

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

Injury No.: 04-145448

Employee: Patsy Ellis

Employer: Brad and Laura Erwin, d/b/a Tri-State Medical Enterprises, Inc.
and/or Erwin Medical Supplies and Uniforms

Insurer: Uninsured

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

Date of Accident: December 10, 2004

Place and County of Accident: Jasper County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 11, 2008. The award and decision of Administrative Law Judge Karen Wells Fisher, issued July 11, 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 10th day of December 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Patsy Ellis

Injury No. 04-145448

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents: N/A

Employer: Brad and Laura Erwin, d/b/a Tri-State Medical
Enterprises, Inc. and/or Erwin Medical Supplies
And Uniforms

Additional Party: Second Injury Fund

Insurer: Uninsured

Hearing Date: February 25, 2008

Checked by:

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: DECEMBER 10, 2004
5. State location where accident occurred or occupational disease was contracted: JASPER 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? UNINSURED
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
INVOLVED IN MOTOR VEHICLE ACCIDENT
12. Did accident or occupational disease cause death? NO
13. Part(s) of body injured by accident or occupational disease: BODY AS A WHOLE

Nature and extent of any permanent disability: 61 PERCENT

15. Compensation paid to-date for temporary disability: NONE
16. Value necessary medical aid paid to date by employer/insurer? NONE
17. Value necessary medical aid not furnished by employer/insurer? 641.40
18. Employee's average weekly wages: \$625.00
19. Weekly compensation rate: \$416.67/\$354.05

- Method wages computation: STIPULATED

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: \$165,459.99

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

244 weeks of permanent partial disability from Employer

-0- weeks of disfigurement from Employer

22. Second Injury Fund liability: YES

Total: \$165,459.99

23. Future requirements awarded: FUTURE MEDICAL

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 PERCENT of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Tom Carlton
MORRISON & WEBSTER

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Patsy Ellis

Injury No. 04-145448

Before the
DIVISION OF WORKERS'
COMPENSATION

Dependents: N/A

Employer: Brad and Laura Erwin, d/b/a Tri-State Medical
Enterprises, Inc. and/or Erwin Medical Supplies
And Uniforms

Additional Party: Second Injury Fund

Insurer: Uninsured

Hearing Date: February 25, 2008

AWARD ON HEARING

A hearing in this matter was held on February 25, 2008, before the undersigned. The employee, Patsy Ellis, appeared personally and through her attorney Tom Carlton. The Second Injury Fund, an additional party to this claim, appeared through its attorney Assistant Attorney General Christina Hammers. The employer, Brad and Laura Erwin d/b/a Tri State Medical Enterprises, Inc. and/or Erwin Medical Supplies and Uniforms (henceforth Employer), did not appear at hearing; however, the records of the Division of Workers' Compensation show notice of the hearing was sent to the employer's last known address.

All parties present stipulated that on or about Dec. 10, 2004, Employer was operating subject to Missouri Workers' Compensation law. The Employer, however, did not carry workers' compensation insurance as required under Chapter 287 RSMo. (SIF Ex. II). On the alleged injury date of Dec. 10, 2004, Patsy Ellis was an employee of Employer and was working subject to Missouri Workers' Compensation law. The parties agreed that on or about Dec. 10, 2004, Ms. Ellis was involved in a motor vehicle crash while working in the course and scope of employment for Employer. The parties agreed that venue in the Joplin Division office, which is situated in Newton County, was appropriate. Ms. Ellis notified Employer of her injuries as required by Section 287.420, and her Claim for Compensation was filed within the time prescribed by Section 287.430. At the time of the claimed accident, Ms. Ellis' average weekly wage was \$625, sufficient to allow for compensation rates for temporary total disability of \$416.67 and for permanent partial disability of \$354.05.

The issues to be resolved at final hearing include:

1. Employer and/or Second Injury Fund's liability for past medical treatment.
2. Employer and/or Second Injury Fund liability for future medical.
3. Employer's liability for 121 weeks of unpaid temporary total disability for the dates of December 10, 2004, to January 3, 2006.
4. Nature and extent of Employee's permanent disability, if any.
5. Liability of the Second Injury Fund.

