

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

Injury No. 00-081838

Employee: Robert Graham
Employer: LATCO Contractors Incorporated
Insurer: Legion Insurance Co. (In Liquidation)
MIGA
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

On April 7, 2015, the Missouri Court of Appeals for the Southern District issued an opinion reversing, in part, our April 11, 2014, award and decision. *Graham v. Latco Contrs., Inc.*, (Mo. App. 2015)(Nos. SD33332 & SD 33337). In particular, the Court decided we acted in excess of our authority by deciding the subrogation issue in this matter. By mandate dated April 23, 2015, the Court remanded this matter to the Commission for further proceedings in accordance with the opinion of the Court.

In accordance with the Court's opinion and mandate, we set aside the administrative law judge's discussion, analysis, and conclusions regarding the subrogation rights of all parties. We modify the administrative law judge's award to remove entirely the section of his award dealing with subrogation interests.¹ In all other respects, we affirm the award of the administrative law judge.

Award

We affirm the administrative law judge's award, as modified herein.

We approve and affirm 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.

We attach the July 8, 2013, award and decision of Administrative Law Judge Gary L. Robbins and we incorporate it herein to the extent it is not inconsistent with our findings, conclusions, award and decision.

Given at Jefferson City, State of Missouri, this 14th day of May 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

¹ Award pages 47-50, section entitled "9 and 10. Subrogation rights of the employer-insurer/Legion, the Second Injury Fund and MIGA"

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Robert A. Graham Injury No. 99-178620 and 00-081838

Dependents: Gale Graham - wife
Seth Graham - son
Caleb Graham - son

Employer: LATCO Contractors Incorporated

Insurer: Legion Insurance Company (Legion) (bankrupt)/Missouri Property and Casualty Insurance Guaranty Association (MIGA)

Additional Party: Second Injury Fund

Appearances: Daniel H. Rau, attorney for the employee.
Julie L. Petraborg, attorney for the employer-insurer.
Jonathan J. Lintner, attorney for the Second Injury Fund.

Hearing Date: April 18, 2012 Checked by: GLR/rm

SUMMARY OF FINDINGS

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes, in each case.
3. Was there an accident or incident of occupational disease under the Law? Yes, in each case.
4. Date of accident or onset of occupational disease? July 30, 1999 in 99-178620. July 5, 2000 in 00-081838.
5. State location where accident occurred or occupational disease contracted: Stoddard County, Missouri in both cases.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes, in both cases.
7. Did employer receive proper notice? Yes, in both cases.

8. Did accident or occupational disease arise out of and in the course of the employment? Yes, in both cases.
9. Was claim for compensation filed within time required by law? Yes, in both cases.
10. Was employer insured by above insurer? Yes, in both cases.
11. Describe work employee was doing and how accident happened or occupational disease contracted: In 99-178620 the employee claimed that he injured his right shoulder while carrying a fan motor. He claimed that he was permanently and totally disabled. In 00-081838 the employee claimed that he was exposed to noxious materials while working. He claimed that he is permanently and totally disabled.
12. Did accident or occupational disease cause death? No, in either case.
13. Parts of body injured by accident or occupational disease: Right shoulder in 99-178620. Body as a whole in 00-081838.
14. Nature and extent of any permanent disability: In 99-178620 the employee settled his case with the employer-insurer for 10% permanent partial disability of the right shoulder-\$7,029.83. In 00-081838 the employee initiated a third party claim and settled it with Tyson Foods for \$730,000.00 on September 26, 2005.
15. Compensation paid to date for temporary total disability: \$1,604.40 in 99-178620. \$20,449.80 in 00-081838.
16. Value necessary medical aid paid to date by employer-insurer: \$2,308.66 in 99-178260. At issue in 00-081838. The employer-insurer reported \$51,688.75 in medical payments.
17. Value necessary medical aid not furnished by employer-insurer: \$0 in 99-178620. In 00-081838 the employee is claiming the amount paid by the Veterans' Administration that the employee says is unknown.
18. Employee's average weekly wage: Not disclosed in 99-178620. \$568.05 in 00-081838.
19. Weekly compensation rate: In 99-178620 the employee's rate for temporary total and permanent total disability is \$374.37 per week. His rate for permanent partial disability is \$303.01 per week. In 00-081838 the employee's rate for temporary total and permanent total disability is \$378.70 per week. His rate for permanent partial disability is \$314.26 per week.
20. Method wages computation: By agreement.
21. Amount of compensation payable: See Award.

22. Second Injury Fund liability: None. See Award.
23. Future requirements awarded: See Award.

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

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

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW

On April 18, 2012, the employee, Robert A. Graham, appeared in person and with his attorney, Daniel H. Rau for hearings for final awards. LATCO Contractors Incorporated/LATCO was insured by Legion Insurance but Legion was bankrupt. Missouri Property and Casualty Insurance Guaranty Association/MIGA insured LATCO due to the bankrupt status of Legion. Julie L. Petraborg represented the interests of LATCO, Legion Insurance and MIGA. In this award, depending on the context, the term employer-insurer may refer to LATCO and Legion singularly or may refer to LATCO, Legion and MIGA as an entity. Assistant Attorney General, Jonathan Lintner represented the Second Injury Fund. Prior to trial the employer-insurer had settled its portion of the case in Injury Number 99-178620. Prior to trial the parties reported that the case had a substantial amount of evidence and involved difficult issues. They acknowledged that the evidence could not be reviewed and that the final award could not be completed in ninety days. At the request of the parties the record was left open until April 28, 2012. After trial, the parties conducted further negotiations regarding settlement. This was done after the Court reviewed the evidence in the case and advised them of the Court's decision. The parties asked the Court to take this action. Unfortunately, after two efforts, the Court was advised on April 25, 2013, that all settlement negotiations had collapsed and that the Court should prepare the final awards. At the time of the hearings, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a statement of the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS IN 99-178620:

1. LATCO Contractors Incorporated was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by MIGA.
2. On July 30, 1999, Robert A. Graham was an employee of LATCO Contractors Incorporated and was working under the Workers' Compensation Act.
3. On July 30, 1999, the employee sustained an accident arising out of and in the course of his employment.
4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage was not disclosed at trial. His rate for temporary total and permanent total disability is \$374.37 per week. His rate for permanent partial disability is \$303.01 per week.
7. The employee's injury was medically causally related to the accident.
8. The employer-insurer paid \$2,308.66 in medical aid.
9. The employer-insurer paid \$1,604.40 in temporary disability benefits.
10. The employee had no claim for previously incurred medical bills.
11. The employee had no claim for mileage or future medical care.
12. The employee had no claim for any temporary disability benefits.
13. The employee has no claim for permanent partial or permanent total disability against the employer-insurer.

UNDISPUTED FACTS IN 00-081838:

1. LATCO Contractors Incorporated was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by MIGA.
2. On July 5, 2000, Robert A. Graham was an employee of LATCO Contractors Incorporated and was working under the Workers' Compensation Act.
3. On July 5, 2000, the employee sustained an accident arising out of and in the course of his employment.
4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage is \$568.05. His rate for temporary total and permanent total disability is \$378.70 per week. His rate for permanent partial disability is \$314.26 per week.
7. The employee's injury was medically causally related to the accident.
8. The employer-insurer paid \$20,449.80 in temporary disability benefits.
9. The employee has no claim for mileage.

ISSUE IN 99-178620:

1. Liability of the Second Injury Fund for permanent total disability.

ISSUES IN 00-081838:

1. Medical Aid Furnished - How much medical aid did the employer-insurer furnish?
2. Prior Medical Bills - The employee is claiming past medical bills paid by the Veterans' Association. The employee claimed that the amount has not been disclosed to the employee.
3. Future Medical Care.
4. Temporary total disability compensation.
5. Liability of the employer-insurer for permanent partial disability.
6. Liability of the employer-insurer for permanent total disability.
7. Liability of the Second Injury Fund for permanent partial or permanent total disability.
8. Liability under Schoemehl.
9. Subrogation rights of the employer-insurer or the Second Injury Fund.
10. Whether or not MIGA is entitled to any subrogation interests?
11. Attorney lien of Jay York of \$5,840.00.

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employees Exhibits:

- A. Deposition of Terry T. Martinez, Ph.D.

- B. Deposition of James M. England, Jr.
- C. Deposition of Peter G. Tuteur, M.D.
- D. Medical record.
- E. Medical report of Anthony C. Zoffuto, M.D.
- F. Employee's list of medications.
- G. Prescription medication list.
- H. Missouri Department of Conservation Hunter Method Exemption Card.
- I. Certified records of the Circuit Court of Stoddard County, Missouri, Case No. 02CV763577.
- J. Affidavit of J. Michael Ponder.

Employer-insurer Exhibits:

- 1. Deposition of Thomas M. Hyers, M.D.
- 2. Deposition of Karen Kane-Thaler.
- 3. Deposition of Bryan Burns, J.D.
- 4. Motion to Quash.
- 5. Deposition of Nancy Dubbert.
- 6. Medical records of the Veteran's Administration.
- 7. Records of Legion Insurance Company.
- 8. Records of Legion Insurance Company.
- 9. Record of Temporary Disability Benefits.
- 10. Wage Statement.

The Second Injury Fund did not offer any exhibits.

Rulings on objections

Employer-insurer objection to Employee Exhibit E.

At trial the employer-insurer objected to this exhibit stating that Dr. Zoffuto was not a treating doctor and they have no opportunity to cross examine Dr. Zoffuto. Dr. Zoffuto's records were generated in 2002. Dr. Zoffuto died in 2008. The Court overrules that objection and allows the introduction of Employee Exhibit E into evidence.

Employee objection to Employer-Insurer 7.

At trial the employee would not agree to the amount of medical bills that were paid by the employer-insurer and objected to Employer-Insurer Exhibit 7 as not being relevant. The Court overrules that objection and allows the introduction of Employer-Insurer Exhibit 7 into evidence. Information of this nature is definitely relevant and in the Court's opinion is critical in determining the subrogation interests of the parties.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:

STATEMENT OF THE FINDINGS OF FACT:

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

Robert Graham

Mr. Graham was fifty-three years old at the time of the trial. He was married to Gale Graham and has two minor dependent children, Seth age seventeen and Caleb age fifteen. His wife and two children were dependent on him when he was injured in July of 2000. He is presently living at his new home in Piedmont, Missouri with his family. This is the property he moved to as a result of the disabilities he contracted in this case. The employee is receiving Social Security Disability Benefits and VA benefits for service related disabilities.

Mr. Graham graduated from high school in 1977. He held various types of employment and served in the military before starting employment with LATCO/employer in 1995. The employee served in the U.S. Air Force from approximately 1982 to 1992. Prior to his employment at LATCO the employee received some training in business management and electrician and telephone maintenance. Part of his civilian employment included farm work, driving a truck and working as an electrician.

In 1995 the employee was employed by LATCO to build and maintain chicken houses. LATCO worked with poultry companies including Hudson and Tyson Foods. Mr. Graham was a construction supervisor and maintenance personnel manager. He built and maintained chicken houses. He also maintained the equipment in the chicken houses. The chicken houses are 600 feet long and 40 feet wide. The houses had automatic feeders and water dispensers. They have heaters and coolers, lights, and are divided by curtains. Baby chicks come in and are divided from the whole house by a curtain that can be raised or lowered. An auger pipe system distributes food into the houses. The water is distributed into the house through a medicator and filter system that distributes water throughout the house. An auger system was used to cool the birds in the summer. The floors of the chicken houses are covered with rice hulls.

When Mr. Graham constructed a chicken house it was built from the ground up. After the houses were built, he maintained them for one year as part of the cost. He performed all of the maintenance work. After the initial year he maintained the houses and billed the farmers for his work. All of the maintenance work was performed while the chickens were in the houses.

When the employee started in 1995 he had 300 existing houses. He built additions on to some chicken houses. When he last worked in 2000, Mr. Graham was mostly performing maintenance work.

How often the houses were cleaned varied depending on the farmers. When the employee first started, the employer was Hudson and later Tyson took over. He testified that under Hudson the houses were cleaned every three flocks. The employee testified that with Tyson, chicken houses were cleaned maybe once every six flocks, once a year, or not at all. A house is cleaned when a machine goes through and cleans. The equipment is raised off the floor and a tractor goes through and hauls everything on the floor out, including dead chickens and feces etc. that is in the material that covers the floor. Some, but not all, houses were then hosed out. The houses were then sprayed with a chemical. The chemicals were bleach and other chemicals that the employee did not recall the names of as they were changed on a regular basis. When asked at trial, the employee could not specifically remember the names of the chemicals that he was sprayed with.

Mr. Graham testified that he was in the houses when spraying was actually going on. His responsibility was to get all of the houses ready for new chickens and he had a deadline. After Tyson took over he indicated that you may only have three days to do the job. He testified that he actually got sprayed with chemicals on multiple occasions. He testified that the rice hulls on the floor were about twelve inches thick. He indicated that feces and dead chickens were all over stuff. Mr. Graham also testified that when you were working in the houses the chickens scattered and stirred up a lot of dust like material.

Mr. Graham testified that LATCO never provided any safety equipment. They never provided a mask or a respirator or a protective suit. On his own he bought a respirator. He was made fun of for having it and was told he did not need it as there was nothing in the houses that could hurt him. Sometimes he wore a dust mask.

Mr. Graham testified that his lungs were injured from breathing the material and chemicals while working for LATCO. His opinion is that the dust, the lint and the chemicals is what hurt him. He indicated that the dust and lint were everywhere and that the chemicals were sprayed on everything. He said this is what made him sick.

While maintaining and repairing the chicken houses, the employee was routinely exposed to chemicals including, but not limited to, Agri-Phene and Tempo while they were airborne after spray application. He was further exposed to such chemicals when he would perform repair work inside the houses as all surfaces of the houses were covered with the chemicals. When he worked on any surface the particles that had settled thereon would become airborne once again, causing further inhalation and exposure.

In addition to the chemicals that were used, the employee was also exposed to wastes incidental to poultry farming including, but not limited to, feathers, ammonia and various other substances found inside chicken houses. The employee was advised by representatives of his employer and its contractor, Tyson Foods that he did not need to use masks or respirators while being exposed to the chemicals and waste despite the fact that employees of Tyson Foods were provided such protective equipment. The employee reported that he was discouraged from using protective devices by LATCO and his co-employees.

Mr. Graham testified that he does not remember the last day he worked. He said that after he saw a doctor, the doctor told him to get out of chicken houses. He indicated that when he told LATCO this information they fired him.

