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

Injury No.: 03-020144

Employee: Matthew Held

Employer: City of St. Louis

Insurer: Self-Insured

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

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated September 27, 2013. The award and decision of Administrative Law Judge John K. Ottenad, issued September 27, 2013, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 10th day of April 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

# AWARD

Employee: Matthew Held

Injury No.: 03-020144

Dependents: N/A

Employer: City of St. Louis

Additional Party: Second Injury Fund

Insurer: Self-Insured C/O
Cannon Cochran Management Services

Before the
**Division of Workers' Compensation**
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Hearing Date: September 27, 2012 & October 9, 2012
Record Closed October 27, 2012

Checked by: JKO

## FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes

2. Was the injury or occupational disease compensable under Chapter 287? Yes

3. Was there an accident or incident of occupational disease under the Law? Yes

4. Date of accident or onset of occupational disease: February 2, 2003

5. State location where accident occurred or occupational disease was contracted: St. Louis City

6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes

7. Did employer receive proper notice? Yes

8. Did accident or occupational disease arise out of and in the course of the employment? Yes

9. Was claim for compensation filed within time required by Law? Yes

10. Was employer insured by above insurer? Yes

11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was employed as a firefighter for Employer and injured his right ankle (right lower extremity), low back and body as a whole when he was buried under bricks, stone and hot roof material as the porch of a burning house collapsed on him.

12. Did accident or occupational disease cause death? No Date of death? N/A

13. Part(s) of body injured by accident or occupational disease: Right Ankle, Low Back and Body as a Whole

14. Nature and extent of any permanent disability: Permanent total disability against Employer/Insurer from the injury in this accident

15. Compensation paid to-date for temporary disability: $93,696.68

16. Value necessary medical aid paid to date by employer/insurer? $239,279.74

Employee: Matthew Held Injury No.: 03-020144

17. Value necessary medical aid not furnished by employer/insurer? (alleged) $25,473.47

18. Employee's average weekly wages: $941.92

19. Weekly compensation rate: $627.88 for TTD/$340.12 for PPD

20. Method wages computation: By agreement (stipulation) of the parties

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

| | |
|---|---|
| Past medical bills | $25,400.57 |
| Unpaid/underpaid temporary total disability benefits from 06/01/05-07/21/10 | $74,575.16 |
| $627.88 per week starting 07/22/10, subject to review and modification by law | |

22. Second Injury Fund liability:

| | |
|---|---|
| None | $0.00 |

**TOTAL: $99,975.73 THROUGH 07/21/10 AND $627.88 PER WEEK STARTING 07/22/10, SUBJECT TO REVIEW AND MODIFICATION BY LAW**

23. Future requirements awarded: Continued and ongoing weekly benefits, as described above, and future medical care for Claimant's right ankle, low back and psychiatric conditions, including but not limited to chronic pain management, medications (pain and psychological/psychiatric), medication management (doctors' visits), psychotherapy, and any other testing, treatment or evaluation that the treating doctors deem necessary to cure and relieve Claimant of the effects of the February 2, 2003 injury. To prevent the health and recovery of Claimant from being further endangered in this case, Employer is further directed to return Claimant to Dr. Anthony Guarino for ongoing pain management and to Dr. Gregg Bassett for ongoing psychiatric therapy and medications, as well as any other treatment they may deem reasonable and necessary to cure and relieve Claimant of the effects of the February 2, 2003 work injury.

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

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

# FINDINGS OF FACT and RULINGS OF LAW:

| | | |
|---|---|---|
| Employee: | Matthew Held | Injury No.: 03-020144 |
| Dependents: | N/A | Before the **Division of Workers' Compensation** Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri |
| Employer: | City of St. Louis | |
| Additional Party: | Second Injury Fund | |
| Insurer: | Self-Insured C/O Cannon Cochran Management Services | Checked by: JKO |

On September 27, 2012, the employee, Matthew Held, appeared in person and by his attorney, Mr. Christopher A. Wagner, for a hearing for a final award on his claim against the employer, the City of St. Louis, which is duly self-insured under the statute C/O Cannon Cochran Management Services, and the Second Injury Fund. The employer, the City of St. Louis, which is duly self-insured under the statute C/O Cannon Cochran Management Services, was represented at the hearing by its attorney, Mr. Thomas A. Goeddel. The Second Injury Fund was represented at the hearing by its attorney, Assistant Attorney General Rodney J. Campbell.

To allow the parties time to determine if there would be a further stipulation as to the average weekly wage and rates of compensation in this matter and to also prepare and file their proposed awards or briefs in this matter, the record did not technically close until October 27, 2012. Pursuant to an e-mail, received from the parties on October 5, 2012 and scanned into the Division's file in this matter, the parties agreed on an average weekly wage of $941.92, resulting in appropriate rates of compensation of $627.88 for total disability benefits and $340.12 for permanent partial disability benefits. This additional stipulation was made a part of the record on October 9, 2012. The record was, then, closed on October 27, 2012 and the briefs were submitted by the parties on or before that date.

Along with this Claim [Injury Number 03-020144, with a date of injury of February 2, 2003, alleging injury to the right ankle, low back and body as a whole], Claimant also tried his other open companion claim at the same time. Injury 02-137196, with a date of injury of December 9, 2002, alleges injury to the right elbow. The only issue in that matter was the liability of the Second Injury Fund. At the time of trial, on the record, Claimant voluntarily dismissed his Second Injury Fund Claim in 02-137196, bringing closure to that matter. Separate Orders of Dismissal have been issued for 02-137196 with this Award being issued solely to bring resolution to 03-020144.