DISCUSSION

Employee Patsy Evonne Ellis appeared and testified on her behalf. She is 58 years of age, having been born on April 26, 1949, and lives in Neosho, MO. Ms. Ellis completed the 9th grade; she does not have a G.E.D. She has spent most of her adult career employed in outside sales.

Ms. Ellis was hired by Brad and Laura Erwin d/b/a Tri State Medical Enterprises, Inc. and/or Erwin Medical Supplies and Uniforms in October 2002 as Director of Marketing. Every day she worked on the road visiting clients in Missouri, such as hospitals, nursing homes, doctor's offices and nursing schools, selling medical equipment, uniforms and jewelry. She testified that on Dec. 10, 2004, she was one of six employees employed by Employer.

Ms. Ellis testified that on Dec. 10, 2004, she was driving to Cox Monett Hospital, where she was scheduled to host a uniform fair, when she was involved in a motor vehicle crash at the junction of Missouri highways 69 and 400 sometime after 5:20 a.m. near her home. She has no memory of the crash. Police reports indicate Ms. Ellis drove her personal vehicle into a dirt embankment. She was taken by ambulance to Freeman

Medical Center in Joplin, where she underwent CT scans on multiple parts of her body. A CT scan of her abdomen and pelvis revealed transverse process fractures on the right at L4 and L5. A CT scan of her head showed early diffuse cerebral edema associated with a head injury. A CT scan of her right ankle identified a comminuted right ankle fracture/dislocation, including the distal fibula, distal tibia and talus. A CT scan of her left ankle revealed a comminuted calcaneal fracture with lateral displacement of multiple fragments that did extend into the subtalar joint, as well as a distal tibial fracture that included a non-displaced medial malleolar component as well as a posterolateral component. There was evidence of rib fractures and right pneumothorax as well.

Ms. Ellis was treated orthopedically by Drs. Schwab and Smith. Dr. Schwab performed open reduction and internal fixation on both Ms. Ellis' right and left ankles. Dr. Schwab also performed an open reduction and internal fixation for the lateral tibial plateau fracture below her right knee. Dr. Smith performed an open reduction and internal fixation of her calcaneal fracture. During her hospitalization, Ms. Ellis developed hospital-acquired pneumonia associated with her chest trauma. After being released from the hospital, Ms. Ellis received outpatient and in-home care, as well as pain management.

Ms. Ellis testified she is in pain every day, and because of her pain she limits the time she is on her feet and takes pain medication. She is able to ambulate for short periods of time without an assistive device, but she uses a wheelchair if she must walk long distances, such as at the Mall or Wal-Mart. In her kitchen, Ms. Ellis uses a seat with wheels in order to cook because she cannot be on her feet for long periods of time. She has trouble balancing on her feet. She no longer can baby-sit her grandchildren or do outside sales or volunteer work due to her pain and lack of mobility. She, however, currently works as a customer service representative for AT&T.

Ms. Ellis testified that the majority of her medical bills have been paid by her personal insurance. She also testified she believes her insurance falls under ERISA, and she may be required to pay back her insurance under that federal law. Under cross examination, she admitted, however, she has no personal knowledge of whether her insurance was covered by ERISA, and no person or entity has contacted her about any subrogation interest.

The Second Injury Fund presented SIF Ex. I, an itemized bill provided by Ms. Ellis of bills related to her medical treatment and amounts currently owed. According to the itemized list, she is claiming:

<u>Provider</u>	<u>Amount</u>	<u>Paid</u>	
<u>Outstanding</u>			
Dr. Brent Koprivica (IME)	\$1,250.00	\$1,250.00	0
Cherokee County Ambulance	\$803.00	\$803.00 (Farmers Ins.)	0
METS	\$1,079.00	\$100.00 (Farmers) \$784.00 (BC/BS) \$195.00 (Hospital Contract)	0
Dr. Schwab	\$8,226.00	\$3,168.00(Managed Care) \$107.00 (Insurance) \$4,951.00 (Man. Care Adjust.)	0
Ferrell Duncan Clinic	\$12,307.00	\$6,174.10 (BC/BS) \$5,966.00 (BC/BS Adj.)	\$166.90
Mercy Health Systems/ St. Mary's Home Care	\$3,204.50	\$2,102.79 (Health Adv.) \$627.21 (Health Adv. Adj.) \$60.00 (Employee) \$10.00 (Insurance)	\$404.50