Mr. Graham testified that Dr. Hudson was a physician that he saw in 2000 and it was on July 18, 2000, that the doctor told him to stay out of chicken houses.

Mr. Graham testified that he was having problems with his lungs before 2000. He would agree that the records show problems in 1996 and 1997. He said he had trouble breathing, coughed a lot, had headaches and sometimes would pass out. This probably started in about 1996 and got worse up to 2000.

Mr. Graham reported that he saw Dr. Carney in about June of 1997. Dr. Carney is his family doctor. He was treated for bronchitis. He said that Dr. Carney gave him an inhaler and told him to get away from chickens. In July 1999 he hurt his shoulder when working in a chicken house carrying a motor and slipped and fell. LATCO told him not to go to the doctor, but he eventually went on his own. He reported that the doctor offered surgery, but he did not get it as he wanted a second opinion. He said he got a second opinion after workers' compensation cut him off. October 22, 2001 was when he said he saw Dr. Nogalski.

Mr. Graham testified that Dr. Carney sent him to see Dr. Hudson. He saw Dr. Hudson in April 2000. He had been in the hospital right before for an appendectomy. He testified that Dr. Hudson did a lung biopsy, did cultures and removed lint and chicken feathers from his lungs. He also reported that Dr. Hudson checked for smoking and found little evidence of that. The employee testified that Dr. Hudson referred him to Dr. Tuteur.

Mr. Graham indicated that Dr. Tuteur went over records, examined him and did a breathing test that tested for whatever closed his lungs off/different smells. He testified that his lungs are crystallizing from the chemicals and getting smaller each day. He said that there is no cure. He reported that he was told that he should leave the Sikeston area due to the proximity of chicken houses to his house.

Mr. Graham also testified that Dr. Tuteur told him:

- To do what he could with what time he had left.
- Not to be around chemicals, perfumes or colognes. He says these things cause him to have attacks/pressure on his lungs.
- He could never work again.

Mr. Graham testified that he continues to have attacks and he has had to go to the hospital multiple times since 2000. At trial the Court made note that it was obvious that the employee did not have a good memory. The employee testified that he was in the hospital in October 2000. He reported that stress tests were run and they found that there was nothing wrong with his heart. He said he was hospitalized in August 2001, but he does not remember why. He said he was

hospitalized for a stroke. He also reported being in the hospital in 2004. Mr. Graham testified that he did not believe that LATCO was paying his medical bills in 2004. He testified that after the 2004 hospitalization he saw Dr. Tuteur. Dr. Tuteur did more testing and told him to modify the people, places and things he was around. He was to do this as he could prevent more episodes of passing out or choking. He testified that he thinks his lungs get worse the more episodes he has.

The employee testified that he receives VA benefits from his military service. He indicated that he has been seeing VA doctors since 2004. He indicated that he has received pulmonary function testing and has seen “head doctors” to help him stay calm. He referred to psychiatrists as “head doctors”. He said that he sees the psychiatrists for nervous and erratic behavior as he screams and hollers a lot. He said that he gets angry and it does not take anything to set him off. Mr. Graham testified that he did not have any of these problems prior to his exposures while working for LATCO. He testified that the VA hospitalized him in 2005 due to outbursts. He testified that he uses inhalers and he has to pay for them as VA says they are not service connected.

Mr. Graham testified that he purchased a 102 acre farm and house in Piedmont, Missouri with the money he received for settling his civil case with Tyson. He says he signed the settlement on September 26, 2005. He reported that the settlement was around \$730,000.00. He testified that he made changes to the house he bought by building him a special “controlled room”. He said it is an 18 x 30 foot bedroom area with a TV, closets and a bathroom. He also said that the walls and ceiling are insulated and the floor is concrete. He testified that he maintains a room temperature of 65 degrees as that is where it is easier for him to breathe.

The employee had some injuries and exposures prior to the exposures while working at LATCO. He had a back surgery in 1994. LATCO tested Mr. Graham’s back prior to hiring him. He testified that while he takes some medication for his back and has some back spasms, it did not prevent him from doing his job. He testified that as a result of his July 30, 1999 right shoulder injury he does have some problems with his right shoulder including pain and loss of strength. In addition, he indicated that he drops things and cannot pull a compound bow anymore. He indicated that he was placed on light duty due to his problems with lifting. In addition his wife was hired by LATCO to assist the employee with lifting and driving.

Employee Exhibit F is a handwritten document prepared by the employee that is a list of activities that he says he can no longer do. He testified that he could do all of the things on the list before he started working for LATCO. Mr. Graham testified that he has to get medical care as he is depressed because he cannot do the things he wants to. Employee Exhibit G is a list that the employee made that he says contains the medications he is taking for all of his problems. He indicated that prior to working for LATCO he only took a muscle pill for his back and something to help him sleep.

Mr. Graham provided testimony concerning his problems and disabilities. He indicated that:

- He presently has shortness of breath all day.
- He uses inhalers.

- Unknown smells make him pass out. He tries to stay away from exposures as much as possible.
- He passed out in church due to smelling colognes or perfume. Due to this he does not go to church anymore.
- He passed out while working on the computer. He indicated that he passed out from lack of oxygen.
- He gets embarrassed due to his problems.
- He spends most of his time in his “control room”. While there he watches television. He testified that he used to try to work on a computer, but it made him mad and he busted it with a sledge hammer.
- No dogs or cats are allowed in his room.
- He does not go to his boys’ activities anymore.
- He does not ride a horse or 4-wheeler anymore.
- He quit smoking.
- Sometimes his wife helps him out of bed.
- If it is hot he stays in his room. He says he maintains a 65 degree temperature so he can breathe. Heat affects his ability to breathe. However, the employee testified that it is cold in the winter and he does do some hunting.
- If he leaves the house his sons or wife go with him. He may not know how to get back and passes out.
- “I live a life of pure hell”.
- He does not drive unless it is an emergency. However, he testified that he drives his truck now and then just to get out of the house and keep his sanity. He indicated that he gets in trouble with his wife when he drives the truck.
- He has no chemicals on the farm.
- He does not do household chores as he cannot be around cleaning supplies. His wife does not use smelly stuff to clean.
- His wife will not allow him to cook as he forgets and leaves the stove on.
- He takes medication for nightmares due to stress.
- He takes a “happy pill”.
- He has sleeping problems.
- He had no memory problems before working at LATCO.
- He cannot control his temper. Mr. Graham testified that this problem has gotten worse.

Mr. Graham testified that he has some disability for which he receives VA disability. He indicated that he gets 10% for his back, 10% for hearing loss and 10% for depression. He indicated that he was diagnosed with PTSD prior to working for LATCO and was exposed to various substances while in the military.

After the employee was done testifying he left the courtroom.

Gale Graham

Ms. Graham is the employee's wife and mother of his two sons. They were married and lived together as husband and wife in 2000 when the employee was injured. She testified that she and their two children were dependent on the employee for support.

Ms. Graham testified that she worked in the chicken houses with her husband after he hurt this shoulder. She reported that her husband told her that he was actually sprayed by chemicals when he was working in the chicken houses. She testified that other employees were sprayed and she knows that three of them are dead. She testified that her husband was not given any protective gear by his employer and that he was told that there was nothing for him to worry about even though the Tyson employees wore protective suits.

She testified that the first time that she realized that her husband's medical and lung problems were actually related to work was after July 5, 2000, when her husband started medical treatment and Dr. Tuteur reported that her husband's problems were related to the substances in the chicken houses.

During her testimony she offered several observations and assessments about her family and of her husband's condition and disabilities:

- She married a good looking man five years before his exposure. His memory was good and he had no problem controlling his moods. Now his mood is that he probably would hurt someone.
- He has other problems but his lung and memory problems are probably the worse.
- Now he is not the same man. Physically he is not the same man. He has lost all of his teeth due to his medications. He gained 89 pounds. He is not a protector like he used to be. We are his baby-sitters. He is not her husband anymore; he is like her third son.
- He gets mad and screams and cusses. He was never violent when they were first married, but since his illness he literally threw her out the front door of their house. He has violent outbursts that he does not remember.
- Over the years since 2000 her husband has gotten worse. "It is like intelligence has left his body". Memory problems are much worse and have progressively gotten worse. He had a stroke and the memory problems became worse. Prednisone caused his memory problems to become worse. He does not remember things correctly and she has to take care of all of the family business.
- He has breathing problems. Anything with a distinct smell may cause him to react and if you do not get him away from it he will pass out. When he is exposed he breathes heavy, bags will come under his eyes and he will rub one side of his face. He passes out and is unconscious. If he is not removed from the situation he would probably die due to lack of oxygen. The smells are what get him. Her husband has had multiple hospitalizations due to breathing difficulties.
- Family life has changed. His sons love their dad but they also hate him. The kids show him no respect as he acts like he is their age. The youngest son does not remember his dad before he got sick. The oldest son does remember his dad and he misses him.

- The family cannot do anything for fear of her husband being exposed. They do not do the things they used to do. They don't go camping. They don't go to church.
- She does not use strong cleaning agents in the house due to her husband's problems. If he is exposed and does not get away from an irritant he will pass out.
- They moved to their new property in October 2005 in Piedmont, Missouri. Her husband built a special room in the house with its own bathroom and heating and air conditioning. Her husband stays in his room for as long as twenty hours a day. She uses a different bathroom than her husband. The money from the Tyson settlement was used to buy the farm and build their house.
- She does not believe that the employee is capable of any employment whatsoever.
- Her husband has regressed over time and all of his doctors say that his regression will continue as he has additional acute respiratory episodes as his disease state progresses.
- She has concerns for her husband's safety.
- He would be angry if he heard her testimony.

Dr. Hyers

Dr. Hyers is a specialist in pulmonary medicine and pulmonary occupational medicine. In the last fifteen years the doctor's practice has been involved with the evaluation of individuals with inhalational injury to the lungs from various dusts and fumes.

Dr. Hyers saw the employee two times at the request of the employer-insurer. He reviewed medical records, took a history from the employee and conducted a physical examination. He saw the employee on October 15, 2001 and December 10, 2003, and prepared reports dated October 15, 2001 and February 4, 2004. He testified by deposition on March 7, 2007.

When Dr. Hyers first saw the employee he reviewed x-rays from August 15, 2001, and relied on the prior Methacholine Challenge Test that was done by Dr. Tuteur in 2000.

Dr. Hyers testified that the Methacholine Challenge Test showed that the employee has airway constriction manifested by worsening of his pulmonary function test as he breathed increasing concentrations of methacholine. His lung volume tested slightly smaller than predicted.

The employee's main complaint was dyspnea, shortness of breath that was noted particularly with exercise or moving around and with exposure to certain fumes, smoke and excessive humidity. At that time he was taking medications such as Serevent, Flovent, Atrovent or Combivent inhalers, an oral drug to decrease inflammation of the lungs and Paxil which is an antidepressant.

Dr. Hyers provided his opinions regarding his first evaluation:

- He was unable to find evidence of obstructive airways disease.
- The employee had a positive Methacholine Challenge Test which indicates that the employee had a predisposition to develop asthma, with any number of exposures.

- He provided a 25% permanent partial disability rating based on the slightly small lung volumes, the restriction, and slightly low oxygen at rest in the blood. The rating was only for pulmonary function.
- His diagnosis was reactive airway disease – restriction with a tendency to develop reactive airway disease.
- The employee’s medical treatment had been appropriate.
- The employee was at maximum medical improvement.
- The employee should avoid exposure to any environment that exposed him to excessive fumes, dust or smoke and continue to refrain from smoking cigarettes.
- The employee’s complaints were out of proportion to the objective findings of the testing that was done on him up to that point.

At that time Dr. Hyers said he was unable to attribute the findings or reactive airways disease or restriction to any particular cause.

Dr. Hyers saw the employee again on December 10, 2003. On this occasion he saw additional medical records and chest films. The doctor again took a history from the employee with the employee reporting his respiratory problems had deteriorated and that he felt his “brain is dead”. The employee had been hospitalized since the doctor’s first evaluation.

Dr. Hyers reviewed more x-rays and conducted another physical examination. He found that the employee’s respiratory rate at rest had increased, the employee spoke slower and his memory appeared poor for medical details of his past history. Dr. Hyers testified that the x-ray showed hypoventilatory changes meaning that the lung volumes appeared slightly smaller. He said this could indicate a scar left over from a previous infection, another inflammatory finding or it could be a small area of lung collapse.

Dr. Hyers reviewed some chest CT scans. He reported that the scans of June 14, 2000 and November 2, 2000, showed a condition called bronchiectasis at the bottom of the right lung which means that the airways are abnormally dilated and usually associated with some inflammation around them. This corresponded to the linear scarring on the chest x-rays. The doctor reported that the likely cause was the previous pneumonia.

Dr. Hyers also said that the findings on the chest x-rays and the chest CT scans were not work related. He also performed a pulmonary function study. Based on the testing he characterized the employee’s lung condition as mildly abnormal and stated that if the employee had airway obstruction it was mild.

Based on the second evaluation, the first evaluation and the records he review he arrived at a diagnosis regarding the employee’s pulmonary condition. He diagnosed:

- The employee continued to have the airways hyperactivity based on the previous Methacholine Challenge Test.
- His lung volumes tested in the normal range at this time, but the low normal range.

- The employee is either mildly restricted or has borderline lung volumes so the doctor did not think his pulmonary function testing had changed that appreciably.
- The objective x-ray findings of mild bronchiectasis were not work related. He also did not think that the abnormalities on the pulmonary functioning testing, if any, were work related either.

Dr. Hyers indicated that the restrictive airway disease refers to a positive Methacholine Challenge Test which means that the airways are a little more likely to constrict than a normal person – five to seven percent of the population have a positive test. He said that if the employee's neurocognitive function was declining between 2001 and 2003 he did not think it would be work related to his work between 1995 and 2000.

After the second examination, Dr. Hyers continued to rate the employee's loss of pulmonary function at 25%. He reported that the employee was not able to work at the time he saw him. He indicated that the 25% pulmonary rating would have allowed the employee to work in absence of the other complaints, but all of the things taken together combined with his statement that his brain was dead caused him to judge that the employee could not work.

When he was cross examined, the doctor agreed that:

- He does not have any experience in dealing with any research into the effects of the poultry industry and the employees who work in the poultry industry and their lung disease or disease process.
- He has not authored any articles with regard to people who work in chicken houses.
- When asked if he has ever treated anyone who was employed in the poultry industry he responded, "I've seen patients who have medical complaints relative to working around chickens, but I can't recall whether these were Workers' Comp type individuals or actual patients".
- He has no experience with people exposed to Agri-Phene.