At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of fact and rulings of law, are set forth below as follows:

**STIPULATIONS**:

1) On or about February 2, 2003, Matthew Held (Claimant) sustained an accidental injury arising out of and in the course of his employment that resulted in injury to Claimant.

2) Claimant was an employee of the City of St. Louis (Employer).

3) Venue is proper in the City of St. Louis.

4) Employer received proper notice.

5) The Claim was filed within the time prescribed by the law.

6) At the relevant time, Claimant earned an average weekly wage of $941.92, resulting in applicable rates of compensation of $627.88 for total disability benefits and $340.12 for permanent partial disability (PPD) benefits.

7) Employer paid temporary total disability (TTD) benefits in the amount of $93,696.68, representing a period of time of 154 weeks at a rate of $608.42.

8) Employer paid medical benefits totaling $239,279.74.

**ISSUES:**

1) On what date did Claimant reach maximum medical improvement from his injury on February 2, 2003?

2) Is Employer responsible for the payment of past medical expenses in an amount to be determined?

3) Is Claimant entitled to future medical care on account of this accidental injury at work on February 2, 2003?

4) Is Claimant entitled to a payment for past total disability benefits for any amount underpaid based on the rate?

5) What is the nature and extent of Claimant’s permanent partial and/or permanent total disability attributable to this injury?

6) What is the liability, if any, of the Second Injury Fund?

**EXHIBITS:**

The following exhibits were admitted into evidence:

***Employee Exhibits:***

A. Deposition of Dr. Thomas Musich, with attachments, dated March 5, 2012
B. Deposition of Dr. Gregg Bassett, with attachments, dated May 11, 2012
C. Deposition of Ms. Delores Gonzalez, with attachments, dated April 11, 2012
D. Medical treatment records of:
    St. Louis University Hospital
    Concentra Medical Centers (Dr. Dennis McGraw)
    Concentra Medical Centers (physical therapy records)
    Orthopedic Specialists (Dr. Joseph Ritchie)
    Barnes-Jewish Hospital
    Orthopaedic Surgery at Washington University in St. Louis (Dr. Joseph Borrelli)
    PRORehab
    Dr. Ravi Yadava
    Aquatic Fitness, Inc.
    West Physical Therapy
    Barnes-Jewish West County Hospital (Dr. Anthony Guarino)
    Missouri Bone & Joint Center (Dr. Gary Schmidt)
    Neurological & Electrodiagnostic Institute, Inc. (Dr. Daniel Phillips)
    Western Anesthesiology Associates, Incorporated (Dr. Thomas Johans)
    Barnes-Jewish West County Hospital (Dr. Bakul Dave)
    Aquatic Fitness, Inc.
    Kirkwood Diagnostic & Orthopedic Associates, LLC (Dr. Steven Stahle)
    Creve Coeur Surgery Center (Dr. Steven Stahle)
    St. Louis Orthopedic Institute, Inc. (Dr. Robert Tucker)
    PRORehab (Functional Capacity Evaluation of September 7, 2004)
    PRORehab (physical therapy)
    The Work Center, Inc. (Functional Capacity Evaluation of December 20, 2004)
    Orthopedic Specialists (Dr. Joseph Ritchie)
    Aquatic Fitness, Inc.
    Surgery Center of Kirkwood dated October 6, 2005 (Dr. Joseph Ritchie)
    Surgery Center of Kirkwood dated December 15, 2005 (Dr. Joseph Ritchie)
    Aquatic Fitness, Inc.
    PRORehab
    Pain Treatment Center, Inc. (Dr. John Graham)
    Washington University Physicians (Dr. Beverly Field)
    Washington University Physicians (Dr. Susan Mackinnon)
    Barnes-Jewish Hospital (Dr. Susan Mackinnon)
    The Rehabilitation Institute of St. Louis
    PRORehab (Functional Capacity Evaluation of March 21, 2011)
E. Medical bills
    Washington University Physician Services
        Dr. Anthony Guarino and Dr. Beverly Field

Allied Behavioral Consultants, Inc. (Dr. Gregg Bassett)
Washington University Physicians (Dr. Susan Mackinnon)
Barnes-Jewish Hospital
Walgreens

F. Stipulation for Compromise Settlement in Injury Number 02-137196 (Date of Injury of December 9, 2002) between Claimant and Employer
G. Stipulation for Compromise Settlement in Injury Number 98-151362 (Date of Injury of December 6, 1998) between Claimant and Employer
H. Stipulation for Compromise Settlement in Injury Number 97-452352 (Date of Injury of October 6, 1997) between Claimant and Employer
I. Correspondence from Glenn C. Sanders at CCMSI to Claimant dated March 25, 2008
J. *Objections sustained—Exhibit not admitted into evidence in this case*
K. *Objections sustained—Exhibit not admitted into evidence in this case*

***Employer/Insurer Exhibits:***

1. Deposition of Dr. William Kostman, with attachments, dated March 21, 2012
2. Deposition of Mr. Michael McKee, with attachments, dated June 12, 2012

***Second Injury Fund Exhibits:***

*Nothing offered or admitted at the time of trial*

***Notes:*** *1) Unless otherwise specifically noted below, any objections contained in the depositions are overruled and the testimony fully admitted into evidence in this case.*

*2) Any stray markings or writing on the Exhibits in evidence in this case were present on those Exhibits when they were admitted into evidence on September 27, 2012. No additional markings have been made since their admission on that date.*

