. Whether the employer is obligated to pay past medical expenses.
2. Whether the claimant has sustained injuries that will require future medical care in order to cure and relieve the claimant of the effects of the injuries.
3. The nature and extent of permanent disabilities.

4. The liability of the Second Injury Fund for permanent total disability or enhanced permanent partial disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The claimant is 45 years old. He lives with his wife in Ironton, Missouri. He graduated from high school in 1985. He can read and write. He has not formal computer skills. After high school he has had no other formal training.

After high school he worked for Ceco Building Manufacturing. This company erected metal buildings. He performed manual labor and no supervisory duties. Next, from 1998 to 2005, he worked for HES Contracting, a general contractor also erecting metal buildings. He performed concrete, framing, general construction, and was eventually promoted to a supervisory role as a foreman. In 2005 he went to work for Heimbürger Construction Inc., the employer, again performing general labor as an ironworker.

The claimant explained that his checks were issued by Select PEO Inc./ELS HR Solutions but Bob Heimbürger, as owner of Heimbürger Construction Inc., controlled the work and gave directions to the employee.

When working for Heimbürger Construction Inc., claimant was involved in framed steel buildings and sheeted them with metal. He described how the frame of the building would be placed with a crane, tied together, and then squared up. After it was framed and squared it would be sheeted with sheet metal.

Prior to claimant's work injury he had testicular cancer in 1991 from which he fully recovered. He had also had some ulcers which had fully recovered. On June 20, 2006, he was descending stairs in his home when he fell approximately 7 feet landing on his right foot. He went to the Mineral Area Regional Medical Center in Farmington, Missouri. X-rays were performed which showed a fractured calcaneus of the right foot. Dr. Robert Duddy

recommended the claimant to schedule an open reduction internal fixation of the right calcaneus to surgically repair the fracture. Because the claimant did not have insurance he could not afford the surgery and opted for conservative treatment. On July 7, 2006, his right foot and ankle were casted instead. He was prescribed medication and exercises and was directed to not weight bear on the foot. He saw Dr. Richard Hollocher, an orthopedic surgeon, on August 29, 2006. Dr. Hollocher put him in a boot, prescribed medication and directed him to avoid weight bearing. On October 10, 2006, claimant saw Dr. Hollocher. Claimant was continuing to take medication and his right foot and ankle were swollen, sore and painful to stand on. Dr. Hollocher recommended surgery but the claimant declined because he could not afford it. The claimant had not worked since he fell and injured his foot in June and decided since he could not afford any further medical treatment to return to work because he had no other income.

Claimant returned to work at Heimburger Construction Inc. He was still taking Norco pain medication prescribed by the doctors. The injury to his right foot and ankle affected the claimant's balance, strength and stamina when he returned to work. He continued to have a burning pain in his ankle. He described it as feeling like walking on a rock. He also had limited movement in his ankle. He had difficulty standing on it and could not squat.

The employer was understanding of his limitations and allowed him to modify his work. Because he could not walk out on the steel beams as he could before the injury he was allowed to work out of a raised basket. Purlins are the steel beams set on rafters that form the roof of the buildings. Before the injury he was able to carry and walk out on these, but was not able to after the injury. He could not carry as much weight because it put too much pressure on his right ankle. He said he was very careful what he did and the injury slowed him down significantly. He took a break whenever he had a chance, sitting down every 30-45 minutes.

Claimant wore a tool belt that was normally very heavily loaded with tools and materials such as bolts and screws. After he injured his ankle he would only carry what was absolutely necessary at the time to lighten the belt as much as possible. After a work day he described his foot as swollen and painful. He would go home, soak, elevate his foot, and take pain medications.

On August 27, 2008, claimant was working at a location in Licking, Missouri. They were in the process of sheeting a wall. A concrete wall came up about ten feet and they were placing a sheet of steel on top of this wall. This particular sheet of steel was about three feet wide and 16-18 feet long. A co-worker had the top of the sheet and was pulling with a rope. The claimant had the bottom of the sheet and was standing on a ladder about two rungs up. While they were pulling on the sheet it unexpectedly struck a water pipe and the co-worker lost his hold on it. This caused claimant's right arm to be pushed back and down, shoving it behind his head. He felt a pop and immediate pain.

He stopped work and notified Bob Heimburger of the injury. He was not able to perform much work the rest of the day. The employer sent him to Dr. Pairat Vibulakaopun, hereinafter referred to as Dr. Pairat. Dr. Pairat took the claimant off work and prescribed pain medications. He continued to see him for a couple of weeks. On September 11, 2008, the doctor returned the claimant to work. He tried to work for three for four days but was not able to get much accomplished. He was laid off and has not worked since.