Dr. Hyers was asked about the testing that the employee did with Dr. Tuteur in 2001. He agreed that:

- There was no indication in the testing that Dr. Tuteur did, that the employee did not put forth sufficient effort.
- As to the onset of the employee's problems, he got the same history that Dr. Tuteur got.
- That the employee's testing showed that his lungs were smaller. He said testing for a smoker would show that their lungs were larger. It is unusual for them to be smaller.

Dr. Hyers was also questioned about his 2003 meeting with the employee and the questionnaire he filled out. When he was asked about the questionnaire the employee filled out, he responded that the average person does not know the difference as to what triggers an allergy and what triggers a reactive airway disease. He agreed that what the employee listed as his allergies could be things caused by his reactive airway disease.

Dr. Hyers was referred to the report about a computer generated pulmonary function test. He agreed that the report gave a printed pulmonary function diagnosis as severe obstructive airways disease, severe restriction possible, mild diffusion defect. He also agreed that he marked through some of the conclusions of the report and wrote in his own hand, "possible airways obstruction" and "spirometry not reproducible". He reported that he marked through severe obstructive airways and severe restriction possible, as he did not agree with the test. When asked about the employee's efforts in blowing to do the testing, the doctor agreed that he was unable to determine if the employee was unwilling or unable to perform the spirometry test.

When Dr. Hyers prepared his report and gave his opinions, he agreed that:

- He did not have the opportunity to see Dr. Tuteur's May 19, 2004 report.
- He did not have the opportunity to see Dr. Tuteur's testing.
- He was not given Dr. Tuteur's reports to review, therefore he had not seen Dr. Tuteur's reports of July 16, 2002.
- He was not given the Social Security report of November 28, 2001.

Dr. Hyers testified that when he first saw the employee his complaints were dyspnea and cough and he attributed those breathing conditions to his exposure to materials while he was working in and around chicken houses. Based on the positive Methacholine Challenge Test, Dr. Hyers concurred with Dr. Tuteur's diagnosis of reactive airways disease. He also agreed that the employee's smoking is not an issue in his case. He said that the fact that the employee had pneumonia in the past did not lead to or cause his onset of reactive airways disease. He testified that he did not know what caused the employee's reactive airways disease and that he found no other preexisting conditions or disabilities that caused this disease. He reported that the employee's obesity did not cause or contribute to the development of it and his shoulder did not contribute to it.

Dr. Hyers testified that in 2004 the employee was having more problems than he had in 2001. He agreed that in his thirty years of practice he has only seen a couple of ammonia patients. He testified that ammonia is a very irritative substance when inhaled in high concentrations and can cause acute symptoms, but he does not think of it as a chemical that causes chronic lung disease.

Dr. Hyers reported that the employee was unable to work in 2004; however, he also testified that he did not say he was permanently and totally disabled. He indicated that the employee was unable to work based on the combination of his respiratory problems and his subjective complaints - also that he is brain dead.

Dr. Tuteur

Dr. Tuteur is a medical doctor who examined the employee. The employee was referred to him by Dr. Hudson. He saw the employee or the employee underwent testing on December 1, 2000, December 21, 2000, and May 19, 2004. He prepared reports or letters dated December 1, 2000,

December 26, 2000, May 9, 2001, May 19, 2004 and July 1, 2004, and he testified by deposition on November 15, 2004 and March 5, 2007.

Dr. Tuteur is trained as an internist with a sub-specialty in pulmonary diseases. His predominant practice is as a pulmonary consultant. His patients are referred to him for concerns that revolve around the lungs.

Dr. Tuteur had at least two occasions to see the employee and establish a treatment plan. He first saw the employee on December 1, 2000. He performed testing including pulmonary function studies and x-rays. By history Dr. Tuteur was aware that the employee worked in chicken houses and that over the years had developed shortness of breath. In 2000 the employee became more breathless, had dramatic air hunger, nearly passing out and did pass out - all worse and different than before. When the employee would leave work he felt a little better and when he returned to work he got worse. Dr. Tuteur was aware that Mr. Graham had obtained medical care, was treated with prednisone with improvement of his respiratory problems, but there were behavioral and neurologic symptoms. His mood was altered. He had a volatile temper and decreased short term memory. When he got off prednisone those symptoms improved, but his respiratory symptoms came back. With this history it was assumed he might have hypersensitivity pneumonitis.

Dr. Tuteur performed his own testing and reported that the pulmonary functions showed that the employee had air flow obstruction. Testing also showed that the employee's lung size was small. Dr. Tuteur testified that this is an important point as the employee did not have the usual pattern for someone with garden variety smoke induced lung disease. Dr. Tuteur specifically testified that the employee's problems clearly were not caused by cigarette smoking. He testified that the employee has a lung inflammatory process from being exposed in the chicken houses. He noted that the x-rays confirmed the employee's problems. In addition, he said that you eventually develop scarring so the airways are permanently narrower. On December 26, 2000, Dr. Tuteur opined that the employee's condition was due to a workplace environment and excess amounts of ammonia and/or exposure to disinfectants, pesticides and polycyclic halogenated hydrocarbons, as well, would be considered. At that time he said he did not have sufficient environmental information to include or exclude any one of these.

Dr. Tuteur testified that the sensitivity that the employee had was related to his work environment. Dr. Tuteur tested the employee with methacholine. He indicated that the response to methacholine translates to a response to perfumes, colognes, hair spray, cooking fumes, cleaning solutions, to hot, to cold, to wet, to dry solutions etc. in the employee's everyday environment. The doctor testified that the employee has inflammation in his air ways and lungs and that because of chemicals or products in the work environment he has sensitivity to all of the substances that he listed in his report.

Dr. Tuteur further says that every time the employee gets this sort of exposure, it perpetuates the cycle of worsening of the disease - the muscles of the airways constrict down and the healing creates scar tissue and you get more fixed airway obstruction. He says there is a vicious cycle.

Dr. Tuteur testified that he saw the employee three and one-half years later on May 19, 2004. He was provided with the employee's intervening medical records to review regarding the employee's history. The pulmonary functions tests, etc. were repeated. Dr. Tuteur testified that the interval history showed continued episodes of severe respiratory symptoms, an exacerbation sometimes requiring hospitalization. He said that these exacerbations sometimes followed exposure to a known irritant that was not necessarily an irritant in the workplace. He also reported that there also were neurologic symptoms. In addition, the doctor reported that there was weakness of the left upper extremity, short term memory loss and other cognitive dysfunctions. He indicated that these problems waxed and waned.

He testified that the testing in 2004 confirmed the testing in 2000. He said that as a lung doctor he concentrated on the lungs. He testified that it was clear that this confirmed the original diagnosis of fixed airway obstruction, tendency toward bronchial hyperactivity, i.e. twitchy airways, associated with some lung substance or lung parenchymal or interstitial process, post-inflammatory, all related to the exposure in the workplace on or about the spring of 2000.

Dr. Tuteur indicated that the employee has "twitchy airways" which was the predominant problem that persisted. The pulmonary studies showed reduction of air flow between the 2000 and 2004 testing. Dr. Tuteur testified that the employee's worsening is caused by a lessening of the oxygen he had in his blood. He indicated that this means low brain oxygen. The employee would experience symptoms, then the oxygen returns and he gets back to his normal; but it may not be the same level as prior to the attack as there is some permanent damage. Dr. Tuteur testified that this process is also caused by the toxic encephalopathy associated with the chemical that the employee was exposed to in the workplace. He went on to testify that the low oxygen levels in the blood are due to the decreased lung capacity when exposed to an irritant. Dr. Tuteur gave an example: the employee is at his normal level, he gets exposed to an irritant, the level of lung function goes down, not enough oxygen gets to the brain etc, brain function goes down. Oxygen then gets better, the brain gets more of it and he gets better, but maybe not back to the same level that he started due to the progression of the problem.

Dr. Tuteur opined that the original cause of the employee's shortness of breath symptoms is that his lung problems were directly caused by the environment of the workplace as it existed and he had very dramatic symptoms. In 2004, Dr. Tuteur said pesticides were used, but at that time he could not state that a particular pesticide or other substances produced these problems. (The Court notes that at the time of the doctor's initial involvement in this case, the chemicals used at the chicken houses had not been disclosed to him. He could say the problems came from the workplace, but not which irritant per se caused the problems. Later on when the substances were identified the doctor said the information supported his causation opinions more so).

Dr. Tuteur further testified that, "all of the healthcare events depicted in these records and as related from Bobby to me, both initially in 2000, and, in our visit in the spring of this year, 2004, are related either directly, as is the twitchiness of the airways, or indirectly, the consequences of the twitchy airways to his exposure to the materials in the workplace, spring 2000".

Dr. Tuteur summarized the employee's condition as of the last time he saw him in May 2004:

- He has a lung condition. Most prominently irritant-induced bronchial reactivity.
- The condition is permanent and tends to be irreversible. It tends to have a natural history of continual worsening because of continued inflammation that is called chronic remodeling of the lung leading to fixed airway obstruction.
- Also with the continued propensity for bronchial reactivity, which is the action or overreaction of the airways to constrict in response to ubiquitous irritants that tend not to bother the normal person, such as perfume, colognes, hairspray, cleaning solutions, products of combustion, etc. (this seems to be missing something at the end to finish the thought.)
- Every time the employee is exposed to and responds to these conditions and substances which are clearly difficult to avoid in a normal day-to-day environment, inflammation takes place and a greater propensity towards fixed airway obstruction occurs.
- He is also likely to have some parenchymal abnormality which is abnormalities in the alveolar lung of the wall where gas exchange takes place in materials that he inhaled at the workplace which is a second condition.
- The cause of this medical condition is the exposure to the environment of the chicken house.
- The temporal relationship of the exposure to the development of acute and then chronic illness is strongly supported by the history of the response to irritant materials. Objectively this is supported by the pulmonary function studies and the Methacholine Challenge Test. This information causes these conclusions to be made with the upmost reasonable medical certainty.
- The employee's smoking is not playing a role in his illness.

Dr. Tuteur testified that the employee's lung condition will not get better and will most likely get slowly mildly, worse. He also said that the employee's neurologic conditions will also get worse over time. He indicated that treatment for the employee revolves around his lung disease. The worsening of the toxic encephalopathy is due to transient temporary reductions in oxygen in the blood.

Dr. Tuteur outlined the treatment for the employee's lungs as being two-fold:

- One is to exquisitely control the environment as much as possible. The employee needs to recognize what conditions, substances, venues, tend to give him narrowing of the airways suddenly. He needs to avoid those places or things that cause the problems, it doesn't matter if it is a loaf of bread, soap powder, cigarette smoke or gasoline fumes, he should avoid those substances. If the employee goes to a certain place and has problems for whatever reason, he should not go there. When the doctor was told he was describing living inside a house, he said that he is describing a limitation of activities that is a trade off for feeling better - the employee may have to modify his home.
- Two is medication. Anti-inflammatory medication such as corticosteroids and bronchodilators, etc. are required. Dr. Tuteur stated that for the rest of the employee's life he has to control his environment and take his medications. He must maintain as

good oxygenation as he can. Dr. Tuteur testified that he was not a neurologist, but thought that the employee's neurological symptoms could also be treated by maintaining as good oxygenation as possible.

On cross-examination, Dr. Tuteur was asked if he knew the names of the chemical disinfectant that the employee was exposed to and when he became aware of the chemicals. He indicated that Tempo came in a phone call on December 26, 2000, and the Agri-phene came by a letter dated January 16, 2001. He said there were five pages of printed materials that had the chemical composition. He agreed that he did no further analysis of the chemical properties of the two chemicals other than reading the original materials.

Dr. Tuteur testified that he has other patients who worked in chicken houses that developed these symptoms. He reported that his diagnosis is that the employee has workplace irritant induced problems. He indicated that he cannot tell whether it's a pesticide or ammonia or interaction between the two or a third phenomenon. He said that medically it does not make a difference if the employee was exposed to ammonia that naturally occurs in chicken producing or from Tempo or Agri-Phene. He said that just because something occurs naturally does not mean it is good and you should inhale it with impunity. Dr Tuteur testified that the employee does not have hypersensitivity pneumonitis, he doesn't have an allergy problem, the employee is not allergic to all things that you would associate with a chicken house. He testified that his opinion is that the employee had irritant induced bronchial reactivity as opposed to hypersensitivity pneumonitis. He indicated that there is a great deal of biological variation in humans who respond or don't respond to exposure and that there is no way to predict who will and who will not be affected by exposure. He said that he has refined the cause as close as possible and now he is not only treating the symptoms, but is understanding the pathophysiology in an attempt to control the symptoms and to control the rate of the progression of the disease.

Dr. Tuteur indicated that it is impossible to recreate the conditions that existed at the time the employee was exposed. He said he does not know if the condition in the chicken house when the employee was exposed was the same as from the past. He says the difference at the time of exposure was that the employee was exposed to a disinfectant material that produced a dramatic, clinical medical change in the employee, at the time the employee entered the chicken house it was not safe for him. The doctor said that he did not know when the employee purchased a respirator. He also did not know if the respirator would have prevented or limited his problems.

Dr. Tuteur testified that within reasonable medical certainty he has eliminated the employee's prior smoking as a contributing factor to his current health status. He agreed that the employee does have objective symptoms related to smoking, but indicated that the bronchitis-inflammation of the airways was due to the chemicals not due to the prior smoking.

Dr. Tuteur testified that all the Methacholine Challenge Test tells you, is that the employee has twitchy airways. It does not tell you about ammonia or Tempo or Agri-Phene. It does not tell you the cause of twitchy airways. He said that the employee has an underlying encephalopathy which is aggravated when his lung disease functionality is at its worst. He explained that he did not know whether it was the ammonia and/or the disinfectants in combination together or with

other materials that caused the employee's sudden deterioration of his health status in the spring of 2000, but it was the workplace environment on that day that did it. And he did not know whether it was natural chicken excrement ammonia or unnatural products that were in the environment that had nothing to do with the ammonia or the biological combination or the chemical combination of those three materials with or without other materials in the environment.

Dr. Tuteur testified that the employee's lung condition alone does not make him completely unable to work, if he could work in his house or where he could keep his environment safe he could work. He said the employee cannot return to his previous work, the environment is difficult to control. Dr. Tuteur testified that the ideal environment for the employee is a bubble, but this is not tenable.