**FINDINGS OF FACT:**

Based on a comprehensive review of the substantial and competent evidence, including Claimant's testimony, the expert medical opinions and depositions, the vocational opinions and depositions, the medical treatment records and bills, and the other documentary evidence, as well as my personal observations of Claimant at hearing, I find:

1) **Claimant** is a 45-year-old, currently unemployed individual, who was working for the City of St. Louis (Employer) as a firefighter on or about February 2, 2003. Claimant was employed by Employer in this capacity from April 1992 until approximately June 2005. He has not worked at all since his injury on February 2, 2003, but he continued to receive his regular salary from Employer until June 2005, despite not actually performing any work for them during that time. In June 2005, he was retired by the Fire Department with service-connected disability, indicating that he could no longer

perform his job as a firefighter. In addition to his disability pension from the City of St. Louis, he also receives Social Security disability benefits.

2) Claimant graduated from St. Mary's High School in St. Louis, Missouri in 1985. He took one year of classes at Meramec Community College. Claimant attended EMS/St. Louis City Fire Department Academy for fire training from 1994 to 1995. He also attended ongoing HAZMAT training through the St. Louis Fire Department. He has had no other education or training at colleges, universities or technical schools.

3) Prior to working as a firefighter for Employer, Claimant worked as a parking lot attendant, at Sears, cutting down trees and performing landscaping, as a stagehand, a plumber and doing work with asphalt. He explained that he also had secondary work while he was employed by Employer. He said that as a firefighter he would work a 24 hour schedule, on duty for 24 hours, and, then, off duty for 24 hours. It was during his off-duty days that he performed his secondary jobs. These jobs included landscaping, cutting trees, plumbing, work as a stagehand and performing fire watch during construction.

4) Claimant's job as a firefighter involved controlling and extinguishing fires, protecting life and property, maintaining equipment, and responding to fire alarms and other emergency calls. He would help position and/or climb ladders and use water hoses or chemicals to extinguish fires. He sometimes created openings in buildings for ventilation or entrance using axes, chisels, crowbars, electric saws, core cutters and other power equipment. In addition, he would assist removing individuals from burning structures and administered first aid and artificial respiration to injured persons and those overcome by fire and smoke.

5) In terms of past medical history, Claimant had an arthroscopy of the left knee in 1984, while in high school. He testified that he had no ongoing problems with his left knee after that surgery, up through his injuries in 2002 and 2003, except perhaps an occasional twinge or some soreness. He said that his left knee did not hold him back from doing anything that he wanted to do.

6) On October 6, 1997, Claimant testified that he stepped off a truck and rolled his left ankle. He said that he sprained it and was conservatively treated with ice and physical therapy. He was released back to full-duty work and testified that he had no real ongoing complaints with his left ankle up to the injuries in 2002 and 2003. Claimant and Employer resolved this case, Injury Number 97-452352, by **Stipulation for Compromise Settlement** (Exhibit H) for the payment of $4,315.51, or 10% permanent partial disability of the left ankle. The Stipulation was approved by Administrative Law Judge Matthew Vacca on January 4, 1999.

7) Claimant was next injured on the job on December 6, 1998, when he fell through the floor while fighting a fire. He said that he received some physical therapy for his knee. As noted above, he had no ongoing problems with his left knee, except perhaps an occasional twinge or some soreness, up through his injuries in 2002 and 2003. Claimant and Employer resolved this case, Injury Number 98-151362, by **Stipulation**

**for Compromise Settlement** (Exhibit G) for the payment of $3,536.76, or 7.5% permanent partial disability of the left knee. The Stipulation was approved by Legal Advisor Kathleen M. Hart on May 15, 2000.

8) On December 9, 2002, Claimant was again injured while working as a firefighter for Employer, when his foot slipped on the step while getting onto a fire truck apparatus and he fell, hurting his right elbow.

9) He received initial treatment on that date at **St. Louis University Hospital** (Exhibit D), where he was diagnosed with a right elbow contusion. He followed up at **Concentra Medical Centers** (Exhibit D) for doctors' visits and physical therapy. Despite the treatment and a repeated diagnosis of a right elbow contusion, Claimant continued to complain of considerable radial head pain and elbow stiffness, so he was referred to **Dr. Joseph Ritchie** (Exhibit D), who first examined him on January 10, 2003. Dr. Ritchie diagnosed traumatic synovitis, possible lateral epicondylitis or extensor tear, and possible intraarticular chondral loose body, for which he recommended an MRI to see if there is an operative lesion. The MRI of the right elbow taken on January 14, 2003 revealed a partial tear at the common extensor origin. On January 31, 2003, Dr. Ritchie recommended surgery to repair the extensor tendon tear, which he causally related to the December 9, 2002 work injury.

10) Claimant testified that although the surgery was scheduled for February 6, 2003, it did not happen at that time because he was injured again on the job.

11) On February 2, 2003, Claimant was fighting a fire at a three-story brick residence. He said that there was heavy fire on the second floor and he had orders to get to the third floor, but he could not make it. The Chief ordered them to pull out of the building. He and his partner came out of the building onto the porch, when a window collapsed, causing bricks to fall down and the roof of the porch collapsed on them and buried them. Claimant and his partner were buried under bricks, stone and hot roof material. Claimant testified that other firefighters dug him out and he was taken by ambulance to Barnes Hospital. He said that he woke up in the ICU. He was treated with a breathing tube and pain medications. He said that he was released after a couple of days and then began a course of treatment with Dr. Borrelli.

