

**FINAL AWARD ALLOWING COMPENSATION**

Injury No.: 01-145244

Employee: Melvin Gillham  
Employer: Melvin Gillham  
Insurer: Clarendon National Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

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

**Discussion**

Medical causation

The parties dispute what injuries employee sustained in the August 2001 accident. Employee argues he not only suffered the physical injuries to his right knee when he slipped and fell on that date, but also suffered psychiatric injuries of depression and anxiety. The administrative law judge found, without analysis or explanation, that employee sustained a 50% permanent partial disability of his right knee as a result of the primary injury, and no psychiatric injury. We agree with this result, but wish to provide supplemental analysis, findings, and conclusions on the issue of medical causation in order to provide the parties with our reasoning for denying compensation for employee's depression and anxiety. The version of § 287.020.2 RSMo applicable at the time of the August 2001 accident sets forth the standard for medical causation, and states, as follows:

An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor.

Employee argues that the August 2001 accident caused him to suffer depression and anxiety because he never suffered from these conditions before. He also points to mental health treatment notes from Muskogee Regional Medical Center and Dr. Charles Lester. Those notes record employee telling treating practitioners that his feelings of hopelessness, worthlessness, and anxiousness started after the August 2001 accident and stem from not being able to work and not knowing what he will do for the rest of his life. Employee argues that the administrative law judge erred in finding that his depression and anxiety resulted from family deaths, family illnesses, divorce, bankruptcy, and weight. Employee asks for his past medical expenses and an award of future medical treatment from employer in connection with the claimed depression and anxiety injuries.

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Employer, on the other hand, argues that employee failed to meet his burden of proof on the issue because no medical expert identified the August 2001 accident as a substantial factor causing any of employee's psychiatric problems. Employer also points out that the treatment notes record a prior history of depression related to divorce and child custody issues.

After careful consideration, we agree with employer on this issue. Especially given the evidence that employee's psychiatric concerns may stem from a number of sources unrelated to the August 2001 accident, and because we believe the cause of this employee's psychiatric concerns does not reasonably come within the realm of lay understanding, we consider the absence of any medical expert opinion supporting employee's lay testimony on the issue to be determinative. We find that employee failed to meet his burden of proof on the issue of medical causation of his depression and anxiety conditions.

We conclude that employee's depression and anxiety are not clearly work related and that work is not a substantial factor in causing employee to sustain the medical conditions of depression and anxiety, or any disability associated therewith. Accordingly, employee's claim for past and future medical expenses related to depression and anxiety are denied, because he failed to prove that these conditions amount to compensable injuries stemming from the August 2001 accident.

We note employer's argument that most of employee's right knee disability should be considered the result of a preexisting right knee injury and degenerative condition, per the testimony of Dr. Farley. We agree that employee suffered some preexisting permanent partial disability of the right knee that should be apportioned as between the work injury and the preexisting condition. *Goleman v. MCI Transporters*, 844 S.W.2d 463, 466 (Mo. App. 1992). However, we disagree with Dr. Farley's ratings, as they do not fairly reflect the degree of pain and limitation employee now suffers as a result of the work injury.

Accordingly, we find that employee suffered a 5% preexisting permanent partial disability of the right knee, and we affirm the administrative law judge's finding that the work injury resulted in an additional 50% permanent partial disability of the right knee.

#### Permanent total disability

The administrative law judge determined, without analysis or explanation, that employee is permanently and totally disabled as a result of the effects of the primary injury of August 5, 2001, in combination with subsequent obesity and psychiatric issues. We disagree with the administrative law judge's determination on the issue of permanent total disability, as it finds no support in the expert medical or vocational testimony on record.

Dr. Musich and Gary Weimholt believe employee is permanently and totally disabled as a result of the last injury considered alone, while Dr. Farley and James England believe employee is permanently and totally disabled as a result of the effects of the primary injury in combination with employee's preexisting conditions of ill. After careful consideration, we find the testimony of Mr. England most credible on this issue. Mr. England explained that employee's overall health situation, not just the knee problem in isolation, contributes to render him unemployable on the open labor market. Mr. England identified employee's

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preexisting morbid obesity as a serious concern harming his ability to compete for work, noting that the condition affected everything from employee's presentation to potential employers to a doctor's willingness to provide certain treatments for a work injury. Mr. England opined most employers, whether justly or not, would be "leery" of hiring and providing insurance for an individual who most likely would be assumed to suffer from the many health problems that go along with obesity. We are convinced employee's preexisting obesity constitutes a preexisting permanent partial disability, and based on the testimony of Mr. England, we believe that employee's preexisting obesity, along with the preexisting right knee disability, combines with the primary right knee injury to render employee unemployable on the open labor market.

Accordingly, we modify the award of the administrative law judge on the issue of permanent total disability. We find employee is permanently and totally disabled owing to a combination of the effects of the primary injury and his preexisting disabling conditions of ill.