Cox South Medical Center/ Cox Walnut Lawn	\$38,237.56	\$25,574.51 (BC/BS) \$12,663.05 (St. Louis Ins.)	0
Freeman Hospital	\$99,246.93	\$17,957.73 (Blue Choice) \$80,610.40 (Blue Choice Adj.) \$6,788.80 (Farmers)	0
Health South Rehab Center	\$1,106.00	\$1,096.00 (Insurance)	\$10.00

Ms. Ellis had total medical bills in the amount of \$165,459.99. Of that total amount, her insurance companies (Blue Cross/Blue Shield, Farmers Insurance, Managed Care, Health Advantage, St. Louis Insurance, and Blue Choice) paid \$77,328.98. She personally paid \$60 in co-pays. There were insurance adjustments with the health care providers in the amount of \$92,349.61. Finally, only \$581.40 remains outstanding of Ms. Ellis' medical bills. (SIF Ex. I).

EXPERT OPINIONS

Ms. Ellis offered into evidence the report of Dr. P. Brent Koprivica dated March 23, 2006. Dr. Koprivica stated Ms. Ellis sustained multiple traumatic injuries as a direct and proximate result of her work-related motor vehicle crash of Dec. 10, 2004. He opined she needs monitoring and ongoing chronic pain management indefinitely. He also opined she may need a total right knee arthroplasty, as well as a total right ankle arthroplasty or arthrodesis and a subtalar arthrodesis on the left. He opined she may need a motorized cart, as opposed to a wheelchair, in the future; and therefore, as a result, may need her home modified to be handicap-accessible in light of her mobility needs. He also recommended she be provided access to a facility where she can participate in water exercise.

Dr. Koprivica issued the following ratings for permanent disability: 0% permanent partial disability to the body as a whole (closed head injury); 5% permanent partial disability to the body as a whole (chest wall injury); 10-15% permanent partial disability to the body as a whole (fractures at L4 and L5); 20% permanent partial disability to the right knee; 50% permanent partial disability to the right ankle (at 155 weeks); and 35% permanent partial disability of the left ankle (at 155 weeks). Dr. Koprivica stated that when looking at these multiple physical impairments in combination, he would assign a global disability of 60% permanent partial disability to the body as a whole. Dr. Koprivica did not identify any Second Injury Fund liability in this workers' compensation claim from a combination greater than the simple sum of those disabilities with any disability that pre-dated her Dec. 10, 2004 motor vehicle crash.

FINDINGS AND CONCLUSIONS

The main issue in this case is the Second Injury Fund's liability for past medical treatment as Ms. Ellis' employer did not carrying workers' compensation insurance as required in Chapter 287, RSMo. The analysis of this issue begins with the duties and liabilities of the Second Injury Fund in cases of uninsured employers as outlined in Section 287.220.5.

If an employer fails to insure or self-insure as required in Section 287.280, funds from the Second Injury Fund may be withdrawn to cover the fair, reasonable and necessary expenses to cure and relieve the effects of the injury or disability of an injured employee in the employ of an uninsured employer, or in the case of death of an employee in the employ of an uninsured employer, funds from the Second Injury Fund may be withdrawn to cover fair, reasonable and necessary expenses in the manner required in sections 287.240 and 287.241. In defense of claims arising under this subsection, the Treasurer of the state of Missouri, as custodian of the Second Injury Fund, shall have the same defenses to such claims as would the uninsured employer.

Ms. Ellis argues she is owed by the Second Injury Fund the full amount of her past medical expenses, or \$165,459.99, without regard to any adjustments by healthcare providers and payments by her personal insurance. The basis for this claim rests in the second sentence of section 287.220.5, which states that the Second Injury Fund is entitled to the defenses of the employer but does not specify these defenses. It

becomes necessary to look beyond this one section of the statute to fully define the rights and obligations of the Second Injury Fund in an uninsured employer case. In particular section 287.270 indicates: Those savings or insurance of the injured employee nor any benefits derived from any other source than the employer or the employer's insurer for liability under this chapter shall be considered in determining the compensation due hereunder.