12) Claimant received initial medical treatment for this injury at **Barnes-Jewish Hospital** (Exhibit D) on February 2, 2003. The record contained a consistent history of the injury at work when he was working in a burning house and the roof collapsed on him. Claimant received care from **Dr. Bradley Freeman** (Exhibit D) for smoke inhalation and a right ankle fracture/dislocation. Dr. Freeman had X-rays performed of the pelvis and right ankle. X-ray of the pelvis revealed no acute fracture. X-ray of the right ankle revealed a posterior dislocation of the right ankle with possible fracture of the posterior malleolus. Claimant had a closed reduction and casting of the right ankle to treat the bimalleolar fracture.

13) Claimant was discharged from the hospital on February 4, 2003 and followed up with **Dr. Joseph Borrelli** (Exhibit D) on February 12, 2003. Claimant reported severe,

aching pain in the right ankle. Dr. Borrelli diagnosed an ankle dislocation and placed Claimant in a long leg non-weightbearing cast. He recommended continued conservative treatment for the ankle. In addition to right ankle complaints, the records also note complaints to the left knee and left shoulder, which were treated conservatively as well. The right leg cast was removed by Dr. Borrelli on March 19, 2003 and X-rays of the right ankle showed no subluxation of the talus. Claimant was started on a course of physical therapy at **PRORehab** (Exhibit D) that ran from March 20, 2003 through June 30, 2003. He also continued to follow up with Dr. Borrelli through July 2, 2003. Both Dr. Borrelli's and the physical therapy notes contain references to Claimant being hypersensitive to extremely light palpation on the right ankle. On July 2, 2003, Dr. Borrelli noted complaints of pain and swelling in the right ankle. He noted that the swelling occurred as the day proceeds with increased activity and the pain was exquisite along the medial aspect of the right foot and ankle. Dr. Borrelli noted that it appeared to be like a reflex sympathetic dystrophy or region pain syndrome type of pain. He referred Claimant to pain management for the right ankle pain because he suspected that Claimant had regional pain syndrome.

14) Claimant next sought the treatment of **Dr. Ravi Yadava** (Exhibit D) on July 16, 2003 for both his right ankle pain from the 2003 injury and right elbow pain from the 2002 injury. Dr. Yadava found some discoloration/mottling and/or early-to-mild features of instability at the level of the foot and ankle, as well as hypersensitivity, hypoesthesia to temperature and asymmetrical hyperhidrosis at the level of the right ankle relative to the left. He diagnosed possible type 1 complex regional pain syndrome of the right lower extremity and right ankle pain, as well as right elbow pain, probable right cubital tunnel syndrome and an extensor tendon tear on the right by MRI. He recommended physical therapy and medications. Dr. Yadava opined that the medications and appropriate desensitization program (physical therapy) would hopefully provide good pain relief of the complex regional pain syndrome, but if it did not, then a therapeutic blockade of the lumbosacral plexus may be required. He also recommended a course of treatment for the right elbow, noting that Dr. Ritchie may still be able to perform the previously recommended surgery to address the elbow. Claimant began a course of physical therapy and desensitization of the right ankle at **Aquatic Therapy** (Exhibit D), which ran from July 23, 2003 until August 25, 2003. He was also provided with a different therapy program for the right elbow at **West Physical Therapy** (Exhibit D) that ran from August 12, 2003 to August 21, 2003. As Claimant continued to follow up with Dr. Yadava, Dr. Yadava recommended a referral for a sympathetic blockade of the lumbosacral plexus because he was making improvements in his pain level, but only very modest improvements in his functional abilities. Claimant last saw Dr. Yadava on September 2, 2003, at which time he had had the triple phase bone scan, and Dr. Yadava had no further changes to recommend to his desensitization program. He released Claimant to continue to follow up with Dr. Guarino to modify Claimant's medications and treatment, as necessary.

15) In the midst of this treatment, Claimant said that Employer set up a psychiatric evaluation with **Dr. Gregg Bassett** (Exhibit B) on July 11, 2003. Claimant testified that Dr. Bassett worked with him on his PTSD and mental issues connected with his accident and not being able to work. Claimant noted that the treatment with Dr.

Bassett continued even though he was released orthopedically by Dr. Ritchie, as described below.

16) In his report dated August 9, 2003, Dr. Bassett (Exhibit B) diagnosed Post Traumatic Stress Disorder, Chronic (PTSD) that he related to the February 2, 2003 work injury. He recommended medications and psychotherapy to treat his condition. He did not believe Claimant had any ongoing pre-existing psychiatric symptoms leading up to the 2003 injury. Dr. Bassett opined that Claimant was not malingering, either with regard to his psychiatric or his physical complaints.