#### Second Injury Fund liability

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

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

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

We note Mr. England's testimony that employee did not identify any specific past difficulty that made obesity a "hindrance or obstacle" to him prior to August 5, 2001. *Transcript*, page 478. But as the Missouri courts have made clear, past difficulties are not determinative. *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. 1995). Rather, we must apply a "potential to combine" analysis. See *Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 637 (Mo. App. 2007); *Concepcion v. Lear Corp.*, 173 S.W.3d 368, 371 (Mo. App. 2005); *E.W. v. Kan. City Sch. Dist.*, 89 S.W.3d 527, 538 (Mo. App. 2002); and *Carlson v. Plant Farm*, 952 S.W.2d 369, 373 (Mo. App. 1997). When we apply the appropriate standard, as identified in *Wuebbeling* and consistently reaffirmed by the courts, we conclude that employee's preexisting obesity amounted to a hindrance or obstacle to employment at the time he sustained the primary injury. This is because we are convinced a cautious employer could reasonably perceive employee's obesity as having the potential to combine with a work related injury so as

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to produce a greater degree of disability than would occur in the absence of such condition. Accordingly, we conclude employee's obesity was serious enough to constitute a hindrance or obstacle to employment for purposes of § 287.220.1.

Similarly, we conclude employee's preexisting right knee injury was serious enough to constitute a hindrance or obstacle to employment. The very facts of this case demonstrate that this condition not only had the potential to combine with a subsequent injury to result in increased disability, but that it actually did so when employee suffered the August 2001 primary injury.

The only remaining question is whether employee satisfied the statutory requirements for proving that the Second Injury Fund is liable for permanent total disability benefits. To establish Fund liability for permanent total disability benefits, employee must prove that: (1) he suffered a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with the prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007). Section 287.220.1 requires us to first determine the compensation liability of the employer for the last injury, considered alone. If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, not the Second Injury Fund, is responsible for the entire amount of compensation. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003).

We have adopted the administrative law judge's finding that, as a result of the last injury, employee sustained a 50% permanent partial disability of the right knee. We have credited Mr. England and found that the primary injury, considered in isolation, did not render employee permanently and totally disabled, but that employee is permanently and totally disabled due to his preexisting disability as it existed on August 5, 2001, in combination with the disability stemming from employee's injuries sustained on that date.

In light of the foregoing findings and conclusions, we modify the award of the administrative law judge with respect to the issue of Second Injury Fund liability. We conclude employee met his burden of establishing Second Injury Fund liability for permanent total disability benefits under § 287.220.1.

### **Award**

We supplement and modify the award of the administrative law judge.

Employee is not entitled to compensation for his depression and anxiety, because he failed to prove that work was a substantial factor causing these medical conditions or any related disability.

Employee is entitled to permanent total disability benefits from the Second Injury Fund to commence on July 26, 2005, at the stipulated rate of \$309.41.

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

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

The award and decision of Administrative Law Judge Cornelius T. Lane, issued February 3, 2012, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

Given at Jefferson City, State of Missouri, this 3<sup>rd</sup> day of July 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

# AWARD

Employee: Melvin Gillham

Injury No.: 01-145244

Dependents: N/A

Before the  
**Division of Workers'  
Compensation**

Employer: Melvin Gillham

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

Additional Party: Second Injury Fund

Insurer: Clarendon National Insurance Company

Hearing Date: November 16, 2011

Checked by: CTL

## 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: August 5, 2001
5. State location where accident occurred or occupational disease was contracted: Jamestown, New Mexico
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
Claimant injured his right knee when he slipped and fell while in the course and scope of his employment.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Right knee
14. Nature and extent of any permanent disability: 50% right knee
15. Compensation paid to-date for temporary disability: \$32,216.95
16. Value necessary medical aid paid to date by employer/insurer? \$49,097.70

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- 17. Value necessary medical aid not furnished by employer/insurer? \$19,821.56
- 18. Employee's average weekly wages: Unknown
- 19. Weekly compensation rate: \$309.41/\$309.41
- 20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

80 weeks of permanent partial disability from Employer	\$24,752.80
unpaid TTD	\$ 5,190.64
unpaid medical expenses	\$19,821.56

22. Second Injury Fund liability: NONE

TOTAL: \$49,765.00

23. Future requirements awarded: See award

Said payments to begin 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 permanent disability payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Scott Holwitt

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Melvin Gillham	Injury No.: 01-145244
Dependents: N/A	Before the <b>Division of Workers'</b>
Employer: Melvin Gillham	<b>Compensation</b>
Additional Party: Second Injury Fund	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Insurer: Clarendon National Insurance Company	Checked by: CTL

### **PREFACE**

A hearing was held in the above-mentioned matter on November 16, 2011. The Claimant, Melvin Gillham, was represented by Attorney Scott Holwitt. The Employer/Insurer was represented by Attorney Jason Caudill. The Second Injury Fund was represented by Assistant Attorney General Da-Niel Cunningham.