Claimant returned to Dr. Pairat on January 15, 2009. An MRI was performed which showed an incomplete articular surface tear of the rotator cuff. The claimant was eventually referred to Dr. James Emanuel, an orthopedic surgeon, who first saw him on June 22, 2009. Dr. Emanuel's opinion was the work injury was the prevailing factor in his right shoulder complaints

and recommended surgery. His pre-operative diagnosis was subacromial bursitis with a spur, possible rotator cuff tear, and AC joint arthritis.

On July 22, 2009, Dr. Emanuel performed surgery consisting of:

1. Extensive Arthroscopic Debridement of Glenohumeral Joint Including a Bicep Tenotomy, Debridement of the Glenoid Labrum and Undersurface of the Rotator Cuff
2. Open Repair of Massive Rotator Cuff Tear Including the Subscapularis Tendon
3. Open Acromioplasty
4. Open Distal Clavicle Resection.

His post operative diagnosis included:

1. Massive Rotator Cuff Tear Including a Tear of the Subscapularis Tendon with Significant Retraction
2. Torn Biceps Tendon that was Subluxed Out of the Joint
3. Degenerative Fraying of Glenoid Labrum Posteriorly and Inferiorly
4. Subacromial Bursitis with a Spur
5. AC Joint Arthritis

Claimant testified that before the surgery he could not use his right arm at all as his whole arm felt dead. He said it was constantly painful with muscle spasms in his bicep and chest. After surgery he had improvement in that he could now use his arm more. He said it did take awhile, with several follow-up visits with Dr. Emanuel and fifty physical therapy sessions. Dr. Emanuel released the claimant on January 26, 2010.

Dr. Emanuel recommended the claimant work in the light to medium level and assigned permanent restriction of: "no lifting greater than 20 pounds from floor to waist, no lifting greater than 10 pounds from waist to shoulder and nothing greater than 2 pounds above shoulder height. I would not recommend repetitive shoulder reaching or lifting." He also recommended no pushing or pulling over 100 pounds on a four wheel cart and no push or pulling over 20 pounds without a cart.

Dr. Kenneth Smith examined the claimant on March 12, 2010, for an independent medical evaluation. He found the work injury of August 27, 2008, caused the claimant's work

injury and felt he had a moderate disability relative to the injury and that he could not return to work as an ironworker. He also recommended future medical treatment consisting of continued physical therapy and possibly an orthopedic consultation. He deferred to an orthopedic surgeon to determine if the claimant had reached maximum medical improvement.

On April 30, 2010, Dr. Richard Hulsey performed an independent medical evaluation of the claimant. He testified by deposition that at the time he saw the claimant, "He was about 10 months after the procedure, continued to have pain which made it difficult to do any type of heavier lifting or especially movement above shoulder level. He was taking Motrin at the time. He also had complaints of waking up at night because of discomfort." He also found claimant had significant atrophy of the supraspinatus and the infraspinatus on the right compared to the left, which he described as clearly visible as a "hollowed-out appearance of the muscle on one side versus the other."

His impression was, "post repair of massive retracted subscapularis tear with extension into the supraspinatus." He reviewed the MRI and found that it showed significant changes of the subscapularis. He commented, "Unfortunately, the subscapularis can rapidly retract and become difficult to repair. From review of Dr. Emanuel's operative note, that was the case. Due to the difficulty in healing of the subscapularis, it is possible that this repair may have dehisced. Unfortunately the ikelihood to improve this situation is very limited. An MRI is not unreasonable, but I think even if the tear has dehisced, any type of surgical procedure would have an extremely high risk of failure." He found claimant at maximum medical improvement and felt continued medications and a strengthening program to be continued indefinitely was reasonable. He did not believe the claimant could return to work as an ironworker and imposed restrictions of lifting no more than 20 pounds from the floor to chest and no lifting more than 1-2 pounds over the shoulder level. No extended activity above shoulder level on the right. He felt

he had a moderate level of disability involving his right upper extremity and that the restrictions all apply to the August 27, 2008, injury.

Dr. Hulsey testified that he believed the claimant would most likely “require anti-inflammatories and non-narcotic medications but no other specific treatment.” This would also require him to be seen by some type of physician to prescribe this medication. He found claimant to have a 20% permanent partial disability of the right upper extremity at the level of the shoulder.