17) On August 13, 2003, Claimant was seen by **Dr. Anthony Guarino** (Exhibit D) complaining of right ankle pain for six months. Dr. Guarino diagnosed unresolved ankle pain with some components of sympathetically mediated pain. Dr. Guarino performed lumbar sympathetic blocks on August 13, 2003 and August 20, 2003 with excellent short-term response. Dr. Guarino recommended spinal cord stimulation on October 6, 2003. A temporary spinal cord stimulator electrode was placed on December 9, 2003 which provided greater than 50% relief. Dr. Guarino referred Claimant to **Dr. Bakul Dave** (Exhibit D) for permanent spinal cord stimulator placement. On January 16, 2004, Dr. Dave permanently placed a spinal cord stimulator for Claimant's chronic pain in the right ankle. Following the placement of the spinal cord stimulator, Claimant told Dr. Guarino that he had a 30-40% decrease in his pain, but he still had pain, weakness and sensitivity to light touch in the right ankle. Dr. Guarino wanted to work on strengthening the right ankle, so he ordered a course of physical therapy that Claimant attended at **Aquatic Fitness** (Exhibit D) from January 29, 2004 to May 26, 2004. He showed some progress in physical therapy with an increase in his ankle range of motion and a more normalized gait pattern. He continued to follow up with Dr. Guarino, who continued to prescribe medications for the pain and noted a flare-up of pain complaints in the right ankle, elbow and low back at his visit on May 26, 2004. On June 11, 2004, Dr. Guarino noted that Claimant was not functionally improved, although his pain had been reduced. He opined that Claimant was at maximum medical improvement for his right ankle injury, but he would require ongoing medications and use of the spinal cord stimulator to help with symptom management, so he would continue to see Claimant for that purpose. He believed that Claimant could work in a sedentary job that would not require him to be on his foot extensively. He sent Claimant for a Functional Capacity Evaluation at **PRORehab** (Exhibit D) on September 7, 2004, that found Claimant could work in at least the medium work demand level. This was well below the work demand level required for a firefighter.

18) As he continued to treat with Dr. Guarino in late 2004, he noted back pain that Dr. Guarino believed to be muscular in nature. Dr. Guarino ordered a course of physical therapy for the back complaints that Claimant attended at **PRORehab** (Exhibit D) from October 15, 2004 to November 5, 2004. The therapist noted Claimant's antalgic gait pattern as a result of his problems with weightbearing on the right foot. Dr. Guarino continued to believe Claimant could return to a sedentary job without being up on his right foot and with a lifting restriction of 50 pounds. The therapy seemed to improve his low back issues. However, by January 10, 2005, there were continued

notations about the right elbow and the fact that the surgery he was originally prescribed had never been performed. Dr. Guarino continued to see Claimant to monitor his pain management regimen throughout the surgical treatment he eventually had (as described below) and into 2006, when the generator on his stimulator ran out and had to be replaced by Dr. Dave. The notes from Dr. Guarino throughout 2006 to 2008 confirm continued intractable right ankle pain for which Dr. Guarino continues to prescribe various medications to attempt to control it and allow for some functionality. An additional round of physical therapy was ordered at **PRORehab** (Exhibit D) from January 28, 2008 to March 7, 2008 for his low back pain. Dr. Guarino commented in his January 15, 2008 report that it, "is not uncommon when someone alters their gait because of foot pain" to have back pain.

19) While Claimant was receiving the pain management treatment from Dr. Guarino, as described above, he also was examined by **Dr. Gary Schmidt** (Exhibit D) to determine if there was anything else surgically to be done with the ankle. Dr. Schmidt saw him on September 12, 2003 and ordered an EMG/nerve conduction study of the right ankle to determine if he had RSD or tarsal tunnel in the right foot/ankle. **Dr. Daniel Phillips** (Exhibit D) conducted the study on September 23, 2003 and when Dr. Schmidt next examined Claimant on September 30, 2003, he noted that the study showed no nerve entrapment and he "certainly appears to have a case of RSD." He did not think surgery was needed, but recommended continued pain management.

20) Claimant was evaluated by **Dr. Steven Stahle** (Exhibit D) on March 9, 2004 as a result of his ongoing right elbow issues. Although he was concerned about RSD in the elbow similar to what he had with the right ankle, he suggested either surgery on the elbow or an OssaTron procedure for the elbow. Because of the possibility of RSD, he went with the OssaTron procedure (Orthotripsy), which was performed on March 24, 2004 at **Creve Coeur Surgery Center** (Exhibit D) to treat Claimant's chronic lateral epicondylitis. The procedure seemed to help relieve the complaints for a time, but, then, the intense sensitivity in the elbow returned. Dr. Stahle opined that Claimant had RSD in the elbow, for which he recommended a course of physical therapy for desensitization.

21) Further evaluation of the right elbow occurred when **Dr. Robert Tucker** (Exhibit D) examined Claimant on July 14, 2004. Dr. Tucker recommended an MRI to further evaluate the need for surgery, but the MRI could not be performed because of the implanted spinal cord stimulator, so a CT scan was ordered instead. The CT scan taken on August 4, 2004, showed a medial capitellar osteochondral defect with a small intra-articular bone fragment in the right elbow. On August 12, 2004, Dr. Tucker opined that the findings on the CT scan were consistent with his prior elbow injury, but he did not feel there was significant benefit to any surgical treatment to outweigh the potential risks associated with the development of chronic pain syndrome. Therefore, he placed Claimant at maximum medical improvement for the elbow and rated him as having 10% permanent partial impairment in the right elbow. He also noted, "Were the patient employed, and strictly with regard to the right upper extremity, the patient could use the right hand as a helper at ground level duty, avoid

vigorous twisting or gripping activities, and lifting no more than 20 pounds on a repeated basis." He noted these restrictions would be permanent.

22) The Fireman's Retirement System of St. Louis sent Claimant for another Functional Capacity Evaluation at **The Work Center** (Exhibit D) on December 20, 2004, to determine his ability to return to work in his regular capacity as a firefighter for Employer. This evaluation, much like the last one, determined he could only function in a medium demand work level, not the heavy demand level required of firefighters. He was, therefore, unable to return to his prior job.