### **STIPULATIONS**

1. Claimant was an employee of the Employer pursuant to Chapter 287 RSMo.
2. Claimant suffered an accident arising out of and in the course of his employment.
3. Employer received proper notice.
4. Jurisdiction and venue is proper in St. Louis, Missouri.
5. Rate of compensation is \$309.41 for TTD and \$309.41 for PPD.
6. Employer/Insurer has paid \$32,216.95 in TTD. Employer/Insurer acknowledges that it still owes and will pay \$5,190.64 in TTD.

### **ISSUES**

1. Medical causation.
2. Nature and extent of permanent disability against Employer.
3. Nature and extent of permanent disability against the Second Injury Fund.
4. Employer's liability for past medical bills.
5. Employer's liability for future medical treatment.

**EXHIBITS**Claimant's Exhibits:

- A. Records of Dr. Gill
- B. Records of Dr. McClain
- C. Records of MRI of Springfield
- D. Records of Central States Orthopedic Specialists
- E. Evaluation of March 5, 2003 – Orthopedic Hospital of Oklahoma
- F. Records of Dr. Olshen
- G. Records of Muskogee Regional Medical Center
- H. Records of Dr. Lester
- I. CMS payment summary of unpaid medical aid
- J. Eufaula Pharmacy billing detail of unpaid medical aid
- K. Deposition of Dr. Musich of May 26, 2011
- L. Deposition of Mr. Weimholt of March 8, 2011

Employer's/Insurer's Exhibits:

1. Deposition of Dr. Farley of November 8, 2011
2. Deposition of Mr. England of September 27, 2011
3. Records of Dr. Wood

The Second Injury Fund offered no exhibits.

All of the above exhibits were accepted into evidence.

**FINDINGS OF FACT**

1. The Claimant at the time of the hearing was 49 years of age. He was born April 15, 1962. Claimant testified that he had a commercial driver's license at the time of the primary injury in 2001. Claimant worked as an over-the-road truck driver for the Employer. As a truck driver his duties were essentially to deliver freight to and from destinations within the United States. Claimant testified that as a truck driver he would do lifting and handling of different materials and did bending, stooping, crouching and twisting, etc.
2. On August 5, 2001, while driving his truck, Claimant stopped to fuel his truck and slipped and fell on some fuel oil and injured his right knee. Claimant said he hurt his right knee but did not seek medical treatment because he did not think it was that serious at that time. The knee became worse and he reported the injury to his Employer and requested medical treatment.
3. The Employer sent Claimant to see Dr. Gill, who examined the Claimant and referred him to Dr. Thomas McClain, an orthopedic surgeon in Springfield, Missouri. The doctor ordered an MRI and after the MRI Dr. McClain recommended arthroscopy of the right knee. Dr. McClain also told Claimant to remain off work until after he had his surgery.
4. Claimant went to Central States Orthopedic Specialists in Tulsa, Oklahoma in February 2002 with regard to his right knee problem. At such medical institution, the Claimant

came under the care of Drs. Tanner, Hawkins and Robertson who felt that Claimant should have an arthroscopic repair of the medial meniscus and an open upper tibial osteotomy to repair a fracture of the medial tibial plateau.

5. In October of 2002, Claimant underwent a medial meniscectomy and high upper tibial osteotomy by Dr. Tanner. After the surgery, Claimant according to the medical records developed a non union from the tibial osteotomy and required a repeat surgical procedure in July 2003. The doctors that operated on the Claimant opined that the surgery on the Claimant's right knee is the result of his work injury of August 5, 2001.
6. Dr. Tanner on January 13, 2004, released the Claimant at MMI with certain restrictions about lifting no more than 40 pounds, no standing or walking for long periods of time, no kneeling or climbing and doing a sitting job only. Dr. Tanner also gave the Claimant a rate of 29% permanent partial disability of the body as a whole referable to his knee injury of August 5, 2001. Claimant has not been able to return to work and has not worked after being released by Dr. Tanner.
7. Claimant in May of 2005 on his own went to see a pain management and rehabilitation physician, Dr. Olshen. Claimant's complaints were to his right knee as well as some problems in his low back, right hip and left knee which the Claimant felt were as a result of the August 5, 2001 injury to his right knee. Claimant's treatment was medication and patches to control pain and he also had physical therapy.
8. Claimant as a result of his treatment by Dr. Olshen has incurred charges of \$1,907 for his office visits and \$11,674.32 for prescription drugs.
9. Claimant because of ongoing depression and anxiety went to seek mental health treatment at Muskogee Regional Medical Center. He attended regular talk therapy sessions from 2004 to 2009. At the Muskogee Regional Medical Center, Claimant came under the care of Dr. Lester who he is still seeing at the time of the hearing for depression and anxiety. According to the evidence Claimant's depression and anxiety resulted from family deaths, family illnesses, divorce, bankruptcy, weight and his inability to return to work.
10. Claimant testified that he never had any depression or anxiety prior to the primary injury of August 5, 2001.
11. Claimant as a result of his treatment at Muskogee Regional Medical Center incurred a bill of \$5,581.61 and \$1,900.03 for office visits to Dr. Lester and \$26,245.42 for prescription drugs.
12. Prior to Claimant's primary injury of August 5, 2001, he had a prior right knee injury while doing martial arts and the injury resulted in a meniscal tear which did require surgery. Claimant testified he did not have any problems with the right knee as a result of that incident.
13. Claimant in the early 1990s while at work for a company, Kaywood Industries, suffered a right knee injury which resulted in a tear and rupture in the ACL which did require