Dr. David Volarich examined the claimant on January 27, 2011, and also testified by deposition. He found the right shoulder had at least a 50% loss in motion. Passively he could get the arm to 90 degrees flexion and 80 degrees abduction. The claimant was unable to touch the side of his head with his right hand. He could not get his right hand behind his back. There was significant weakness noted with external and internal rotation as well as abduction. He noted significant atrophy he characterized as between 3-4/5, which he said was moderately severe. He found that overall his findings were consistent with a frozen shoulder. He measured claimant’s right hand grip strength as 30, 40, 35, 30, and 25 pounds compared with his left hand grip strength of 65, 105, 95, 85, and 80 pounds. He said that you expect the dominate hand to have a 5% advantage in strength but he found a 50% loss in the claimant’s.

Regarding the right ankle, he found significant deformity consistent with post traumatic arthritic changes. He said “the valgus deformity of the ankle and foot was noted because of malunion of his calcaneal and talus fractures. Some people call that a pronation defect. It’s basically like your arches collapse and you’re standing on the inside of your foot, the medial portion of your foot. There was 1-2/4 swelling in the ankle. There was moderately severe pain found when palpating the medial and lateral compartments as well as the ankle mortise

anteriorly. The Drawer test was negative at the ankle mortise. Tinel sign was negative at the tarsal tunnel. There was no evidence of plantar fasciitis.”

His diagnosis regarding the right shoulder was “internal derangement of the right shoulder, which was a massive rotator cuff tear, impingement, labral tear and biceps tear, status post arthroscopic debridement of the glenohumeral joint, labrum and rotator cuff with biceps tenotomy followed by open repair of a massive rotator cuff tear with acromioplasty and distal clavicle excision. Second was adhesive capsulitis right shoulder.” Regarding claimant’s pre-existing condition he diagnosed “right ankle talus fracture and comminuted displaced calcaneal fracture status post nonoperative treatment, healed with a malunion.” He felt the claimant was at maximum medical improvement but would need additional treatment including medications and physical therapy.

Dr. Volarich assessed permanent partial disability related to the work injury of August 27, 2008, of 75% of the right upper extremity at the shoulder. He testified that the claimant should not use his right arm for anything except activities of daily living, and not use the arm away from his body at all.

With reference to his pre-existing disabilities, he assessed a 75% permanent partial disability of the right lower extremity at the ankle due to the talus and calcaneus fractures that were treated nonsurgically. He testified that due to his right ankle, the claimant should avoid stooping, squatting, crawling, kneeling, pivoting, climbing, and all impact maneuvers as well as be cautious on uneven terrain, including slopes and ladders, especially if he was handling weight. He also thought claimant should limit prolonged weight bearing including standing and walking to 30 minutes or tolerance and to use a pad if he had to be on his knees. He also recommended the use of Glucosamine and that claimant pursue appropriate stretching and exercise.

Dr. Volarich in his report also recommends future medical treatment for claimant's pain to include but not be limited to narcotic and non-narcotic medications such as NSAID's, muscle relaxants, physical therapy as well as possible cortisone shots. He also felt that it was likely that the claimant will require shoulder joint replacement surgery due to the severe damage to his right shoulder joint.

Dr. Volarich determined that the combination of the work injury and his pre-existing injury caused a substantially greater disability than the simple sum and assessed a loading factor and recommended the claimant undergo a vocational evaluation to determine his ability to return to the open labor market. After reviewing Mr. England's evaluation, Dr. Volarich testified that he believed the claimant to be permanently and totally disabled as a result of the combination of his work injury of August 27, 2008, and his pre-existing right foot and ankle injury.

James England, a certified vocational rehabilitation counselor, evaluated the claimant on June 24, 2011, and issued a report on July 6, 2011. Mr. England also testified by deposition. He interviewed the claimant, and reviewed medical records regarding the work injury and his pre-existing condition. He obtained a vocational history of claimant working for the employer and as an ironworker and general construction for other companies.

Mr. England concluded that the claimant did not have any transferable skills from his past work below a medium level of exertion. He thought the welding activity claimant had performed would be the one thing that could potentially be utilized in alternative work settings, but it would still require medium level physical ability. He testified "I think the restrictions that the doctors noted would preclude returning to even that kind of work. So all and all I don't think he's got any useful transferable skills." He noted all the physicians' restrictions and the claimant's history that he could not sleep well, rarely getting more than four hours a night. He testified that regarding his right foot, claimant "told me that he just did the best he could. He

said that his foot would swell so bad that he could barely get through the day. He said as soon as he got home from work he would immediately elevate his foot. He said some days he could barely tolerate the pain. It made it really difficult to get through a regular workday, but he said, you know, he knew that he was making the most money he had ever made in his life. He was going to tough it out as long as he could, but it really did make it difficult for him.”