23) In a report dated August 12, 2005, **Dr. Gregg Bassett** (Exhibit B) opined that Claimant had reached maximum medical improvement with regard to his psychiatric conditions related to the work injury of February 2, 2003. He still diagnosed PTSD, but also added a depressive disorder, which had a pre-injury component related to the child custody issues, a post-injury component related to his pain and inability to work and a subsequent component related to continued conflict over his son with his son's mother. He opined that the February 2, 2003 work injury was a substantial factor in the development of the PTSD. Using the AMA Guides, Dr. Bassett rated Claimant as having 11.5%-20% permanent partial impairment due to the psychiatric component of his February 2, 2003 work injury. He opined that Claimant would indefinitely require ongoing psychiatric medications and pain management (monitoring his pain medications and implanted device). He also suggested a need for some continued psychotherapy for both his work-related and personal (child custody) issues.

24) On September 30, 2005, Claimant was returned to **Dr. Joseph Ritchie** (Exhibit D) who again opined that surgery for the right elbow was necessary. He took Claimant to surgery for the right elbow at the **Surgery Center of Kirkwood** (Exhibit D) on October 6, 2005. He performed a right elbow arthroscopy with partial synovectomy and removal of small loose body, as well as a lateral epicondylectomy and excision of chronic ERCB tendonitis, to treat Claimant's chronic synovitis, small loose body and chronic epicondylitis.

25) On October 24, 2005, Dr. Ritchie also evaluated Claimant for his right ankle injury. He opined that Claimant had a component of RSD, but he also believed Claimant had an unstable syndesmotic injury that may be putting stress on the ankle joint and causing pain and some lost motion, as well as creating some irritation to the posterior tibial nerve. Following a CT scan, Dr. Ritchie took Claimant back to surgery at the **Surgery Center of Kirkwood** (Exhibit D) for the right ankle on December 15, 2005. He performed a right ankle arthroscopy with significant synovitis and debridement, an open reduction and internal fixation of the tibiofibular syndesmosis, a lateral syndesmosis ligament repair and a tarsal tunnel release. Following surgery, Dr. Ritchie noted no frank flare-up of the RSD and sent him for physical therapy at **Aquatic Fitness** (Exhibit D) from January 16, 2006 to April 18, 2006. Claimant noted improvement after the surgery with less sensitivity, better motion and improvement in his ability to walk. When Dr. Ritchie last examined him on April 19, 2006, he found that Claimant had improved with less pain and better function in the ankle, although he still had the RSD-type pain in the leg. He placed Claimant at

maximum medical improvement with regard to the stabilization of the syndesmosis, but noted that the symptoms from his RSD continue to be a problem for him. He noted that Claimant was already disabled from his firefighting job, " and really the only work that this gentleman can do with his continued RSD symptoms of his ankle would be sedentary type activity."

26) During his ongoing pain management treatment that was being monitored by Dr. Guarino, on March 3, 2008, Claimant was sent by Employer for an independent medical examination with **Dr. John Graham** (Exhibit D). Dr. Graham did not believe that Claimant had RSD or complex regional pain syndrome because he did not exhibit enough of the criteria to allow such diagnoses. He believed that the chronic narcotics Claimant was on were not helping or appropriate and needed to be discontinued. He diagnosed Claimant with right ankle pain following an objectively good outcome from a dislocated ankle and ORIF surgery. He recommended that Claimant be weaned off the narcotics and that all of his medications essentially be changed. He said that there were no objective findings to correlate to Claimant's subjective complaints and a diagnosis of functional overlay should be considered. He opined that Claimant was capable of working, from an objective standpoint, at full duty without restriction. He did not believe it appropriate to place restrictions based solely on his subjective complaints. He opined that Claimant would be at maximum medical improvement once he was weaned off the narcotics. He also opined that Claimant's low back pain was not work related, because "minor trauma does not appear to increase the risk of serious low back pain episode or disability." He attributed it instead to abnormal psychomotor testing, smoking and the fact that he has a compensation case.

27) Based on **correspondence from Mr. Glenn Sanders at CCMSI** (Exhibit I) to Claimant dated March 25, 2008, Employer terminated his TTD benefits as of that date, since Dr. Guarino had placed him at maximum medical improvement back in 2005, and despite that fact, he has continued to receive TTD benefits through the date of that letter. Mr. Sanders noted that they would continue to manage his medical treatment with Dr. Graham, since "it was odd for the [sic] Dr. Guarino to have you at MMI and not release you from care."

28) Claimant testified that Employer switched his care to Dr. Graham, who basically told him that there was nothing wrong with him. He said that Dr. Graham wanted to take him off of all of his medications at his first visit with him. Claimant said that he tried to follow Dr. Graham's orders, but he had withdrawal symptoms, and Dr. Graham told him it was because he was on street drugs and he should put a gun to his head. Claimant believed his life, health and recovery was affected by switching his care to Dr. Graham because of the withdrawal of trying to take him quickly off of all the medications and because Dr. Graham did nothing to deal with the implanted spinal cord stimulator. He noted that Employer also quit paying for anything after his first visit with Dr. Graham.

29) In connection with this February 2, 2003 injury, Employer paid $239,279.74 in medical benefits. Employer also paid Claimant temporary total disability (TTD)

benefits in the amount of $93,696.68, representing a period of time of 154 weeks at a rate of $608.42.