Dr. Tuteur also testified that the employee's inability to perform the male role, to be the wage earner, produces a lot of stress and worsens any health problem, or lung condition or toxic encephalopathy or weak hand. He reported that the employee takes 80 milligrams of Prednisone a day and that this amount will exaggerate any underlying personality, behavioral, background neurologic problems, or psychological problems, i.e. if a person has a tendency to be sad or get depressed that will get worse. He testified that what the Prednisone did was to uncover the effects of the toxic encephalopathy, if the employee was histrionic in the past he would get worse with 80 milligrams of Prednisone.

Dr. Tuteur reported that there is no inherent problem with hunting or fishing, but exercise can be an irritant or trigger bronchial reactivity. He said that he told the employee that he can do anything in any environment as long as he does not get an exacerbation from that, and once he gets an exacerbation he should not repeat that. He also reported that between people there is a great variation about what causes or triggers the already existing bronchial reactivity.

Dr. Tuteur was aware that Dr. Hudson diagnosed hypersensitive pneumonitis. He testified that based on the CT scan there is no evidence of hypersensitivity pneumonitis. He reported that there are two phases to the employee's illness. Phase One is irritant exposure that induced bronchial reactivity, i.e. the cause of bronchial reactivity. Phase Two is what other ubiquitous irritant substances, potentially totally unrelated to the workplace environment, serve to aggravate and cause an acute episode, ex. perfumes, colognes, hairsprays, etc. He indicated that the employee could have reactions to things in the environment that he did not see or smell. Dr. Tuteur testified that each time the employee has an exposure an inflammatory response occurs and that healing takes place and that causes irreversible scar tissue and produces a further narrowing of the airways that is unresponsive to medications. The tendency is to have a worsening and worsening over time. He said that the more frequent, or more serious or longer exposure, the more rapid and severe the deterioration of lung function.

Dr. Martinez

Dr. Martinez prepared a report dated July 16, 2002, and testified by deposition on February 6, 2009. He is a toxicologist and pharmacologist. He testified that he never met the employee, but

formed his opinions by reviewing literature, reviewing extensive medical records and reviewing deposition testimony.

He testified that Agri-Phene and Tempo are pesticides used in conjunction with the employee's work and that his knowledge is that the employee was exposed to Agri-Phene and Tempo while working at LATCO.

Dr. Martinez testified that he gave a prior deposition in 2004 or 2005 and that after that deposition he received more information. He testified that the additional information did not change his opinions, but added to his opinions. He indicated that there has been an evolution of the employee's symptoms in that before they were restrictive and now they are obstructive.

The initial medical records stated that the employee had hypersensitivity pneumonitis which is a restrictive type of defect in the lung. It has evolved over time so it is recognized as a chemically induced reactive airway disease. He testified that this is exactly what Dr. Tuteur reported and that he agreed with that finding.

Dr. Martinez testified that the information in the medical records and the specific information that he received about the chemicals that the employee was exposed to while working for LATCO showed that there was a connection between those chemicals and the condition of the employee's lungs. He testified that the employee was exposed to organic substances in the chicken houses in addition to the chemicals that appeared in 2004. He testified that Agri-Phene:

- Contains organic phenol compounds.
- Phenols basically precipitate all proteins.
- They are capable of destroying proteins.

He further testified that Tempo:

- Contains a pyrethrin which is synthetic derivative from the Chrysanthemum flower.
- It is a neurotoxin to insects, it is an insecticide.

Dr. Martinez testified that by deposition in 2004, the employee described being exposed to a fog of these substances. He testified that he now has additional records of the employee's progression of symptoms and additional opinions of the medical doctors; and that information does not change but supports his opinions. He testified that:

- The employee has gotten worse.
- It has become clear that there is a clear obstructive component to his condition. The employee had a chemically reactive condition.
- With the addition of the Methacholine Reaction Test that was performed by Dr. Tuteur it clearly showed that the employee had a chemically reactive exposure.
- The nature of the pesticides and their ability to damage the lungs also played a role in reinforcing my opinion that the employee had a workplace exposure.

- All of his opinions stated in the July 16, 2002 report are made with a reasonable degree of certainty.

Dr. Martinez was cross examined by counsel for the employer-insurer. He confirmed that he has never met the employee, he never did a physical or medical exam of the employee, he provided no treatment and he did review the records for purposes of litigation. The Court notes that Dr. Martinez first became involved in the employee's case when the civil litigation was pending against Tyson Foods.

Dr. Martinez testified that he never discussed his opinions with any of the treating doctors. He reported that he was not asked to do that. He explained that he is a toxicologist and he uses the medical records and his knowledge of toxicology to arrive at his opinions. He testified that he never went to the plant to observe conditions, the employee and the medical records are his source for the employee's working conditions. He added that Mr. England's report also discussed working conditions.

Dr. Martinez testified that the precautions that the employee should have followed at work were not met.

Dr. Martinez was questioned about what records he reviewed. He replied that:

- Some of the additional information that he did not have in 2002 are the deposition of Dr. Teuter and another doctor that were dated 2007, along with medical records.
- He reviewed all of the pulmonary testing reports.
- He does not normally review x-rays.
- He testified that he reviewed records of Dr. Hyers and his deposition.
- He indicated he reviewed the records of Dr. Lee and Dr. Khan if they are in his records.

Dr. Martinez testified about what Dr. Hyers reported. He noted that Dr. Hyers concluded that Mr. Graham was disabled, approximately 25% from pulmonary disability, but included complete disability because of orthopedic and neurologic conditions as well. He diagnosed reactive airway disease which is the same diagnosis as Dr. Tuteur, but they differed in their degree, Dr. Hyers did not identify anything as work related.

Dr. Hyers reported that the employee has a history of smoking a pack of cigarettes a day for 10 to 20 years. Dr. Martinez says there is a differential diagnosis between the effects of smoking and the effects of a workplace chemical and organic antigens exposure. He testified and the doctors say that smoking causes the lungs to expand, not contract. This is significant as the employee's lungs were smaller than normal. Dr. Martinez testified that smaller lungs is not consistent with smoking injury, but is consistent with workplace injury.

Dr. Martinez also testified that the employee's condition has progressed since the last testing. He reported that without later records (if they exist) no one can say about the 2009 condition. He indicated that the last pulmonary testing was the limit of all physicians' knowledge. He agreed

that his opinions are based on the depositions and records he has read and that if they are not true then he says he would have to reformulate his opinion.

Dr. Martinez testified that he highly values Dr. Tuteur's opinion. His opinion was that the pulmonary function alone was sufficient for the employee to be incapacitated. He indicated that "A man that cannot be exposed to smoke, chemicals, common cleaning agents that would commonly be encountered in any, virtually any workplace that wasn't sequestered, they would have a very difficult time of competing in the workplace". He testified that the employee's pulmonary condition is severe, but says it is not the role of a toxicologist to say what he can do or where he can go. He testified that is the role of the treating physicians and he defers to them.

Dr. Martinez testified that when he wrote the 2002 report he did not list the chemicals that the employee was exposed to as he did not know them. The doctor stated that he learned the name of the chemicals from reading the depositions and he knew the names when he gave the 2005 deposition. He testified that the information came from the deposition of Dr. Tuteur and Dr. Hyers taken in 2007. There were also depositions from the employee and there were depositions in the civil case for people who worked for Tyson. He also testified that LATCO employees mentioned the chemicals. He testified that the chemicals were Agri-Phene and Tempo, and they were involved. In addition, the doctor gave a list of organic agents that are commonly found in poultry work places. These are mites, feathers, dander, fish meal, using the feed and so on. He says all of these things are androgenic and known to cause occupational asthma and occupational pulmonary reactive disease. As of 2005 he was aware that Tempo and Agri-Phene and the organic antigens were all there.

Dr. Martinez testified that he was aware of the employee's work in the chicken houses where he was exposed. Dr. Martinez indicated that the employee reported that he was covered with dust, they actually sprayed the chemicals on him, the chemicals caused paint to blister and that when the employee complained, Steve Keys told him there was nothing in the chemicals that would hurt him and to go back to work, yet the crew applying them wore protective clothing.

Dr. Martinez testified that it is normal that a toxicological expert does not see the injured person when rendering an opinion. He testified that he laid out safety precautions and said they were not followed in the employee's case. His opinion is that the employee's symptoms and his reactive emotional problems, and his cognitive defects prevent him from competing in the labor market and that the employee's physicians do not expect his condition to improve.

Dr. Zoffuto

Dr. Zoffuto examined the employee on February 19, 2002. He reviewed medical records and prepared a letter stating his findings and conclusions. Dr. Zoffuto died after the examination. Dr. Zoffuto reported that the employee was taking medications and was anxious and depressed.

Dr. Zoffuto noted the employee's prior injuries and the disabilities due to the 2000 exposure. Dr. Zoffuto made specific mention that:

- The employee's pulmonary symptoms got progressively worse after his exposure. Dr. Hudson reported that the employee had an occupational exposure lung disorder and referred him to Dr. Tuteur.
- Dr. Tuteur's conclusions were basically the same. He did a Methacholine Challenge Test. He recommended that the employee avoid exposure to chicken houses as well as chemicals used there. He reported that other exposures could trigger bronchopulmonary insufficiency syndrome that lead to syncope.
- Dr. Lee treated the employee for his syncope episodes. He said the episodes were most likely due to brain oxygen deficiency related to the pulmonary hypersensitivity and the subsequent hypoxemia.
- Jim England said the employee could not compete in the workplace for a job due to his occupational lung disease, cognitive impairments and musculoskeletal disorders.

Based on his consideration of all the information provided to him, Dr. Zoffuto opined that the employee needs future medical care and is permanently and totally disabled due to his occupational lung disease.

Jim England

Mr. England saw the employee on June 1, 2001. He reviewed medical records, performed testing and met with the employee. He prepared an original report dated June 19, 2001, and also prepared a letter dated August 27, 2007. The 2007 letter was prepared after Mr. England reviewed additional medical information. He testified by deposition on October 10, 2007.

Mr. England testified that he relies on physicians opinions in making his determinations about whether a person is employable.

Mr. Graham reported that he had problems with memory and concentration, vision problems and what he referred to as his breathing problems; but that he was not able continue working mainly due to his breathing problems.

Mr. England's opinion was that:

- The employee cannot return to any of his old jobs.
- The employee seems to be homebound due to the need to avoid exposure to any fumes, dust, etc.
- "His physical problems involving his breathing, combines with his shoulder and hand problems and the emotional problems he seems to be experiencing will prevent him, in my opinion, from competing successfully in the open labor market".

Karen Kane-Thaler

Ms. Kane is a vocational consultant. She saw the employee on June 5, 2011, and prepared a report dated August 10, 2011. She testified by deposition on November 17, 2011. Ms. Kane

reviewed medical records in preparation of her report. As part of her examination she performed a transferrable skills analysis.

She performed a market analysis and concluded that the employee has transferrable skills. Her opinion was that given who he is medically, at the very least the employee could access home-based employment in 2001. She indicated that the home based work would require the employee to have a computer, a telephone line and internet access and would require the employee to have computer literacy.

Ms. Kane was asked if the employee has the mental aptitude to takes classes online and learn the computer skills necessary to be successful at home based employment. She replied that the reactive airway would not prevent the employee from being able to return to the workforce. But when he describes himself he may have difficulties because he talks about his attention span or not feeling comfortable doing things. She reported that when you consider the permanent physical effects of the 2000 injury that there are opportunities in the work force for the employee. She also reported that if you consider all of the employee's problems including his breathing difficulties, his right shoulder, his hands, his back, his legs, his post traumatic stress disorder and psychiatric conditions then the employee possibly could have difficulties participating in the work force.

On cross examination, Ms. Kane was asked if an employer would reasonably be expected to hire the employee in his condition. She responded that she cannot speak for an employer, but it could depend on the job. She stated that if the job was within employee's physical abilities and capabilities then it would be based on how the employee presented himself to the potential employer, given all his circumstances the employee would have difficulty returning to the work force. She said that from what she observed, her concern was the results of his cardiac strokes and the residuals from it. She described memory lapses, arguments in keeping focus on the questions, staying focused and getting upset are indicative of a cognitive impairment.

Ms. Kane was asked if she contacted people in the Piedmont area about whether the employee's skills enabled him to work in the open labor market. She responded that:

- She may have called places.
- She contacted Berkshire Inn and Subway.
- She has to go with her experience with these types of employers in the market.
- She could have called 10-30 employers.
- She then said that none of the employers provided information.
- None of the seven employers she listed were based in Piedmont. You can live anywhere and work for them with a computer.
- Based on employee's primary injury alone he would not have any more trouble than others in going through the training.

When asked if the employee would have more difficulty considering all of the employee's problems she said it was a yes and no answer. She said that the employee had no trouble answering her questions, except when he was upset or angry.

Ms. Kane reported that she did not take into consideration medical restrictions when determining transferrable skills.

VA Records

VA records were received into evidence reporting treatment that was provided to the employee by the VA. The records focus on treatment that the employee received after the accident in 2000, but there is some reference to pre-existing problems. The exhibit contains more information and only some of the records are indicated:

- Service connected disabilities are shown as 10% for tinnitus, 10% for neurosis/general anxiety, 10% for back/neck strain and 10% for impaired hearing.
- October 29, 2003 - the employee says he is disabled and unable to work. He reported respiratory problems that he says has been going on for four years. The employee reported that this problem did start in the military. Records say that the employee was exposed to asbestos and jet fuel etc. while in military. The employee has a restrictive airway disease.
- COPD was identified as a problem in 2004.
- January 15, 2004 - complaining of shortness of breath, etc. Testing showed moderate restrictive and moderate obstructive lung disease.
- July 28, 2004 - the employee reported he had either a CVA or oxygen deprivation which affected his brain. He has short term memory loss, slurred speech and word retrieval problems. Report talks about oxygen deprivation which affected the employee's brain. His blood saturation level was 54%.
- September 24, 2004 - pulmonary consult. The employee was apparently using inhalers at this time. The employee was still smoking four cigarettes per week. He had cut down from over a pack a day. The employee started Social Security disability at age 43 due to back problems and nerve damage. He was exposed to asbestos for about one year. Also exposed to jet fumes while working on jets. He had a stroke last year. The employee reported that a pulmonologist prescribed nasal oxygen and told him that the stroke was related to low oxygen. Pulmonary function test revealed moderate obstructive and moderate restrictive lung disease.
- June 27, 2005 - report says the employee had a stroke six months ago. It said he had a change in his personality. Implication is that it is from the stroke. Employee is afraid he might hurt his wife and kids.
- July 5, 2005 - mental health report where the employee hit his wife.
- July 7, 2005 - the employee was discharged after being admitted for Depression, Anger, PTSD, etc. was the release diagnosis. The employee had a stroke one year prior. The employee admitted to nightmares since being sexually assaulted in the military in 1979. The employee reported three strokes in last three years with the one of May 2004 being severe. The employee reported a history of COPD. The employee was discharged on meds.
- September 8, 2005 - employee reported he got his settlement and bought his farm.
- September 2006 - severe left arm pain.