It is the employee's contention that this provision applies to the Second Injury Fund as a defense allowed the uninsured employer. Therefore, the employee argues that under the holding of *Farmer-Cummings v. Personnel Pool of Platte County*, S.W.3d 818 (MO SC 2003), the adjustments made by the medical provider and the payments made by her personal health insurance shall not be considered as credits to employer in determining the compensation due since these adjustments and payments were provided by employee's own health insurance carrier and not by the employer directly or by the employer's workers' compensation insurance.

Farmer-Cummings v. Personnel Pool of Platte County, 110 S.W.3d 818 (MO SC 2003), en banc was decided on July 29, 2003. In *Farmer-Cummings*, the employee developed a severe asthmatic condition related to her employment at the Future Foam plant. *Id.* at 819. She filed a claim for compensation under the workers' compensation law seeking, among other things, compensation for past medical expenses. *Id.* at 820. Her employer had made no payments toward her medical treatment, and some of her healthcare providers had written off her charges as "bad debt." or made fee adjustments from the original bills, *Id.* The Supreme Court identified the main issue as whether the original medical bills remain "fees and charges" collectable from the employee if they are subsequently reduced or written-off by the provider in the collection process. *Id.* at 821.

In *Farmer-Cummings*, the employee relied on section 287.270. The employee alleged that write-offs and fee adjustments by healthcare providers are neither "savings of the injured employee nor benefits derived from any other source than the employer or the employer's insurer for liability under this chapter" and, therefore, should not be considered in determining the employer's liability for past medical expenses owed to the employee. *Id.* at 822. The Supreme Court held:

If Ms. Farmer-Cummings remains personally liable for any of the reductions, she is entitled to recover them as fees and charges pursuant to section 287.140. If any of the reductions resulted from collateral sources independent of the employer, they are not to be considered pursuant to section 287.270, and Ms. Farmer-Cummings shall recover those amounts. However, if Personnel Pool establishes by a preponderance of the evidence that the healthcare providers allowed write-offs and reductions for their own purposes and Ms. Farmer-Cummings is not legally subject to further liability, she is not entitled to any windfall recovery.

Id. at 823.

There are three aspects of this holding that need to be examined in the case at hand.

1. The court must determine whether the reductions resulted from a collateral source independent of the employer. If those reductions were from a payment made directly by employer or by employer's workers' compensation, then the employee will not receive compensation for that. If the reduction is a result of a payment by the employee herself, a benefit paid by a health insurance policy or a reduction of the original billed amount from any other collateral source, then she may recover those amounts.

2. The court must then consider whether or not the employer has established by a preponderance of the evidence that the health care providers allowed write-offs and reductions for their own purposes and that the employee will not be legally subject to further liability. In other words, it is the employer's burden of proof to show that even if these reductions of the original billed amount were paid by a collateral source, and that the employee's obligation to reimburse those amounts has been extinguished. If the employer has established this by a preponderance of the evidence, then the employee will not be entitled to a windfall recovery by receiving payment for those amounts.

3. While not a part of the *Farmer-Cummings* analysis, this court must consider whether or not section 287.270 applies to the Second Injury Fund.

The *Farmer-Cummings* case addresses the first two questions only. Its holding defines how the

employer defense set out in section 287.270 will be applied. This court will first address whether the reductions in this case resulted from a collateral source independent of employer. Ms. Ellis testified that she did not have an employer provided health insurance policy, but that the health insurance policies which have paid the medical expenses to date in this case were from health insurance policies that she provided for herself. There was no evidence to dispute this. Therefore, I find that the payments on the original bills were from a collateral source.

Now we turn to the second question. The *Farmer-Cummings* case states, "It is a defense of Personnel Pool as employer to establish that Ms. Farmer-Cummings was not required to pay the billed amounts, that her liability for the disputed amounts was extinguished and that the reason that her liability was extinguished does not otherwise fall within the provisions of section 287.270.