surgery but Claimant returned to full duty and never had any problems with the knee after surgery.

14. Claimant at the time of the hearing testified that he has pain and discomfort in his right lower extremity and can no longer walk for any distance and must use a scooter/wheelchair in order to move around. Claimant testified that as a result of the scooter/wheelchair, which he has been in and using since mid 2005, he has incurred charges of \$7,050.24 from The Scooter Store.
15. Claimant said that since the time of his primary injury he has depression and anxiety.
16. Claimant testified that because of his right knee injury, the pain in the right knee is really bad and most things he does during the day will be done from a seated position.
17. Dr. Musich testified by deposition on behalf of the Claimant. After Dr. Musich saw the Claimant and reviewed medical records, he agrees the Claimant's complaints of daily right knee pain are very serious. It was further Dr. Musich's opinion that Claimant was permanently and totally disabled as a direct result of the knee injury of August 5, 2001.
18. Gary Weimholt, a vocational rehabilitation specialist, testified by deposition on behalf of the Claimant and after his review of the history of the Claimant's fall of August 5, 2001, as well as the medical treatment he received and as well as regarding Claimant's educational background and work history concluded that the Claimant has a total loss of access to the open competitive labor market and there is no reasonable expectation that an employer in the normal course of business would hire the Claimant. Claimant's unemployability is a direct result of the Claimant's permanent and total disability resulting from the injury of August 5, 2001.
19. Dr. Farley did an IME on behalf of the Employer on Claimant and felt after examining the Claimant as well as the Claimant's history and review of the medical records that Claimant had suffered a traumatic work-related injury to his right knee on August 5, 2001. He felt Claimant had an overall permanent partial disability of 2% of the right lower extremity or 1% of the body as a whole. Dr. Farley was also of the opinion that Claimant's permanent disability is a result of a combination of his August 5, 2001 work injury and preexisting disability on account of his two prior knee injuries predating August 5, 2001, as well as preexisting obesity. Thus, Dr. Farley felt that the Claimant's permanent disability was a result of the primary injury in combination with his prior injuries and obesity.
20. Mr. England, a vocational rehabilitation consultant, testified by deposition on behalf of the Employer/Insurer. Mr. England interviewed the Claimant and reviewed the medical records and performed vocational testing of Claimant, evaluating his reading at post high school level and math at sixth grade level. Mr. England was of the opinion that Claimant was incapable of competing in the open labor market and, thus, permanently totally disabled due to the combination of his knee problems prior to the primary injury as well as the primary injury and his obesity.

**RULINGS OF LAW**

From all the testimony, exhibits and opinions of experts, I make the following rulings:

1. Claimant as a result of the August 5, 2001 injury sustained a 50% permanent partial disability of his right knee.
2. Claimant as a result of the August 5, 2001 knee injury is entitled to future medical care for the treatment for the right knee to be paid by the Employer.
3. I find that the Claimant is permanently and totally disabled but as a result of the primary injury of August 5, 2001 and the subsequent problems with obesity, distress and depression, I do not find his subsequent obesity, anxiety and depression are the result of his primary injury.
4. I find that Claimant's treatment by Dr. Olshen in the amounts of \$1,097.00 for his office visits and \$11,674.32 for prescription drugs is to be payable by the Employer.
5. I do not find the Claimant's past medical bills other than Dr. Olshen's are related to the primary injury of August 5, 2001.
6. I find that the Claimant is entitled to future medical care as a result of the primary injury of August 5, 2001, with regard to his right knee.
7. The Employer is to pay the Claimant \$7,050.24 for the scooter/wheelchair that was purchased from The Scooter Store.
8. I find that the Second Injury Fund is not liable for any benefits to Claimant.

Made by: \_\_\_\_\_  
CORNELIUS T. LANE  
*Administrative Law Judge*  
*Division of Workers' Compensation*