- January 2007 - employee shows limping and speech impairment which seems to correlate to his history of being post stroke.
- The employee reported that he is primarily happy as long as he is on his property. He reported episodes of getting lost or passing out.
- February 2007 - the employee reported he had another stroke.
- April 2008 - the employee says he has a health condition that was diagnosed outside the VA system and does not want it put in his records. Record says the employee has been ill for a long time due to chemical poisoning from work. Employee reported hard financial times. He reported he has a suit pending regarding his work/health issues. This record generally deals with the problems mentioned above and the employee's handling of stress etc. due to life's problems and pressures. Intellectual testing showed a full scale IQ of 97 with above average and below average in certain areas. The employee had trouble with verbal comprehension.
- October 2008 - Record says the employee has been ill for a long time due to chemical poisoning from work.
- 2009 entries concern diabetes, lumbar disc displacement, shortness of breath, anxiety disorder, COPD and PTSD etc.

The Court notes that the record was left open for the employee to submit medical bill information from the VA. No such information was received by the Court.

Records from Stoddard County Circuit Court

Records were received documenting Stoddard County Circuit Case Number 02-CV763577. Those records show that a civil case was filed on October 11, 2002, three counts for damages and one count for loss of consortium. Page three of the employee's petition alleges that he was exposed to Tempol, Mythalone, Agri-Phene and Poulphrene. The case was dismissed by parties on October 11, 2005. The Court dismissed the case on October 17, 2005, with each party bearing their own costs.

Affidavit of Michael Ponder, J.D. dated April 24, 2012

The trial in this case was held on April 18, 2012. This evidence was received after the trial date as the record was left open for the receipt of additional evidence.

Mr. Ponder practices law in Cape Girardeau County with the then law firm of Thomasson, Gilbert, Cook & Maguire, L.C. He represented the employee and wife in a civil suit v. Tyson Foods - Case No. 02CV763577

The affidavit outlines a settlement of a lawsuit between the employee and his wife against Tyson Foods. Attached to the affidavit is a bank deposit showing that \$730,240.00 was deposited into the law firm's bank account. Also attached is a copy of a check dated September 28, 2005, indicating that \$313,712.90 was paid to the employee and his wife. Also attached is a copy of a check dated September 28, 2005, indicating that \$195,334.93 was paid to Cook, Barkett, Maguire & Ponder. Also attached is a check dated September 28, 2005, indicating that

\$116,800.00 was paid to Davis & Rau, PC. Also attached is a copy of a check (date to small to read) for \$15,000.00 that was paid to a People's Community Bank account; and another check (date to small to read) for \$10,907.87 that was paid to the employee and his wife.

The affidavit also indicates that:

- The claim was for the personal injuries of the employee and a claim of loss of consortium for his wife.
- The check for \$313,712.90 was paid to the employee and his wife for the employee's injuries and for the wife's claim of loss of consortium.
- Total attorney fees and expenses were \$312,134.93.
- \$15,000.00 was paid to People's Community Bank as a Medicare Set Aside Account for the employee.
- An additional \$10,907.87 was paid to the employee and his wife.
- The law firm is still holding \$73,152.17 in its trust account that is being held until the resolution of the employee's workers' compensation claim.
- The law firm is still holding \$5,092.13 for the employee and wife until the resolution of the Medicare claim.

Due to the settlement of the civil case, the employee and his wife received or are entitled to a total of \$417,865.07. This figure includes the original settlement for \$313,712.90, the \$15,000.00 in a Medicare trust, a subsequent check for \$10,907.87, \$73,152.17 that is being held in trust by the law firm until the workers' compensation case is closed, and the \$5,092.13 that the law firm is holding in trust until the resolution of the Medicare claim. The affidavit states that the employee and his wife paid a total of \$312,134.93 in attorneys' fees and expenses.

Byran Burns

Byran Burns testified by deposition of February 26, 2010. He testified that he is in-house counsel for Tyson Foods and that Tyson is not bound by the confidentiality agreement.

Nancy Dubbert

Ms. Dubbert testified by deposition on September 11, 2009. She testified that she is the custodian of records for the Missouri Department of Conservation and that she signed an affidavit on May 15, 2009. She testified that the affidavit contained information:

- When permits were issued to the employee.
- The employee was given a permanent hunting method exemption as of May 26, 2004.
- He was allowed to hunt with a crossbow from a stationery vehicle.
- He harvested deer prior to 2000.
- Documents show that the employee was hunting and took deer, turkey and birds after his accident.

Michael Dwyer

Mr. Dwyer testified by Affidavit. He is a Senior Claims Analyst with Legion Insurance Company. He testified that the affidavit is a summary of payment made by the TPA including \$51,688.75 that was paid for medical bills.

He reported that \$72,138.55 was paid on behalf of Legion Insurance prior to the July 28, 2003 liquidation. He indicated that all but \$8,050.36 is recoverable as that figure represents expenses.

RULINGS OF LAW IN 99-178620:

The employee settled his primary claim with the employer-insurer by Stipulation for Compromise Settlement on December 18, 2002. The settlement was for 10% permanent partial disability of the right shoulder. The Second Injury Fund portion of the case was left open.

At trial, in this case, the only issue that was presented by the parties was whether the Second Injury Fund had liability for permanent total disability.

After considering all of the evidence presented by the parties, the Court finds that the employee has not met his burden of proof on the issue of permanent total disability. The Court finds that the employee was not rendered permanently and totally disabled as a result of this injury alone or in combination with any other prior injuries. The Court finds that in this case the Second Injury Fund has no liability for permanent total disability.

RULINGS OF LAW IN 00-081838:

1. How much medical aid did the employer-insurer furnish?

At trial the employee would not agree to the amount of medical bills that were paid by the employer-insurer and objected to Employer-Insurer Exhibit 7 as not being relevant. The Court overruled that objection and allowed the introduction of Employer-Insurer Exhibit 7 into evidence. The employer-insurer maintains that they paid medical bills in the amount of \$51,688.75.

The employer-insurer offered Exhibits 7, 8, and 9, on the issue of past medical payments. Exhibit 7 is an affidavit of Michael Dwyer, Senior Claims Analyst with Legion Insurance Company. His records show medical payments on this case totaling \$51,688.75, broken down into categories of treating physician, prescriptions, nursing homes, medical case management, independent medical exam, mileage, diagnostic testing and hospitals. After reviewing the records the Court finds that there is a \$325 charge for "independent medical exam". This is a litigation expense, and will not be included in the calculation of medical bills paid by the employer-insurer. The payments are broken down individually, including payment amount, date of issue, and payee. Other than not agreeing to stipulate to these medical payments, the employee offered no affirmative evidence refuting the accuracy of any of these entries. The employee did not testify that medical bills were unpaid or that anyone was trying to collect the costs of medical care from him. His testimony was essentially that he had no idea about the

medical bills. Neither the employee nor his wife provided any evidence that any entity was trying to collect money from them from unpaid medical bills. No one claimed that the bills were inappropriate or excessive or that the care indicated was not provided.

While Exhibit 7 is the most recent, and appears to be the complete summary of the medical payments for which employer-insurer is requesting a credit, the employer also offered two other exhibits corroborating the accuracy of Exhibit 7. Exhibit 9 is a document faxed to the employee's attorney on January 24, 2002, purporting to be a printout of all payments on the case to that date. Spot-checking any entry in Exhibit 9 reveals a corresponding entry in Exhibit 7 identical in amount, date of payment, and payee. Similarly, Exhibit 8 is a mass of invoices. While they do not appear to be complete, every invoice in the exhibit has a corresponding entry in Exhibit 7.

The employee offered no documents or evidence refuting or contradicting these three exhibits, despite documentation that he received notice of some of these payments claimed by the employer-insurer as early as January, 2002.

The employee took a position that the employer-insurer's evidence was not credible and was not admissible as it did not reflect actual proof of payment. The employee cited principles from **Nelson v. Missouri Department of Social Services**, 363 S.W. 3d 423 (Mo. App. W.D. 2012). (The employee cited this as the Quisenberry Case); in support of its position. The Court distinguishes this case as it is a Medicaid case where the government was trying to collect money from the estate of the deceased recipient of Medicaid benefits. In addition the statute cited indicates that the statute applies to a situation where the recipient is dead. There is no evidence in this case that any Medicaid benefits were paid to the employee or that anyone is trying to collect any medical bills from him.

The Court finds that Exhibits 7, 8, and 9 are internally consistent and credible. The employee offered no evidence indicating that the employer-insurer did not provide the medical care enumerated in the employer-insurer's exhibits or disputing the specific amount that the employer-insurer claimed. The Court finds that the employer-insurer has made past payments for medical care related to the employee's work injury of July 5, 2000, in the amount of \$51,363.75.

2. The employee is claiming past medical bills paid by the Veterans' Association/VA.

At trial the employee claimed that the employer-insurer should be responsible to pay for the costs of care provided to the employee by the VA. As of the trial date the employee advised the Court that the VA had not provided any documentation on this issue. At the employee's request the record was left open for the specific purpose of giving the employee additional time to present evidence of the amount of the bills.

The employee testified at hearing that the VA provided him with care. Medical records were submitted into evidence that documented VA care. However, the employee failed to present any evidence for the Court to review to make a determination regarding this issue even though the

record was left open an additional ten days to give the employee further opportunity to submit any records provided by the VA.

Based on the lack of evidence the Court finds that the employee did not meet his burden of proof on this issue. The Court further finds that there is not any evidence regarding the costs of any medical care expended by the VA on behalf of employee. Based on a consideration of all of the evidence the Court does not award anything due to the VA providing medical care. The employer-insurer is not responsible for any further costs for past medical care that has not already been paid.

3. Future Medical Care

The employee is requesting that the employer-insurer be required to provide future medical care as a result of the disabilities he suffered from his occupational exposure while working for LATCO.

To be entitled to future medical care the employee must establish that it is a reasonable possibility that he will need future medical care. **Forshee v. Landmark Excavating and Equipment**, 165 S.W. 3d 533 (Mo.App. E.D. 2005). In addition, the employee must establish that said future medical care is necessary to "cure and relieve the effects of the injury" per Section 287.140(1), RSMo., and is medically and causally related to the same.

The employee has submitted the testimony and/or opinions of Dr. Tuteur and Dr. Zoffuto. Both doctors opine that the employee will require additional medical care in the future.

In addition, the employee has submitted medical records of the VA and St. Francis Medical Center documenting that both institutions provided continued medical care since the employee's occupational exposure that is of the kind and nature described by both Dr. Tuteur and Dr. Zoffuto.

In his report dated March 1, 2002, Dr. Zoffuto stated that:

"[i]t is clear that Mr. Graham will require future medical treatment for his chronic incurable lung condition. It is clear that he will continue to have intermittent and unpredictable exacerbations of his breathlessness and fainting episodes triggered by environmental allergens. These environmental allergens are ubiquitous in our environment and include fragrance-producing chemicals, antigens found in most chemical sprays, and antigens associated with chickens and chicken products. Because of the ubiquity of all these chemicals in our society, no matter where Mr. Graham is, he will be susceptible to these attacks as respiratory insufficiency and subsequent syncope."

In his report dated July 1, 2004, Dr. Tuteur stated:

"it is anticipated that he continue on his current pharmaceutical regimen (approximately \$250.00 to \$300.00 per month), have regular routine follow up with his primary care physician and less frequently with a pulmonary specialist. I anticipate that from time to

time [Employee] may require hospitalization for either an acute exacerbation, or an infectious process. Testing intermittently to include radiographic studies and pulmonary function studies are likely to be required as well."

It is clear from the medical records submitted from the VA that the employee has, in fact, received medical care as is described by Dr. Tuteur. Specifically, over the last decade, the VA has provided the employee with prescription medications, routine follow up visits with a primary care physician and visits from time to time with a pulmonary specialist. In addition, it is clear from the records submitted from St. Francis Medical Center that the employee has required multiple hospitalizations over the years as was anticipated by Dr. Tuteur.

Regarding the "hospitalizations for acute exacerbation," Dr. Tuteur discussed in his May 19, 2004 report several such episodes that had occurred in previous years. Specifically, he stated that:

"[i]n August of 2001, [Employee] was admitted to St. Francis Medical Center in extreme respiratory distress apparently following exposure to nonspecific irritants, possibly associated with exposure to cleaning solutions while visiting a nursing home. He presented with hypoxemic respiratory failure... Over the next several years he has had recurrent episodes not dissimilar from this, one resulting in left hemiparesis."

In addition, Dr. Tuteur discussed the neurological component to the employee's condition on December 1, 2000:

"secondary CNS [central nervous system] symptoms of altered mood, volatile temper, decreased short-term memory followed... Acute episodes tend to occur with stress, exercise, extremes of temperature, and inhalation of ambient tobacco smoke, diesel exhaust, cooking fumes, heavy perfume, and hair spray. Exposure to such triggers resulted in sudden breathlessness, difficulty inhaling and/or exhaling, syncope or near syncope, and when these symptoms were resolving, persistent fatigue and malaise may be present for days."

Dr. Tuteur also reported that, "the CNS [central nervous system] symptoms of recent memory loss and change in personality have features of a toxic encephalopathy." He reiterated this diagnosis of toxic encephalopathy in his May 19, 2004 report. According to the National Institute of Neurological Disorders and Stroke, a Division of the National Institutes of Health:

"[e]ncephalopathy is a term for any diffuse disease of the brain that alters brain function or structure. Encephalopathy may be caused by infectious agents (bacteria, virus, or prion)..., prolonged exposure to toxic elements (including solvents, drugs, radiation, paints, industrial chemicals, and certain metals)..., or lack of oxygen or blood flow to the brain. The hallmark of encephalopathy is an altered mental state. Depending on the type and severity of encephalopathy, common neurological symptoms are progressive loss of memory and cognitive ability, subtle personality changes, inability to concentrate, lethargy, and progressive loss of consciousness."

In his December 1, 2000 letter to Dr. Hudson, Dr. Tuteur states that, "I think it is absolutely clear that (Employee's) pulmonary and CNS [central nervous system] process is uniquely secondary to his workplace environment."

While Dr. Hyers disagreed as to the exact cause of the employee's problems, he testified that in 2004 the employee was having more problems that he had in 2001.