In the current case Ms. Ellis did not testify as to a specific knowledge of a continuing liability for the adjusted charges or for the amounts actually paid by her personal insurance. She did testify that she believed that some of the health insurance policies do fall under ERISA requirements, but she was not certain as to which of the policies these were, if any.

The *Farmer-Cummings* court stated that, "After a thorough review of Ms. Farmer-Cummings medical bills this court cannot determine with certainty whether Ms. Farmer-Cummings remains liable for either the write-offs or adjusted fees. Ms. Farmer-Cummings did not testify as to her continuing liability for these adjusted charges." The court in the *Farmer-Cummings* case remanded the file for further evidence on this issue. The court in the current case allowed the record to remain open for a period of 30 days for the submission of this very evidence. Having received no additional evidence during that 30-day period, the record was closed. Therefore, it is my finding that the Second Injury Fund failed to meet its burden of proof by a preponderance of the evidence that employee's obligation on these reductions had been extinguished.

This finding does take into account the argument of actual liability made by the Second Injury Fund in that if they had offered evidence that the adjustments actually extinguished the liability of the employee, then those amounts would not be awarded. As it stands Ms. Ellis may yet be actually liable for the amounts of adjustments made by providers or liens by her health insurance for benefits paid.

As to the third question the court must consider, the Second Injury Fund argues that *Farmer-Cummings* can be distinguished from the present case as it does not pertain to the Second Injury Fund or the Fund's liability under section 287.220.5. The Supreme Court, in reaching its decision that absent evidence that an employee was not liable for fees written off as bad debt, employee's recovery would not be reduced by write-offs and fee adjustments, relied on sections 287.270 and 287.140; both of which apply to an employer's liability to an injured employee. The Southern District Court of Appeals treated the Second Injury Fund as an employer in *Wilmeth v. TMI, Inc.*, 26 S.W.3d 476 (Mo.App. SD 2000). The *Wilmeth* case dealt with the Second Injury Fund's obligations when an employer is uninsured for purposes of Workers Compensation. The Southern District in *Wilmeth* did specifically look and mention 287.220.05 and still treated the Second Injury Fund as an employer who is uninsured for purposes of workers compensation. In the *Wilmeth* case the Claimant's medical bills had already been paid by the Employers liability policy which was not a workers compensation insurance policy. The Court cited 287.270 and stated that the Employer should not receive a credit nor should the Second Injury Fund. (Id. At 482-483).

The Fund's liability in uninsured employer cases has also been addressed in a number of cases including *Mann v. Varney Construction*, 23 S.W.3d 231 (Mo.App. ED 2000) (June 20, 2000); *Phillips v. Par Electrical Contractors*, 92 S.W.3d 278 (Mo.App. WD 2002) transfer denied Jan. 28, 2003; and *Leach v. Board of Police Commissioners of Kansas City*, 118 S.W.3d 646 (Mo.App. WD 2003) (Nov. 4, 2003)

In *Mann v. Varney Construction*, 23 S.W.3d 231 (Mo.App. ED 2000), the Eastern District Appeals Court held an employee whose employer was uninsured for workers' compensation was entitled to Fund reimbursement for only that portion of his medical expenses that his health care providers accepted from Medicaid as a full-settlement payment of the amount submitted, and not the total of his medical expenses. *Id.* at 234. Employee was injured when he fell from a roof while working for Varney Construction, who did not carry workers' compensation insurance. *Id.* at 232. Employee's total medical costs were \$130,085.13, of which \$98,543.32 was submitted to Medicaid for payment. *Id.* Medicaid paid \$19,547.50 to the health care providers as a full-settlement payment of the amount submitted to Medicaid. *Id.* Employee argued he should

be reimbursed for the total of his medical costs instead of only the portion he would be liable for under Medicaid. *Id.* at 233. The *Mann* Court looked to section 287.220.5, stating the clear language of section 287.220.5 expresses the legislature's intent to limit the liability of the Fund for employees who are not covered by insurance as required by law to cover the fair, reasonable and necessary expenses to cure and relieve the effects of the injury. *Id.*; see also section 287.220.5. "Section 287.220.5 does not provide for any benefit payments to employees of uninsured employers. The statute provides only an employee's actual expenses be paid by the SIF." *Id.* The employee argued that section 287.270 mandates the payment of the full amount of medical bills by the employer regardless of a payment by a collateral source not funded exclusively by the employer even where this results in a windfall to the employee. *Id.* The *Mann* Court disagreed, stating that section 287.220 makes no cross-reference to section 287.270 concerning Fund liability in uninsured cases. *Id.*