Mr. England found claimant was employable in the open labor market before his last injury on August 27, 2008. He concluded after his evaluation that the claimant was no longer competitively employable in the open labor market based on the combination of problems that he had. He thought the foot basically limited him more to a sit-down type of activity overall and he was having problems using the right arm, keeping it close to his torso. He said, “Just the overall presentation and the problems he had with both the upper and lower extremity, I didn’t think he would be able to go out and successfully be picked over alternative candidates for entry level kinds of employment, nor did I see him as being able to sustain that work in the long run day in and day out because of the difficulties, again, with both his foot and the problems with his arm and the lack of sleep, all those things combined, I just don’t see him as being able to think clearly enough and stay with it well enough to last in a job site.”

On cross-examination, Mr. England testified that ironworking is classified as a heavy level job. He understood the claimant had worked for a year, 40 hours a week, as an ironworker between the injury to his right foot and ankle and before the last injury to his shoulder. He was also aware of the accommodations that were made by the employer that allowed the claimant to get off his feet as much as he could and to avoid walking out on the purlins.

The following exchange took place in his deposition: “Q: Okay. And Mr. Dalton also told you that his ankle is still in the same condition as it was before August 27, ’08; correct? A: The pain level is still there, correct. Q: Okay. So if his pain level in the ankle is the same as it

was before August 27, '08 when he has told you he was working eight hours a day on his feet most of the time, he should still be able to do that with respect to his feet; is that correct? A: I don't know whether he could or not. I mean, he's indicated to me that he doesn't, you know, he's not on his feet that much now, but whether or not he could or not, I don't know."

Claimant testified that at present he has pain from his right shoulder down his arm to his elbow, sometimes to the fingertips. He also has chest muscle spasms. On an average day his pain is a 5-6/10 and on a bad day it is a 9/10. He has a bad day about twice a month. His arm feels heavy and he has trouble controlling it when he picks things up. He feels a tingling sensation in his arm and it will shake if he strains it. If he attempts to pick up anything heavy it will cramp. He is right hand dominate and cannot write over five minutes and cannot use a keyboard. If he holds his arm up he will get a cramp. It is more comfortable for him to hold his arm on his lap. He can pick up a gallon of milk but he cannot pour it without using his left hand to hold it.

His personal doctor has sent him to the Advanced Pain Management Center on October 20, 2012. Before he went he was taking 20 Ibuprofen a day and kept his shoulder as inactive as possible. Since October 20, 2012, he is taking prescribed medication of Tramadol, Mobic, and a muscle relaxer instead of the Ibuprofen. He sees them for a combination of his shoulder and his foot. The claimant has incurred medical bills as a result of this treatment totaling \$261 from the Advanced Pain Center and \$8.60 in medications. These total \$269.60.

Claimant does not drive and did not prior to this injury. He does not have a drivers' license. He testified that he does not travel well as it is hard for him to sit still because of his the pain in his shoulder and arm. He testified that his shoulder is worse than his ankle because his shoulder hurts all the time and his ankle more when he has been on it. He sleeps a couple of hours at a time because of his shoulder injury. In typical day he gets up around 3-4:00 a.m., makes coffee, watches television, plays cards, does laundry, and will let his dogs out. He feels

his tolerance to standing is now probably less than before he hurt his shoulder because he has become deconditioned since he has not been working.

After carefully considering all of the evidence, I make the following rulings:

1. Whether the employer is obligated to pay past medical expenses.

Claimant has sought treatment on his own to cure and relieve him of the pain and effects of his injury to his right shoulder with the Advanced Pain Management Center. Before he went he was taking 20 Ibuprofen a day and kept his shoulder as inactive as possible. He is now taking prescribed medication of Tramadol, Mobic, and a muscle relaxer instead of the Ibuprofen. He sees them for a combination of his shoulder and his foot. The claimant has incurred medical bills as a result of this treatment totaling \$261 from the Advanced Pain Center and \$8.60 in medications. These total \$269.60.

The claimant incurred these bills on his own after the employer and insurer ended authorized treatment. I find that these were necessary and reasonable and to cure and relieve the effects of the injury. Therefore, the employer and insurer are ordered to pay claimant \$269.60 in past medical bills.