In addition, both the employee and his wife testified that based upon their understanding of his medical condition, he would need additional medical care in the future, both pharmaceutical care and additional hospitalization for both his respiratory symptoms and mental component.

Medical causation was stipulated to by the parties. It is clear from the treatment records of the VA and St. Francis Medical Center that the employee has in fact had a continued and consistent need for medical care since his occupational exposure. In addition, the care that he has received is consistent with the care recommended by both Dr. Tuteur and Dr. Zoffuto. Even if you disregard Dr. Zoffuto's opinions there is credible evidence to be considered on this issue.

Based on a consideration of all of the evidence, the Court finds that the testimony and opinions of Dr. Tuteur and Dr. Zoffuto, as well as the testimony of the employee and his wife, are all persuasive and credible. The Court further finds that the medical and psychiatric/psychological treatment that the employee has received since his occupational exposure dated July 5, 2000, and the medical and psychiatric/psychological treatment that he received prior to the trial on April 18, 2012 and the medical and psychiatric/psychological care that he will need in the indeterminate future is that which is necessary to cure and relieve the employee from the results of the disabilities that he received as a result of his occupational exposure. The Court therefore finds that it is a reasonable possibility that the employee will require additional and future medical care necessary to cure and relieve the effects of the injury and awards the same to the employee.

The employer-insurer is ordered to provide such medical care that is necessary to cure and relieve the employee from the physical and mental effects of his occupational exposure.

4. Temporary total disability compensation

At trial, the parties did not agree on a date that the employee reached maximum medical improvement. The Court finds that the employee reached maximum medical improvement as of February 19, 2002.

The employee is making a claim for past temporary total disability benefits. At trial the employee claimed that he is entitled to \$1,853.50 in past temporary total disability benefits for the period of July 21, 2000 to August 26, 2000. The purpose of temporary total disability benefits is to cover the employee's healing period. **Tilley v. USF Holland Inc.**, 325 S.W.3d 487 (Mo. App. E.D. 2010)(citing **Chatmon v. St. Charles County Ambulance Dist.**, 55 S.W.3d 481 (Mo. App. E.D. 2001)). Temporary total disability benefits are owed until the employee has reached the point of maximum medical improvement. **Id**

The parties stipulated that the employee was paid \$20,449.80 in temporary total disability payments for 53.7 weeks covering the period from August 26, 2000 to September 6, 2001. At the hearing the employee admitted that he had received the checks. However, there is a dispute as to whether the employee was working from July 5, 2000 to August 26, 2000. According to the wage statement provided by the employer-insurer, the employee worked until July 13, 2000. He returned to work from August 3, 2000 to August 17, 2000. Therefore, the Court finds that the employee is due 4 2/7 weeks of temporary total disability benefits from July 14, 2000 to August 2, 2000 and from August 18, 2000 to August 26, 2000. At the employee's rate of \$378.70, he is due \$1,623.00 in back temporary total disability benefits for this time period. The employer-insurer shall pay that amount to the employee.

The employee-insurer provided the employee with treatment by Dr. Hudson until August 17, 2000. At that time Dr. Hudson referred that employee to an allergist. The employer-insurer denied the employee this treatment even though it had been recommended by their treating doctor. The employer-insurer chose to cut off temporary total disability benefits at that time even though Dr. Hudson opined that the employee was in need of additional medical care. As such, the employee was not actually placed at maximum medical improvement. The Court looked to the report of Dr. Zoffuto for a determination of the end date of the employee's healing period. Dr. Zoffuto examined the employee on February 19, 2002 and stated at that time that the employee was "totally and permanently disabled by virtue of his occupational lung disease...".

Using that date of February 19, 2002 as the date that the employee reached maximum medical improvement, the employee is due 23 5/7 weeks of additional temporary total disability benefits from September 7, 2001 to February 19, 2002. 23 5/7 weeks of temporary total disability benefits equates to \$8,974.00 in such disability payments. The employer-insurer is ordered to pay \$8,974.00 to the employee as temporary total disability benefits for that period.

In summary, the employer-insurer is ordered to pay a total of \$10,597.00 in temporary disability benefits to the employee for the two periods.

5. Liability of the employer-insurer for permanent total disability.

The employee claims that he is permanently and totally disabled and requests a decision by the Court ordering such benefits. When determining whether an employee is permanently and totally disabled, "[t]he question is whether in the ordinary course of business an employer would reasonably be expected to hire the employee in his present physical condition."

Mihalevich Concrete Constr. v. Davidson, 223 S.W.3d 747, 755 (Mo.App.2007).

The evidence submitted at hearing described both the employee's physical and mental condition. Over the years since his occupational exposure, the employee has been hospitalized multiple times due to respiratory distress, acute exacerbations of his respiratory condition, black out spells and strokes. Dr. Khan treated the employee during one of the recurrent episodes of hospitalization in October of 2000. Dr. Khan stated on October 24, 2000, that the employee's hospitalization was "related to his workers compensation illnesses." In his December 1, 2000 letter to Dr. Hudson, Dr. Tuteur, stated that, "I think it is absolutely clear that [Employee's]

pulmonary and CNS [central nervous system] process is uniquely secondary to his workplace environment."

Dr. Tuteur also discussed the neurological component to the employee's condition on December 1, 2000. He stated that,

"secondary CNS [central nervous system] symptoms of altered mood, volatile temper, decreased short-term memory followed... Acute episodes tend to occur with stress, exercise, extremes of temperature, and inhalation of ambient tobacco smoke, diesel exhaust, cooking fumes, heavy perfume, and hair spray. Exposure to such triggers resulted in sudden breathlessness, difficulty inhaling and/or exhaling, syncope or near syncope, and when these symptoms were resolving, persistent fatigue and malaise may be present for days."

Dr. Tuteur also states that, "the CNS [central nervous system] symptoms of recent memory loss and change in personality have features of a toxic encephalopathy." He reiterated this diagnosis of toxic encephalopathy in his May 19, 2004 report. The employee cited a study reporting; that according to the National Institute of Neurological Disorders and Stroke, a Division of the National Institutes of Health, Encephalopathy is a term for any diffuse disease of the brain that alters brain function or structure. Encephalopathy may be caused by infectious agents (bacteria, virus, or prion)..., prolonged exposure to toxic elements (including solvents, drugs, radiation, paints, industrial chemicals, and certain metals)..., or lack of oxygen or blood flow to the brain. The hallmark of encephalopathy is an altered mental state. Depending on the type and severity of encephalopathy, common neurological symptoms are progressive loss of memory and cognitive ability, subtle personality changes, inability to concentrate, lethargy, and progressive loss of consciousness."

During another hospitalization on August 10, 2001, due to respiratory distress and hypoxemia, Dr. Hudson stated that, "two arterial blood gas samples drawn from different arms in the emergency department demonstrated the patient to have a P02 in the low 50s." At that time, Dr. Hudson diagnosed the employee as not only having hypersensitivity pneumonitis and occupational induced asthma, but also "depression secondary to recent disability."

The employee continued to require additional recurrent hospitalization in the intervening years. Dr. Tuteur discussed these hospitalizations for acute exacerbation in his May 19, 2004 report. He stated that,

"[i]n August of 2001, [Employee] was admitted to St. Francis Medical Center in extreme respiratory distress apparently following exposure to nonspecific irritants, possibly associated with exposure to cleaning solutions while visiting a nursing home. He presented with hypoxemic respiratory failure... Over the next several years he has had recurrent episodes not dissimilar from this, one resulting in left hemiparesis."

The employee was again hospitalized on March 23, 2004, due to left sided weakness and numbness, difficulty speaking and swallowing, and blurred vision resulting from cerebral ischemic disease and right cerebral infarct. At that time, he was noted to have a blood gas P02 of

58.4. The employee's wife warned his physicians at that time that he had a "decrease in comprehension secondary to chemicals and has short term memory problems. Also, she [said] he can get violent." Following this hospitalization, the employee and his wife discussed his situation with his physicians at the VA on July 28, 2004.

"[H]e either had a CVA [cerebral vascular accident] and/or oxygen deprivation which affected his brain. During this crisis, his blood oxygen saturation was 54%. There is still residual short-term memory loss, slurred speech, and word retrieval problems. They both report he cannot be left at home by himself as he forgets to turn off the stove and leaves things running. He reports frustration with his wife 'not answering' his questions. It seems she may be answering his questions, but he does not remember her doing what she said.... Also, when he becomes over stimulated in the environment, or he becomes frustrated his anger is kindled. He is no longer able to inhibit his anger response. He may even forget why he is angry, but cannot break the cycle or rationalize his response.... His speech was slurred. He exhibited a poverty of content in his thought processes. He exhibited word finding problems."

Employee counsel reported that a cerebral vascular accident, aka stroke, "occurs when the blood supply to part of the brain is suddenly interrupted or when a blood vessel in the brain bursts, spilling blood into the spaces surrounding brain cells. Brain cells die when they no longer receive oxygen and nutrients from the blood or there is sudden bleeding into or around the brain. The symptoms of a stroke include sudden numbness or weakness, especially on one side of the body; sudden confusion or trouble speaking or understanding speech; sudden trouble seeing in one or both eyes; sudden trouble with walking, dizziness, or loss of balance or coordination; or sudden severe headache with no known cause.

The VA physicians also noted continued problems following this March episode during his July 16, 2004 visit.

"Since I last met with him, he suffered a fairly severe CVA. Today it was noticeable in dysarthria as well as expressive aphasia that was noticeable. He has left-sided weakness that is severe in nature and overall his quality of life and level of functioning are much lower than when I first met him last March. This apparently occurred in late March, early April when he was hospitalized and treated for this stroke."

Dr. Tuteur discussed this progression of the employee's disease in his May 19, 2004 report. He specifically stated that,

"Mr. Robert Graham continues to follow the predicted clinical course of irritant induced bronchial reactivity with a parenchymal component due to his exposure to material(s) associated with the chicken house workplace. In the intervening four years he has developed some worsening fixed airflow obstruction, but maintains clinical evidence of bronchial reactivity. Not only is there no indication to repeat the methacholine challenge test, but also it would pose a medical hazard... Finally, it is quite possible that the episodes of hypoxemic respiratory failure of dramatically rapid onset are associated with

exposure to irritants that he may not even perceive as present in a given environment. On this basis it is important for him both to maintain great compliance with his medications in order to blunt such inadvertent unrecognized exposure as well as to maintain as fastidious control of his environment as possible."

When asked to describe the employee's medical condition at deposition, Dr. Tuteur stated that,

"[Employee] clearly has a lung condition, that condition is most prominently irritant-induced bronchial reactivity. This is a condition which is permanent, tends to be irreversible, tends to have a natural history of continual worsening because of continual inflammation and what's called chronic remodeling of the lung leading to fixed airways obstruction... There are two phases to this illness; one is irritant exposure, which initiated and induced bronchial reactivity, and that's phase one, i.e. the cause of the bronchial reactivity, the second is phase two, that is what other ubiquitous irritant substances potentially totally unrelated to the workplace environment serves to aggravate and cause an acute episode. So obviously there's not perfume, colognes, hairspray in most of the chicken house operation, yet having had it - the condition induced by substance or substances in that environment, then away from that environment, the symptomology is aggravated by other materials.... The ideal environment for him with respect to minimizing acute episodes of bronchial reactivity is...a bubble."

Dr. Tuteur went on to state that,

"[t]he overall tendency is that with each one of these exposures an inflammatory response occurs. The quote, healing, end quote, of that inflammatory response, tends to put down irreversible scar tissue and produce a degree of further narrowing of airways and is fixed and unresponsive to medication."

In his report dated July 1, 2004, Dr. Tuteur stated,

"it is anticipated that he continue on his current pharmaceutical regimen (approximately \$250.00 to \$300.00 per month), have regular routine follow up with his primary care physician and less frequently with a pulmonary specialist. I anticipate that from time to time he may require hospitalization for either an acute exacerbation, or an infectious process. Testing intermittently to include radiographic studies and pulmonary function studies are likely to be required as well."

The employee was evaluated by Dr. Zoffuto on February 19, 2002. Dr. Zoffuto noted that the employee was "pleasant but agitated and frustrated by his dysnomia and lack of instant recall of facts which he should have known such as places, persons, dates, etc." At that time, Dr. Zoffuto not only examined the employee but also reviewed a number of medical records. Specifically, he noted that Dr. Lee had evaluated the employee due to syncopal episodes and that Dr. Lee concluded that these episodes were most likely due to brain oxygen deficiency related to the

pulmonary hypersensitivity and the subsequent hypoxemia. In conclusion, Dr. Zoffuto opined that,

"[i]t is not possible for Mr. Graham to be anywhere without being in danger of a severe respiratory attack and loss of consciousness. It is my opinion, therefore, to a reasonable degree of medical certainty, that Mr. Graham is totally and permanently disabled by virtue of his occupational lung disease, and by the fact that he essentially does not qualify as an individual who can successfully compete in the workplace."

Mr. England evaluated the employee for purposes of vocational rehabilitation on June 19, 2001, and did an additional records review on August 27, 2007. Mr. England noted that the employee was a "very nice man who appeared quite depressed... . He had poor memory and significant word finding problems on a number of occasions during the time we spent together. I could tell he was becoming quite frustrated over inability to get out what he was trying to say."

Mr. England not only evaluated the employee in person, but also reviewed a multitude of the employee's medical records in preparation of his report. In reviewing Dr. Tuteur's records, Mr. England focused on the fact that Dr. Tuteur placed the employee under mandatory restrictions of strict environmental control and avoidance of exposure to irritants, fumes, dust, temperature extremes, perfumes, hair spray, cleaning solutions, smoke, cooking fumes, solvents, exhaust fumes, etc. and that these restrictions were permanent as Dr. Tuteur did not expect the employee to improve. Dr. Tuteur also stated that the employee was at increased susceptibility to infections such as bronchitis and pneumonia, and that such infections would be more severe than in a normal person. During the evaluation, the employee told Mr. England that Dr. Tuteur said he would likely need to stay at home to try to control his environment as per his restrictions. Mr. England verified this per Dr. Tuteur's records.

Mr. England also noted that Dr. Hudson restricted the employee from "exposure to any material from chicken houses, including dust. He thought that [Employee] would have to avoid even being in an office environment where chicken dust exposure was possible."