30) At this point, Employer switched from Dr. Guarino to Dr. Graham being the authorized treating physician. In a letter dated April 1, 2008, Dr. Graham noted how he planned to wean Claimant off the narcotic pain medication and the other medications he had been taking. He suggested that Claimant may be able to return to work, even as a firefighter, but he would leave his ability to return to work from a psychiatric standpoint to the psychiatrists. He did not see any evidence of a need for further medical treatment on the ankle to "deaden the nerve." On May 12, 2008, Dr. Graham met with Claimant and began the process of weaning him off the medications. By May 27, 2008, Dr. Graham felt as though Claimant was not complying with his medication regimen and the visit deteriorated into a verbal argument about Dr. Graham's lack of board certification and Claimant not wanting to be treated by him anyway. Claimant was asked to leave Dr. Graham's office and no further treatment was provided.

31) Claimant said that he asked Employer to provide him with more care after Dr. Graham terminated his care, but Employer never provided more treatment. Therefore, he continued seeing Dr. Guarino and Dr. Bassett on his own. Dr. Guarino sent him for a STEPP program with Dr. Field for people in constant pain. He also saw Dr. Mackinnon, who provided more treatment and surgery for his right ankle. Claimant testified that the treatment and surgery from Dr. Mackinnon lessened his pain and made it more tolerable.

32) In a note dated March 10, 2008, Dr. Guarino agreed with Dr. Graham that Claimant did not have complex regional pain syndrome, but he disagreed with Dr. Graham that Claimant did not need any medications, due to his high level of pain and associated dysfunction. He believed the medications "will help control his symptoms and improve his quality of life." He also noted that Claimant did not exhibit any misuse or abuse of the medications. Following the end of Dr. Graham's treatment, Claimant apparently continued to see Dr. Guarino for his pain medications. Dr. Guarino consistently noted an intractable pain state with obvious impairment in the right ankle, requiring periodic alteration of his medications. He noted that the spinal cord stimulator continued to provide relief of 25% of his complaints. Interestingly, in a letter dated December 8, 2008, Dr. Guarino noted that the medications Claimant takes for his intractable pain state cause some sedation, and, so, he is not a good candidate for jury duty. Dr. Guarino continued to see Claimant throughout 2009, following the treatment described below from Dr. Mackinnon, and into 2012.

33) At the request of Dr. Guarino, Claimant was sent to **Dr. Beverly Field** (Exhibit D) on February 26, 2009, for a psychological evaluation and assessment of whether he would benefit from the STEPP program, a multidisciplinary pain management program. Claimant was admitted to the STEPP program and attended for ten weeks, noting that he found it helpful. In follow-up visits with Dr. Field, Claimant reported getting additional care from Dr. Mackinnon, doing exercises on a stationary bike and wanting to volunteer at Therapeutic Horsemanship, with a goal of perhaps getting

back to working a half-day if it doesn't require much walking. Following his surgery from Dr. Mackinnon, Claimant attended some sessions of the Next-STEPP program, but was not as positive about his functional abilities, noting that it was difficult to even get out of the house, much less exercise, when his pain is severe.

34) Claimant first saw **Dr. Susan Mackinnon** (Exhibit D) as a referral from Dr. Guarino on September 16, 2009. She suggested that additional surgery might bring some relief to his pain complaints. She took him to surgery at **Barnes-Jewish Hospital** (Exhibit D) on October 26, 2009. She performed a release of the right superficial peroneal nerve, an anterior and lateral muscle fascial compartment release and an exploration of the right saphenous nerve with proximal transposition into the saphenous vein, to treat Claimant's right superficial peroneal nerve compression and neuroma of the right saphenous nerve. By November 16, 2009, she was very happy with the results and was talking about trying to eventually wean him off the medications. He attended a course of physical therapy at **The Rehabilitation Institute of St. Louis** (Exhibit D) from November 17, 2009 through April 19, 2010. As Claimant continued to see Dr. Mackinnon, he reported that the surgery helped, but did not completely relieve his pain. As of July 21, 2010, Dr. Mackinnon noted that she had nothing further to offer him surgically and released him from care.

35) Claimant submitted into evidence a number of **medical bills** (Exhibit E) from various providers with whom he sought treatment on his own related to his February 2, 2003 work injury after Employer stopped paying for medical, when his care with Dr. Graham was terminated. Medical bills from **Washington University Physician Services (Drs. Guarino, Field and Mackinnon)** for dates of service of June 4, 2008 through July 12, 2012, total $10,220.00. Medical bills from **Allied Behavioral Consultants (Dr. Gregg Bassett)** for dates of service of April 28, 2009 through September 30, 2010, total $835.00. Medical bills from **Barnes-Jewish Hospital** for dates of service of October 26, 2009 through October 27, 2009, total $11,293.13. Medical bills from **Walgreens** for dates of service May 1, 2011 through September 25, 2012, total $2,003.31 for the prescriptions written by Drs. Guarino and Bassett, and for dates of service of December 18, 2006 through March 3, 2009, total $1,049.13.

36) Claimant testified that he is continuing to receive medical treatment to address the effects of his February 2, 2003 work injury. He said that he sees Dr. Guarino every three months and also sees Dr. Bassett periodically. He takes medications prescribed by Drs. Guarino and Bassett. He also is going to a clinic at UMSL for PTSD to try to get rid of the nightmares.

37) Employer sent Claimant for an independent medical evaluation with **Dr. W. Chris Kostman** (Exhibit 1) on January 19, 2011. Following his physical examination of Claimant and his review of the medical treatment records and reports, Dr. Kostman opined that Claimant was at maximum medical improvement for both his right elbow injury and surgery and his right ankle injury. He recommended a Functional Capacity Evaluation to help determine permanent work restrictions.