2. Whether the claimant has sustained injuries that will require future medical care in order to cure and relieve the claimant of the effects of the injuries.

Dr. Smith recommended future medical treatment consisting of continued physical therapy and possibly an orthopedic consultation. He deferred to an orthopedic surgeon to determine if the claimant had reached maximum medical improvement. Dr. Hulsey found claimant at maximum medical improvement and felt continued medications and a strengthening program to be continued indefinitely was reasonable. Dr. Hulsey testified that he believed the claimant would most likely "require anti-inflammatories and non-narcotic medications but no other specific treatment." This would also require him to be seen by some type of physician to

prescribe this medication. Dr. Volarich also recommends future medical treatment for claimant's pain to include but not be limited to narcotic and non-narcotic medications such as NSAID's, muscle relaxants, physical therapy as well as possible cortisone shots. He also felt that it was likely that the claimant will require shoulder joint replacement surgery due to the severe damage to his right shoulder joint.

Based on the above medical opinions, I find that the claimant has sustained injuries that will require future medical care in order to cure and relieve the claimant of the effects of the injuries. The employer and insurer are to provide a competent physician or physicians, and all subsequent medical treatment as recommended in the future, in order to cure and relieve the claimant of the effects of his injuries to his right shoulder.

3. The nature and extent of permanent disabilities.

The claimant sustained a severe injury to his right shoulder as a result of the work-related accident of August 27, 2008. The doctors agree generally to the restrictions originally imposed by Dr. Emanuel of no lifting greater than 20 pounds from floor to waist, no lifting greater than 10 pounds from waist to shoulder and nothing greater than 2 pounds above shoulder height. I would not recommend repetitive shoulder reaching or lifting. Most put the claimant in the light or medium work level and agreed that he could not return to work as an ironworker. Dr. Hulsey imposed a rating of 20% of the right shoulder and Dr. Volarich found claimant to have a 75% permanent partial disability of the right shoulder and added an additional recommendation of restricting activity with the shoulder to that necessary for daily living. Based on the limitations and medical opinions of the various physicians, as well as the testimony of the claimant, I find that he has sustained a permanent partial disability of 75% of the right upper extremity at the 232-week level as a result of the injury on August 27, 2008.

4. The liability of the Second Injury Fund for permanent total disability or enhanced permanent partial disability.

Section 287.220.1 RSMo states that when an employee has a preexisting permanent partial disability sufficient to constitute a hindrance or obstacle to employment and subsequently sustains a compensable work injury resulting in additional disability, and these disabilities combine to create an additional permanent disability, the employer, at the time of the last injury, shall be responsible only for the degree or percentage of disability resulting from the last injury. After the disability from the last injury, standing alone, has been determined, the degree of disability attributable to all the injuries sustained is determined. The degree of disability from the last injury is deducted and the Second Injury Fund is liable for the balance. If the last injury, combined with prior injuries or disabilities, results in the claimant being unable to compete in the open labor market, and is thus permanently and totally disabled, the minimum standards for disability do not apply. If the claimant is found to be permanently and totally disabled, the Second Injury Fund is liable for benefits after the completion of payment by the employer for the disability due to the last injury.

I find that prior to August 27, 2008; claimant had a significant injury to his right foot and ankle that constituted a hindrance or an obstacle to employment; namely, a right ankle talus fracture and comminuted displaced calcaneal fracture that was treated nonsurgically and as a result healed with a malunion. As a result of the last injury of August 27, 2008, he sustained an injury to his right upper extremity at the shoulder. I have found the extent of disability of claimant for the last injury of 75% of the right upper extremity at the 232-week level.

Based upon the testimony of Dr. Volarich and Mr. England, I find that the claimant is unable to compete in the open labor market as a result of the combination of the prior injury to his right foot and ankle combined with the injury to his right shoulder that is the subject of this

claim. Therefore, I find that the Second Injury Fund is liable for permanent total disability. I find that the claimant was at maximum medical improvement as of January 26, 2010, as stipulated to by the parties. Accordingly, the Second Injury Fund shall pay a weekly differential of \$349.97 for 174 weeks beginning January 27, 2008, and then \$754.63 weekly for claimant's lifetime.

Attorney for the claimant, Kenneth Seufert, is awarded an attorney fee of 25%, which shall be a lien on the proceeds until paid. Interest shall be paid as provided by law.

Made by: /s/ Margaret Ellis Holden

Margaret Ellis Holden
Administrative Law Judge
Division of Workers' Compensation