When asked about his current condition, the employee told Mr. England that his medications do seem to help, but "he still becomes easily frustrated, irritable, has trouble with concentration and memory and remains depressed and tired. He said that he did try to exercise as recommended by the physicians, but passed out while attempting to walk." He went on to state that,

"he is no longer able to run at all because of his lung problems and that he has almost had to completely give up both hunting and fishing altogether because of his difficulty breathing in temperature extremes,... etc. He looked like he was going to begin to cry when he talked about inability to take his children out to fish or play games with them anymore.... He can't read much now for enjoyment because of difficulty focusing his eyes and problems with concentration.... He said he simply doesn't leave home much at all because of possible exposure to fumes. He said that anything, from a cologne or perfume, to a type of cleansing agent, etc., can cause him tremendous difficulty in trying to breath. As a result, he simply stays home most of the time."

Based on all of the above, Mr. England opined that the employee was unable to successfully compete in the open labor market. He reiterated that the employee had difficulty with word finding and concentration, and stated that he "simply could not recommend him for any type of work activity at this point. I believe that he is likely to remain permanently and totally disabled."

Dr. Martinez provided an expert opinion regarding the employee's exposure to toxins in chicken houses. At the time of the generation of his report in July of 2002, he stated that he had been a practicing clinical toxicologist for 10 years at the Regional Poison Control Center in St. Louis. In that capacity, he had been involved in the treatment of more than 35,000 patients, hundreds of which involved exposure to respiratory environmental sensitizers. He had also been a university professor for more than 24 years. Dr. Martinez stated that "hypersensitivity pneumonitis is an immunological pulmonary parenchymal disease.... Once the immune system is sensitized, it is very difficult to turn off.... Mr. Graham suffers from [these] symptoms. In addition, he has reactive emotional difficulties, difficulty in concentration with cognitive deficits. This combination effectively prevents him from competing in the labor market."

The employer-insurer sent the employee to Dr. Hyers for an IME on October 15, 2001. Dr. Hyers agreed with Dr. Tuteur's "diagnosis of reactive airways disease based on the positive methacholine challenge test," but stated that he was "unable to attribute [the] process to a specific exposure, toxin or antigen" although he specifically admitted and agreed with Dr. Tuteur that the "onset of [the] problem occurred during the time of his employment in the poultry-raising industry." He went on to rate the employee at 25% of the body as a whole due to his respiratory issues. He further agreed that treatment had been appropriate and that the employee needed to "avoid excessive fumes, dusts or smoke."

Dr. Hyers saw the employee again for a second IME on December 10, 2003. At that time, Dr. Hyers administered pulmonary function tests which generated Pulmonary Function Diagnoses of "Severe Obstructive Airways Disease, Severe Restriction Possible, and Mild Diffusion Defect." However, instead of agreeing with the outcomes of his own testing, Dr. Hyers instead crossed out the diagnoses and wrote out to the side "possible air ways obstruction." When questioned about this at deposition, his only response was that he disagreed with his own testing's diagnoses.

The employer-insurer sent the employee to Ms. Kane-Thaler for the purpose of a vocational assessment on June 5, 2011. Ms. Kane-Thaler discussed the employee's course of treatment since his occupational exposure in July of 2000. The employee reported that he had suffered four strokes between 2004 and 2010, at least one of which required a stay in the ICU. He told Ms. Kane-Thaler that he often passes out. He indicated that due to his reactive airways disease and depression, he may not get out of bed all day and/or for days. At deposition, Ms. Kane-Thaler acknowledged that she observed the employee's "difficulties" due to his strokes. Specifically, she stated that he might have some difficulties returning to the work force.

"I'll describe it as memory lapses, or rather argumentative in keeping focus with questions, upset, so his staying with the trains of thought. He became upset with

something and focused - - stayed back, I'll say as an example, not literally, but you asked him something, and he focused on that, he couldn't go on and participate with the other questions, you had to wait, come back, and refocus with that."

Ms. Kane-Thaler's analysis assumed that the employee was able to "[a]pply principles of rational systems to solve practical problems and deal with a variety of concrete variables in situations where only limited standardization exists. Interpret a variety of instructions furnished in written, oral, diagrammatic, or schedule form." Even Ms. Kane-Thaler's own observations of the employee's difficulties at the time of her evaluation as noted above seems to negate this assertion.

Ms. Kane-Thaler believed and or reported that the employee was capable of, among other things, upper level math, specifically,

"Algebra: Real number systems; linear, quadratic, rational, exponential, logarithmic, angle and circular functions, and inverse functions; related algebraic solution of equations and inequalities; limits and continuity and probability and statistical inference.
Geometry: Deductive axiomatic geometry, plane and solid, and rectangular coordinates.
Shop Math: Practical application of fractions, percentages, ratio and proportion, measurement logarithms, practical algebra, geometric construction, and essentials of trigonometry."

Although the employee did state at hearing that he used to enjoy math, there is no evidence that he was ever able to perform such high level mathematical functions, much less now that he has suffered several strokes with continued memory problems.

Finally, Ms. Kane-Thaler also appeared to believe that the employee was capable of reading "a variety of novels, magazines, atlases, and encyclopedias.... Write reports and essays with proper format, punctuation, spelling and grammar, using all parts of speech.... Speak before audience with poise, voice control, and confidence, using correct English and well-modulated voice."

However, the employee testified that he has difficulty remembering how to spell and with word recall. Several of his physicians and experts have noted the same, including his physicians at the VA, Dr. Zoffuto and Mr. England. The employee also testified that he is often unable to read due to blurry vision.

No testing of any kind was performed by Ms. Kane-Thaler to confirm these statements as to the employee's alleged level of functioning with regard to reasoning, mathematics and language. Even Ms. Kane-Thaler's own observations of the employee's difficulties at the time of her evaluation do not fit with the person and/or skill set described above.

When questioned at deposition regarding the sentence in her report wherein she purported to have "contacted employers in the Greater Piedmont, Missouri area...to verify physical requirements and job duties, prior skills required, and opportunities for employment," Ms. Kane-Thaler's testimony was of concern. Her answers seemed vague. It appears that she attempted to

reach at least two employers, but no one would speak to her. When taken together, all of the above causes this Court to question Ms. Kane-Thaler's credibility.

Both the employee and his wife testified at hearing regarding activities he has been unable to perform since his occupational exposure and the progression of his pulmonary and chronic nervous system deficits. The employee provided the Court with a list of things he used to enjoy, but no longer can due to his occupational exposure. Specifically, he stated that he is unable to work due to his need to control his environment, breathing problems and concentration/memory issues. He stated that he often cannot recall facts, figures and how to perform tasks. He used to love math and "figuring out problems", but he can no longer remember how to do these things which causes him to become frustrated. This frustration tends to manifest itself as angry outbursts and violence towards those around him.

The employee and his wife discussed these anger issues with his physicians at the Veteran's Administration on multiple occasions, including on July 28, 2004. His VA physician stated that,

"he is no longer able to inhibit his anger response. He may even forget why he is angry, but cannot break the cycle or rationalize his response."

The employee testified that he is also unable to parent his children. Instead, his children have had to learn to parent him. His sons have found him unconscious in the brambles near their home, and have watched him start to cook and then totally forget about it and walk away. His wife testified that his sons "babysit" him, and that she has taken a job caring for their elderly neighbor so that she can see their house at all times just in case something were to go wrong while he is alone.

The employee used to enjoy hobbies such as running, driving, camping, swimming, and hunting and fishing on his own without his boys having to babysit him. He is no longer allowed access to firearms. He also used to enjoy playing catch with his boys, socializing and dancing with his wife, and going on vacations. He is no longer able to work outside, cut firewood, attend his sons' school functions or even sleep through the night without waking due to breathing difficulties. Some days he simply cannot bring himself to get out of bed. He cannot do laundry, cook or do the dishes because he can't be trusted to remember how to perform these simple tasks correctly. All of this causes him to feel depressed, helpless and, again, frustrated, which leads to additional violence and anger. Ms. Graham stated that often after a violent or angry outburst her husband will have no recall of the episode. He will ask why she is crying or why she is mad and then deny that he acted as he did. She also testified that the employee was never violent prior to his occupational exposure and that "this is not the man she married".

Ms. Graham was asked whether, as his primary caregiver, she believed the employee would be capable of carrying out the duties of even an entry level job. She indicated he could not do it. She testified that since his exposure her husband has become her third son...not her husband... and that he hasn't been her husband for many years. She further testified that while her sons have grown up, her husband has continued to regress. For more than a decade, she has had to run their household on her own. She has effectively been a single parent with three children. She pays the

bills, cleans the house, cooks, works and keeps track of the employee's medical care as he is unable to do any of these things.

By way of example of the employee's memory problems, the employee testified at hearing that he had gone horseback riding as recently as February of 2012. His wife testified that in actuality he hadn't been horseback riding in many years. In fact, while they do have horses on their property, the animals are in effect pets as no one rides them anymore.

The employee's family home used to be within a few miles of some chicken houses. However, he and his wife both testified that his doctors told him that was not far enough away from the source of his exposures, and that the continual additional exposure, albeit several miles down the road, was causing him to have recurrent problems. Therefore, based on his doctors' recommendations, the family moved away from their extended family, support system and home to a new home in the woods outside of Piedmont.

The employee testified that the fresh air did seem to help at first, and that they had an addition built onto the house they purchased which he deems his "bunker". It is a concrete room attached to the main house, but totally self-contained...even having its own separate HVAC system so that he can keep the room at a constant 65 degrees and not breathe re-circulated cooking or cleaning fumes from the rest of the house. The employee testified that he remains in his "bunker" much of the time, until forced to leave or go "stir crazy", at which time he walks around his property. Ms. Graham requires the employee to take his cell phone with him when he goes on walks because it contains a GPS so that his family can find him if he gets lost or suffers another episode. From time to time if he thinks his wife won't "catch him", the employee will drive around their property. Ms. Graham hasn't allowed him to drive since he forgot to take his Jeep out of gear and the Jeep hit the barn.

Both the employee and his wife testified that anything can cause him to have one of his spells. Some irritants are things you would expect: perfume, hairspray, cologne, bleach or other cleaners, gas or paint fumes, but some seem totally random, rubbing alcohol and saline, the "plastic-y" smell of trash bags in the hospital, the smell of loose leaf paper as a new package is opened. They both agreed that they never know what will set him off. When that happens, he starts rubbing his face and then very quickly begins to lose consciousness. His family has to then physically remove him from the area of the irritant because he is not aware enough to remove himself. When he "comes to", he has no memory of the episode and is very tired and weak. The attending nurse at St. Francis Medical Center actually witnessed one such episode after the employee underwent a CT scan on August 8, 2001. She stated that,

"after coming out of the CT machine, he appeared to be rather drowsy and had intermittent fluttering of his eyelids.... During that time, he was breathing about 10 times per minutes. He was thought to be in that state for about five minutes. When he came to, he was mildly confused and reported that he smelled burned candle."

Based on all of the evidence in this case, the Court finds the testimony and opinions of Mr. England and Dr. Tuteur, Dr. Khan, Dr. Martinez and Dr. Zoffuto, as well as the testimony of the

employee and his wife, to be very persuasive and credible. Their testimony is supported by the medical records. The Court found the testimony and opinions of Dr. Tuteur especially helpful in understanding the employee's condition, its causes, and the disabilities that have affected him. The Court notes that Dr. Hyers agrees with some of the opinions of Dr. Tuteur, except as to causation. The Court feels that the evidence provided by the employee is persuasive and overwhelmingly credible and further finds that the testimony of Ms. Kane-Thaler and Dr. Hyers lacks credibility and therefore are not persuasive for the reasons previously set forth.

The Court finds that, based upon the totality of the evidence submitted at hearing, no employer could reasonably be expected to hire the employee in his present condition which developed as a result of his accident and exposure of July 5, 2000, and has continued since that date. The Court therefore finds that the employee is permanently and totally disabled and unemployable in the open labor market.

The analysis remains as to whether this is as a result of the last injury alone, which would make the employer-insurer responsible for permanent total disability benefits, or if there exists Second Injury Fund liability.

Section 287.220, RSMo. sets forth the law regarding liability of both employers and the Second Injury Fund for permanent disabilities. Specifically, §287.220.1 states in part as follows: "After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for."

Both the statute and case law are clear that the liability of the employer-insurer in and of itself must first be determined before even considering any possible liability of the Second Injury Fund. "First, the degree of disability from the last injury alone must be determined." **Ball-Sawyers v. Blue Springs School District 286 S.W.3d 247, 254 (Mo.App.2009) citing Mihalevich Concrete Constr. v. Davidson, 223 S.W.3d 747, 754 (Mo.App.2007).** "Pre-existing disabilities are not relevant until this determination is made. **Id.** If the last injury standing alone rendered [Employee] PTD, then the Second Injury Fund has no liability and the [Employer] is responsible for all of the compensation. " **Id.**, 286 S.W.3d at 254.

"It is...necessary that employee's last injury be closely evaluated and scrutinized to determine if it alone results in permanent total disability." **ABB Power T & D Co. v. Kempker, 236 S.W.3d 43, 50 (Mo.App.W.D. 2007).** The Court has very closely examined the extensive amount of evidence in this case. The Court has reviewed the records and has considered the effects of the injury of July 5, 2000 on the employee. The Court has considered the pre-existing injuries that the employee had prior to his accident. The Court has carefully evaluated and balanced the evidence and the law in this case. Both the employee and his wife testified at length regarding the fact that he has difficulty even functioning on a daily basis because of his need to control his

environment, breathing problems and concentration/memory issues, all of which are due to the last injury alone. The medical records setting forth the employee's treatment throughout the years for both his lung condition and his resultant central nervous system deficits also supports this testimony.

In addition, as was set forth above, Dr. Martinez and Dr. Zoffuto both stated that the employee was unemployable in the open labor market due to those same issues, again, all of which are due to the last injury alone. Specifically, Dr. Martinez stated that, "hypersensitivity pneumonitis is an immunological pulmonary parenchymal disease.... Once the immune system is sensitized, it is very difficult to turn off.... Mr. Graham suffers from [these] symptoms. In addition, he has reactive emotional difficulties, difficulty in concentration with cognitive deficits. This combination effectively prevents him from competing in the labor market."

Dr. Tuteur stated that the employee's lung condition "...is permanent, tends to be irreversible, tends to have a natural history of continual worsening because of continual inflammation and what's called chronic remodeling of the lung leading to fixed airways obstruction.... The ideal environment for him with respect to minimizing acute episodes of bronchial reactivity is...a bubble." Dr. Tuteur also stated, "I think it is absolutely clear that [Employee's] pulmonary and CNS [central nervous system] process is uniquely secondary to his workplace environment." Therefore, it is clear that Dr. Tuteur agrees with Dr. Martinez that both the employee's lung condition and the resultant central nervous system deficits are due to the last injury alone.