The scope of SIF liability in cases where the employer is uninsured is defined in section 287.220.5 and is not expanded by section 287.270. We further find that it would be against public policy to allow claimants to recover a windfall from the SIF when their employers had not made insurance contributions required by law.

Id. The Court awarded employee not the full cost of his medical expenses, but only the amount Medicaid paid for employee's medical expenses. *Id.* at 234.

A similar reasoning was applied in *Phillips v. Par Electrical Contractors*, 92 S.W.3d 278 (Mo.App. WD 2002), transfer denied Jan. 28, 2003, the Western District Appeals Court held the injured employee was not entitled to a monetary award from the Second Injury Fund. *Id.* at 289. The injured employee Kevin Phillips was employed to drive commercial vehicles by Hallier Services and was contracted to drive a truck owned by Par Electrical from North Kansas City to Denver, CO, during which time he was injured in a motor vehicle crash. *Id.* at 281. The Court first held that employer was an employer under the Act, and then turned to review whether the Second Injury Fund was liable to the employee for medical expenses that had already been paid for by an automobile liability insurance policy held by the employer. *Id.* at 285.

The Labor and Industrial Relations Commission in *Phillips* relied on *Wilmeth* and section 287.270, stating that benefits paid as a result of private insurance were not entitled to consideration in determining compensation due under the workers' compensation law. *Phillips* at 285. The Appeals Court, however, stated that because this issue involves the Second Injury Fund, it must first look to section 287.220.5, which deals specifically with the Fund's liability in cases where the employer does not carry workers' compensation insurance. *Id.* at 285 and 288. The Court departed from the analysis in *Wilmeth*, because in determining whether the Fund was liable for past medical expenses, the *Wilmeth* Court treated the Fund just like an employer under the statute by applying section 287.270 instead of section 287.220.5. *Id.* at 288. "We are convinced that the legislature wrote section 287.220.5 for a purpose-specifically, as it says in the statute, to insure that SIF's funds are used only when needed to 'cure and relieve the effects of the [worker's] injury'." *Id.* The Court continued by stating:

SIF should not have to bear the cost of reimbursing an employee for claims or debts that have already been discharged by an employer's insurance policy. It was the Commission's reasoning in this case that the 'company could pursue claimant for reimbursement' from the employee, and that, therefore, any such windfall would be short-lived. But no such reimbursement to SIF is guaranteed. For example, what about the claimant who is badly in need of cash, spends the funds, and then shortly thereafter flees the State? Moreover, there is simply no reason for SIF's limited funds to be spent on further burdensome litigation in recovering these funds from those who have no need for them. In actuality, this brings to light the true purpose that legislature had when setting up this fund: to act as a secondary source of payment to employees who need workers compensation benefits.

Id.; see also section 287.220.5 and *Mann*, 23 S.W. 3d at 233. Thus, the Court held that "because employee's debts stemming from his work-related injury have already been discharged, it would not be 'fair, reasonable and necessary' to pay these funds from the Fund to employee because they would not be used 'to cure and relieve the effects of [his] injury'." *Id.* at 289; see also section 287.220.5. The employee appealed this decision to the Supreme Court; however, transfer was denied on Jan. 28, 2003.

In *Leach v. Board of Police Commissioners of Kansas City*, 118 S.W.3d 646 (Mo.App. WD 2003), dependents of a police officer killed while working as a security guard sought benefits from the private security company, which was not insured against workers' compensation claims. *Id.* at 648. Leach's dependents settled a negligence suit against the private security company for \$25,000, and received Leach's pension and funeral benefit from Kansas City's police retirement system. *Id.* Leach's dependents then filed a claim for compensation to recover death benefits. *Id.* The Western District Court of Appeals held Leach was jointly serving the private security company and the Kansas City Police at the time of his death. *Id.* at 651. Next, the Court found Leach's dependents may, under Section 287.130, elect to recover from any or all of an injured worker's employers. *Id.* at 655. Finally, the Court held that if the employer from whom recovery is sought is not insured, the Second Injury Fund is liable for compensation under Section 287.220.5. *Id.*

In reaching this final holding, however, the Court distinguished this case from *Phillips v. Par Electrical Contractors*, 92, S.W.3d 278 (Mo.App. 2002) and *Mann v. Varney Construction*, 23 S.W.3d 231 (Mo.App. 2000). *Leach* at 653. In both of these cases, injured employees attempted to collect from the Second Injury Fund after they were injured while performing employment duties for uninsured employers. *Id.* The Court pointed out that Leach, unlike the employees in *Phillips* and *Mann*, lost his life; therefore, under section 287.220.5, the Fund was liable for payments as required by sections 287.240 and 287.241, which are not applicable in cases where employees merely suffer work-related injuries. *Id.*

The Court continued by noting that section 287.270 states, "No savings or insurance of the injured employee, nor any benefits derived from any other source than the employer or the employer's insurer for liability under this chapter, shall be considered in determining the compensation due hereunder." *Id.* at 654; see also section 287.270. In *Phillips*, the employee's medical expenses were paid for by the employer's automobile liability insurance, while in *Mann*, Medicaid paid the employee's medical expenses. *Id.* at 653. In both cases, the injured employees sought to collect for their full medical expenses again from the Fund. *Id.* The Court noted these courts did not permit either employee to recover the amount sought from the Fund based on section 287.220.5. *Id.*

The General Assembly has required the Fund to compensate a claimant for his actual expenses. Although section 287.270 provides that an employee's compensation from another source is not to be considered in determining the compensation due under the workers' compensation law, both courts concluded that this provision did not expand the Fund's liability beyond that specified in section 287.220.5."

Id. The Court in *Leach* agreed that section 287.270 does not expand the Fund's liability under section 287.220.5. *Id.* at 654.

The Second Injury Fund argues that as indicated in the cases of *Mann*, *Phillips*, and *Leach* only section 287.220.5 is controlling in claims against the Second Injury Fund where an employer has failed to carry workers' compensation insurance as required under chapter 287. They further argue that since *Farmer-Cummings* only discusses the employer's liability under section 287.270, and not Second Injury Fund liability, that case does not establish precedent. However, it is the opinion of this court that while the *Farmer-Cummings* case discusses the applications of the defense set out in section 287.270 on an employer, the strict construction of section 287.220.5 requires acknowledging the second sentence which specifically indicates that the Second Injury Fund would have the same defense as the uninsured employer and would thus be treated as an employer under section 287.270. This sentence does not indicate that the court may pick and choose which employer defenses the Second Injury Fund will share when defending a case in which the employer is uninsured. It states they shall have the "same" defenses as the uninsured employer. There is no question that the uninsured employer would be entitled to the defense set out in section 287.270 and as defined by the *Farmer-Cummings* case. It is this court's belief that to ignore specific provisions of chapter 287 when determining the obligations of the employer or the Second Injury Fund would be to not strictly construe the statute.

The Labor and Industrial Relations Commission came to a similar conclusion in *Tina Williams v. William Peck & Donna Peck, d/b/a Discovery Sales*, uninsured employer, October 16, 2003. The Commission noted that there was a conflict between the Districts of the Missouri Court of Appeals on the issue of whether section 287.220.5 and 287.270 are to be read in conjunction in determining Second Injury Fund liability as the

statutory guarantor of medical expenses. The Commission noted that there were two reported decisions considering Second Injury Fund liability under Section 287.220.5 where Employee's had received payment on account of their injuries from collateral sources. The Commission went on to discuss *Wilmeth v. TMI* and *Phillips v. Par Electrical Contractors* as well as the *Mann* case. The Commission notes "notably absent from the analysis in either *Mann* or *Phillips* is a discussion of the second sentence of section 287.220.5 that states that the Second Injury Fund has the defenses that would be available to the uninsured employer when defending claims brought under section 287.220.5". (*Mann*, Commission page 6 & 7). The Commission indicated that:

We recognize that *Phillips* was decided after *Wilmeth*, however, we are unable to reconcile *Phillips* with the plain language of the statutes and the decision in *Farmer-Cummings*. For that reason we must follow the reasoning of *Wilmeth*. We conclude that section 287.270 as the statutory authority for the employer defense of entitlement to a credit must be considered in determining Second Injury Fund liability under section 287.220.5. It is only through this conclusion that we can require adherence to the Supreme Court standard for defending against medical expense claims as set forth in *Farmer-Cummings*. Having determined that Section 287.270 must be considered in the determination of this matter, we conclude that the Second Injury Fund is not entitled to a credit against its medical expense liability in this case. Claimant in this case paid the premiums for the health insurance policy that ultimately paid the medical bills on this case. As such the express language of Section 287.270 prohibits us from considering the health insurer payment. This section clearly was intended to allow the employee to benefit from any collateral source the employee might have available to him or her, independent of the employer, whether purchased or not. If the employer has not provided such a source the employer has no right under the statute to claim benefit from it. Second Injury Fund defenses derive only from those available to the uninsured employer. The uninsured employer would have no right under section 287.270 to claim a benefit from Claimant's collateral source health insurance payment. Therefore, the Second Injury Fund has no right". (*Mann*, Commission Page 8 & 9).

As stated by the Commission in the *Williams* case, the Second Injury Fund defenses derive only from those available to the uninsured employer. The uninsured employer would have no right under section 287.270 to claim a benefit from claimant's collateral source health insurance payments, therefore, the Second Injury Fund has no right.

The Commission in the *Williams* case goes further to indicate that the claimant in these circumstances will not receive a windfall. They define windfall by referring to Webster's Third New International Dictionary, 2619 (3rd Edition 1971) as an unexpected or sudden gain or advantage. The Commission noted, "In the instant case claimant entered into a contractual arrangement with her health insurer that claimant would pay premiums to the health insurer and the health insurer would pay medical bills submitted by claimant's health care providers. As a bargained for benefit the health insurer's payment of the medical bills cannot be considered unexpected. In addition, Second Injury Fund payment of claimant's medical expenses cannot be considered unexpected or sudden because the obligation is statutory." They conclude the claimant would receive no windfall by virtue of the payment of the full amount of her fair, reasonable, and necessary medical expenses.

I find that the Second Injury Fund is to be given the same defenses as employer as plainly stated in section 287.220.5 and is therefore subject to the defense set out in section 287.270 and defined by *Farmer-Cummings*. In this case the Second Injury Fund has failed to meet its burden of proof to show that the employee's obligation was extinguished as to the adjustments and payments for medical.

After considering all the evidence in this claim, I find the Second Injury Fund liable for the full amount of claimant's medical expenses which total \$165,459.99 and order the Second Injury Fund to pay this amount to the claimant. I further award Ms. Ellis future medical treatment to cure and relieve her from the symptoms of the injuries she sustained in this accident and order it to be provided and controlled by the Second Injury Fund.

I find in accordance with Dr. Koprivica's opinion, which I find to be credible, that claimant was temporarily and totally disabled from December 10, 2004, through January 3, 2006. I find claimant entitled to 121 weeks of benefits at a rate of \$416.67 per week for a total of \$50,417.07.

I find claimant suffered permanent partial disability of 61 percent of the body as a whole which more accurately reflects the sum of Dr. Koprivica's ratings, which I find to be credible after consideration of the evidence. This would entitle claimant to 244 weeks of compensation at \$354.05 per week or \$86,388.20.

I order attorney fees on behalf of Attorney Tom Carlton in an amount of 25 percent of all benefits awarded herein.

Date: _____ July 11, 2008 _____

Made by: _____/s/ Karen Wells Fisher _____

Karen Wells Fisher
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

_____/s/ Jeffrey W. Buker _____

Jeffrey W. Buker

Director

Division of Workers' Compensation