Finally, Dr. Zoffuto opined that,

"[i]t is not possible for Mr. Graham to be anywhere without being in danger of a severe respiratory attack and loss of consciousness. It is my opinion, therefore, to a reasonable degree of medical certainty, that Mr. Graham is totally and permanently disabled by virtue of his occupational lung disease, and by the fact that he essentially does not qualify as an individual who can successfully compete in the workplace."

When you consider all of the evidence it is abundantly clear that the exposure to chemicals and chicken waste with resultant respiratory and nervous system disorders arose from the last injury alone and has caused the employee's permanent and total disability. Any evidence to the contrary is just not credible. The Court therefore finds that the employee is permanently and totally disabled and unable to compete in the open labor market based on the last injury alone. The Court finds that the employee is not permanently and totally disabled due to any combination of disabilities as the employer-insurer argued.

The Court rules that the employee reached maximum medical improvement as of February 19, 2002. Subject to the credits applied due to the employee's settlement with Tyson Foods, the employer-insurer and/or MIGA shall pay to the employee permanent total disability payments from February 19, 2002 to July 3, 2013 at rate of \$378.40 per week for as long as allowed by law. By the Court's computation, if there were no subrogation matters to consider, the employee would be owed \$224,623.20 as permanent total disability compensation from February 19, 2002 to July 3, 2013, the date that this award was written.

These payments for permanent total disability shall continue for the remainder of the employee's lifetime or until suspended if the employee is restored to his regular work or its equivalent as provided in Section 287.200 RSMo. Section 287.200.3 RSMo. mandates that the Division "shall keep the file open in the case during the lifetime of any injured employee who has received an award of permanent total disability." Based on this section the Division and the Commission should maintain an open file for purposes of reviewing the status of the employee's permanent disability pursuant to Section 287.200 RSMo.

6. Liability of the employer-insurer for permanent partial disability.

The Court has already found that the employee is permanently and totally disabled as a result of his occupational disease while working for LATCO. Any issue regarding permanent partial disability is denied, is moot and need not be addressed by the Court.

7. Liability of the Second Injury Fund for permanent partial or permanent total disability.

The Court has already found that the employee is permanently and totally disabled as a result of his occupational disease while working for LATCO. The Court found that said permanent partial disability occurred as a result of the last accident alone and did not occur due to a combination of the employee's primary and pre-existing disabilities.

Based on the Court's findings any issues regarding liability of the Second Injury Fund for either permanent partial or permanent total disability are denied, are moot and need not be further addressed by the Court.

8. Liability under Schoemehl v. Treasury of the State of Missouri, 217 S.W. 3d 900 (Mo. Banc 2007).

The evidence is clear and unrefuted that the employee's wife, Gale and his sons, Seth and Caleb were living with the employee and dependent on the employee on July 5, 2000 and thereafter.

"Under **Schoemehl**, decided on March 20, 2007, the surviving dependent of an injured worker who has been awarded permanent total disability benefits is entitled to the unpaid, unaccrued balance of benefits for the duration of the dependent's life." **Tilley v. USF Holland Inc.**, 325 S.W.3d 487, 494, (Mo.App. E.D. 2010).

The employee is requesting a determination of dependency. Under Section 287.240 RSMo., a dependent is defined as a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his wages at the time of the injury. Under Section 287.240 RSMo., a wife upon a husband with whom she lives or who is legally liable for her support is conclusively presumed to be totally dependent for support. Further, 287.240(4) goes on to state that a wife and children under the age of 18 "shall be conclusively presumed" to be total dependents of an employee.

The Court finds that the employee's wife, Gale Graham and the employee's two sons, Seth and Caleb were the employee's conclusively presumed total dependents at the time of the employee's accident and injury and have remained in the same capacity since then.

The employee is requesting a contingent award for his dependents. On September 4, 2012, the Western District Court of Appeals in **White v. University of Missouri, Kansas City**, 375 S.W. 3d 908 (Mo. App. W.D. 2012) held that the adjudication of the spouse's claim to entitlement to successor benefits is not ripe. The Court noted that the contingencies standing between Ms. White and qualification for successor benefits include the fact that she could predecease her husband and the two could divorce. The Court held that Ms. White has no currently enforceable claim for benefits against the Second Injury Fund; and her claim for benefits remain contingent.

Based on the ruling in **White**, the Court finds that at the time of the employee's accident his wife and two sons were living as a family unit, however a final ruling on this issue is not ripe and shall not be ruled on.

9 and 10. Subrogation rights of the employer-insurer/Legion, the Second Injury Fund and MIGA

In review, the employee was an employee of LATCO when he was injured. Legion was the workers' compensation insurer that insured LATCO up until the time Legion became bankrupt. Tyson Foods is the third party tortfeasor that settled their liability for the injury/disability that they caused to the employee. Tyson Foods is the entity that paid the employee and his wife \$730,000.00 in settlement of the third party case. MIGA, in place of Legion, on behalf of LATCO, is the entity that is now responsible to pay the employee workers' compensation benefits due to the insolvency of Legion. The Second Injury Fund has not paid any benefits in this case. The medical bills that were paid in this case were paid by Legion. The Court has found that Legion paid \$51,363.75 in medical bills. Sections 287.150, 375.772, and 375.775 RSMo. provide the statutory guidance for subrogation rights for Legion, MIGA and the Second Injury Fund.

The Court finds that the Second Injury Fund is not entitled to any subrogation interests in this case.

It is the Court's desire to provide LATCO/Legion and or MIGA with full subrogation rights under Section 287.150 RSMo. due to the settlement of the employee's third party claim with Tyson Foods. The employee filed civil suit against Tyson Foods as a third party responsible for his injuries. The employee testified that he agreed to settle his third-party claim against Tyson Foods. He received a check on September 26, 2005. He testified that he recognized his signature on the settlement check issued from Tyson Foods, that he received the settlement money, and that he used settlement money to pay off bills. Ms. Graham testified that they had received the money as well and spent the settlement money to purchase a new home in Piedmont, Missouri. Tyson attorney, Brian Burns, testified by deposition that the case had settled, and records submitted by the employee show that the civil claim against Tyson was dismissed with prejudice. The case settled for \$730,000.00, with attorney's fees and expenses of \$312,134.93, per affidavit of Michael Ponder.

Section 287.150 RSMo. provides that "Where a third person is liable to the employee or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employee or to the dependents against such third person . . ."

Ms. Petraborg pointed out that MIGA assumed responsibility for the obligations of the employer LATCO, as insured by Legion upon Legion's bankruptcy in April 2002. One of MIGA's authorizing statutes, Section 375.775 RSMo., provides at paragraph 7 that, "The association shall be deemed the insurer only to the extent of its obligations on the covered claims and to such extent, subject to the limitations provided in sections 375.771 to 375.779, shall have all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent, including, but not limited to, the right to pursue and retain salvage and subrogation recoverable on paid covered claim obligations." This language contemplates and expressly authorizes MIGA to pursue rights on behalf of an insolvent insurer, including a right of subrogation.

Ms. Petraborg cited **Mikel v. Pott Industries/St. Louis Ship, et al.**, 910 S.W.2d 323 (Mo. App. E.D. 1995) where MIGA argued that it was not properly a party to a workers' compensation case because it was not specifically named in the claim. The court rejected MIGA's argument, noting that while MIGA is not technically an insurer, "it is 'deemed the insurer' on covered claims and has all the obligations of the insolvent insurer as if the insurer had not become insolvent." Ms. Petraborg argues that the employee has presented no argument how section 287.150 RSMo., which refers to the subrogation of a claim against a third person, somehow falls outside the scope of MIGA's authority to pursue a subrogation claim of an insolvent insurer. Ms. Petraborg also argued that she was also representing Legion's interest in any claim for subrogation credit in this matter. She indicated that to the extent there is any question about MIGA's legal standing to claim a subrogation credit, that Legion's claim for a subrogation credit was also presented and represented by Ms. Petraborg, and that the amount of the credit should be appropriately applied to the benefits otherwise due the employee under this award.

Mr. Rau argues that MIGA is not entitled to any subrogation rights for medical bills paid by Legion under Section 375.772 as that section defines "covered claim" as "an unpaid claim". He cites **Tillman v. Cam's Trucking**, 20 S.W.3d 579 (Mo. App. S.D. 2000) as stating that a "covered claim" shall not include any amount...due any...insurer...as subrogation recoveries or otherwise.

It is clear that up to this point MIGA has paid nothing to the employee for workers' compensation benefits. Legion paid bills before their insolvency. The employee sought and received medical care from VA in the interim, but no evidence was submitted to the Court regarding the costs of any medical care that was provided by the VA. The Court previously addressed that issue.

It can reasonably be argued that the authorities cited by the parties in support of their positions appear to be somewhat in conflict. The Court delayed the preparation of the award in this case in order to facilitate a settlement by the parties. At the parties' request, the Court reviewed the evidence and orally advised the parties of the Court's intended ruling. The Court announced that

it intended to give MIGA all subrogation rights allowed by law. Through no one's fault, the parties were not able to reach a settlement.

At trial, the Court was informed that Ms. Petraborg was representing LATCO, Legion and MIGA. After reading Section 287.150 RSMo. and the cases cited by the parties, the Court believes that Section 287.150 provides that MIGA stands in the shoes of Legion. The Court notes that some of the cases cited can be distinguished as they dealt with a situation where the insurer of the third party tortfeasor became insolvent, that would be Tyson Foods in this case. In this case it is the insurance company/Legion that provided workers' compensation coverage to LATCO, that became insolvent. The Court therefore finds that MIGA is entitled to the same subrogation rights that LATCO/Legion would have been entitled to had Legion not become insolvent.

By its own terms, the employer's subrogation interest is only triggered by Section 287.150 RSMo. when settlement is effected. " 'Effecting recovery', within meaning of workers' compensation subrogation statute addressing distribution of recovery, does not equal negotiating settlement; the word effecting means accomplishing, bringing to pass, completing, producing, carrying to completion, or consummating." **Bi-State Development Agency v. Gurley**, 101 S.W.3d 344 (Mo. App. E.D. 2003). The settlement is "effected" when the "moneys were actually paid over in settlement of the third party action . ." **Liberty Mutual Insurance Company v. Borsari Tank Corp.**, 248 F.2d 277 (2nd Cir. 1957)(interpreting § 287.150).

In this case, there is no question from the testimony offered by the employee, the employee's wife and Mr. Ponder that the civil claim has been irrevocably dismissed, and the money transferred to the employee for his use in buying a new home, among other things. Any argument that the settlement is somehow sheltered from the employer's subrogation interest because it was transferred to a trust flagrantly disregards Missouri law, which states to the contrary that settlement of a third party claim creates an express trust "in favor of the employer." See, e.g., **Missouri Highway and Transportation Commission v. Merritt**, 204 S.W.3d 278, 282 (Mo. App. 2006).

When a recovery is made against a third party, the distribution of the proceeds of that recovery is governed in a formula set forth in **Ruediger v. Kallmeyer Brothers Service**, 501, S.W. 2d 56 (Mo. banc 1973). The rule is set forth as follows:

- The expenses of the third-party litigation are first deducted from the third party recovery.
- The balance is apportioned in the same ratio that the amount paid by the employer at the time of the third-party recovery bears to the total amount recovered from the third party.
- The amount due each is paid.
- The amount paid the employee is treated as an advance payment on account of any future installments of compensation.
- The employee is entitled to future compensation benefits in the event that the amount paid to the employee as an advance is exhausted.

Using the **Ruediger** formula, the first step is to deduct expenses of the third-party litigation from the third party recovery. The employee settled his third-party claim, which included a claim for

loss of consortium asserted by his wife, for a total settlement of \$730,000.00. The employee maintains that the employee's wife's claim for loss of consortium should reduce any credit for subrogation. This position is not supported by Missouri law.

In **Ryder Integrated Logistics, Inc. v. Royse**, the court considered whether the employee could properly assert a credit for the loss of consortium aspect of his civil claim. The court noted that the spouse "did not receive a separate check for her claim of loss of consortium claim nor was there mention of her recovery amount as a percentage or portion of the overall settlement with defendant. **Ryder Integrated Logistics, Inc. v. Royse**, 125 F.Supp. 2d 375, 382 (E.D. Mo. 2000). For these reasons, the court held a "unilateral declaration by [a] claimant's attorney' stating that a loss of consortium claim was allocated as part of an overall settlement of a third party claim is insufficient to insulate that claim from a subrogation action."

The settlement agreement in this case provides no percentage allocation attributable to the loss of consortium claim; no separate check was cut to the employee's wife, and nothing more than unilateral assertion by the employee's attorney has been offered in this case. For these reasons, the Court is not providing a deduction for loss of consortium and the full \$730,000.00 is available for the calculation of the employer's subrogation credit.

When the attorneys' fees and expenses of \$312,134.93 are deducted from the settlement of \$730,000.00, a total of \$417,865.07 remains. The employer-insurer's initial credit due is that amount (\$417,865.07) times the ratio of the amount paid by the employer-insurer divided by the total settlement ($\$72,138.55/\$730,000.00$), or 0.0988193 (to eight decimals, per **Kerperien v. Lumbermen's Mutual Casually Company**, 100 S.W. 3d. 778 (Mo. App. 2003)), which equals MIGA's subrogation credit on amounts previously paid by the employer-insurer, a total of \$41,293.40.

Since the evidence supports an award of permanent total disability against LATCO, Legion and/or MIGA, the above credit would fully apply to that liability. The balance of the amount paid to the employee (\$417,865.07-\$41,293.40, or \$376,571.67) is treated as advance payment on account of any future installments of compensation. Permanent total disability exposure to date at the time of this award is \$224,623.20 (February 19, 2002 to July 3, 2013) leaving a credit remaining to the employer-insurer of \$151,948.47 toward any liability they may owe including permanent total disability compensation.

The Court orders the employer-insurer to begin paying the employee \$378.40 per week as permanent total disability compensation at such time that any credit that may have accrued to the employer-insurer has expired.

11. Attorney lien.

Jay Yorke filed an attorney's lien for \$5,840.00 including the attorney's lien and costs. At trial the employee's counsel indicated that the lien would be paid by the employee. Based on this statement, the Court orders that Mr. Rau pay \$5,840.00 to Jay Yorke in satisfaction of this lien from the fees that Mr. Rau receives as a result of this case.

ATTORNEY'S FEE:

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

INTEREST:

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

Made by:

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