38) Claimant was sent for another Functional Capacity Evaluation by Dr. Chris Kostman, which was conducted at **PRORehab** (Exhibit D) on March 21, 2011. The therapist determined that Claimant was "not employable on a full-time basis in any job which would require prolonged standing, walking, climbing, kneeling, crawling, and/or repetitive lifting and load handling." This opinion seems to contemplate an inability to work based solely on the status of the right ankle and his continuing complaints from that injury, because at the top of the report, only the right ankle is mentioned and only the February 2003 injury is mentioned in the body of the report. The therapist noted that Claimant provided valid effort for this test.

39) Following the FCE, in a report dated March 25, 2011, Dr. Kostman imposed permanent work restrictions of occasional lifting floor to waist of up to 40 pounds, waist to shoulder level of up to 40 pounds, shoulder to overhead of up to 30 pounds, bilateral carry of up to 30 pounds, pushing force of the right to 37 pounds and of the left to 127 pounds, pulling force of the right to 27 pounds and of the left to 112 pounds, with the avoidance of climbing, kneeling and crawling activities. Finally, in a report dated February 7, 2012, Dr. Kostman opined that Claimant had permanent partial disabilities of 6% of the right elbow and 12% of the right ankle related to his work injury.

40) Claimant was examined by **Dr. Thomas Musich** (Exhibit A) at his attorney's request on three separate occasions, January 30, 1998, October 31, 2008 and June 24, 2010, after which he issued three separate reports. Dr. Musich took consistent histories of Claimant's injuries at work and also reviewed an extensive stack of medical treatment records in this case. Following his first examination in 1998, he diagnosed a left ankle contusion and strain from the October 6, 1997 work injury, for which he rated Claimant as having 25% permanent partial disability of the left ankle, as well as a pre-existing left knee arthroscopic surgery to address internal derangement and chondromalacia, for which he rated Claimant as having 33% permanent partial disability of the left knee. In his subsequent reports, he opined that these disabilities to these body parts continued undiminished.

41) Following his second examination in 2008, Dr. Musich opined that as a result of the December 9, 2002 work injury, Claimant sustained traumatic extensor tendonitis, lateral epicondylitis and osteochondral defects of the right elbow, for which he rated Claimant as having 40% permanent partial disability of the right elbow. Dr. Musich agreed with Dr. Tucker's previously stated restrictions referable to the right elbow of avoiding vigorous twisting or gripping with the right hand and no lifting greater than 20 pounds on a repeated basis. He further opined that as a result of the February 2, 2003 work injury, Claimant sustained a right ankle dislocation, posterior malleolar fracture, symptomatic synovial proliferation, tarsal tunnel impingement and pain syndrome of the right lower extremity, resulting in significant chronic right ankle/foot symptomology, for which he rated Claimant as having 85% permanent partial disability of the right ankle. He noted that Claimant required a large amount of narcotic pain medications and a spinal cord stimulator to make his work-related right lower extremity pain tolerable. He placed restrictions on Claimant's ability to function on account of the February 2, 2003 injury, of no driving or operating

commercial motorized vehicles, no performance of activities above or below floor level, no extended sitting due to the spinal cord stimulator, standing/walking for only a total of an hour out of a standard workday, no lifting/carrying more than 10 pounds, and no climbing stairs or ladders. He opined that Claimant would require future medical treatment of persistent pain management including narcotic analgesic medications related to the February 2003 work injury. Dr. Musich believed that the combination of the disabilities is significantly greater than their simple sum due to multiple levels of pathology involved. Finally, he opined that Claimant "is totally and permanently disabled due to a combination of his present and past disabilities, as well as his chronic ongoing restrictions and need for large amounts of narcotic analgesic medication."

42) Dr. Musich conducted his third evaluation in 2010 because of the additional treatment Claimant had received on account of his right ankle injury. In addition to his previously stated opinions from his prior reports, Dr. Musich opined that the treatment Claimant received from Dr. Mackinnon for his symptomatic neuropathic pain, was required on account of the February 2003 work injury. He increased his rating of disability for the 2003 injury to 90% of the right ankle. He also diagnosed mechanical low back pain as a result of Claimant's guarded abnormal gait pattern attributable to the February 2003 work injury, for which he rated Claimant as having permanent partial disability of 25% of the body as a whole. In addition to his prior opinion on the need for future medical treatment related to the 2003 injury, he also noted that Claimant would need ongoing treatment for his symptomatic depression. He basically reiterated the restrictions for the 2003 injury, except that he amended the standing and walking restriction to no more than 30 to 60 minutes in a standard workday.

43) The deposition of **Dr. Thomas Musich** (Exhibit A) was taken on March 5, 2012 by Claimant to make his opinions in this case admissible at trial. Dr. Musich is board certified in family practice. He examined Claimant three times over the years for the purpose of independent medical examinations at the request of Claimant's attorney and he provided no treatment. He testified generally consistent with the opinions contained in his reports and described above. On cross-examination, he was extensively questioned on what complaints, problems and restrictions were related to the 2003 injury, versus some other pre-existing condition. Dr. Musich agreed that Claimant's inability to squat and kneel, the significant alteration in his activities of daily living, the use of the cane while ambulating due to instability, the use of narcotic pain medication, the sympathetic nerve blocks and implanted spinal cord stimulator, and the low back problems and complaints, were all related to the 2003 injury, as were the restrictions on driving and the inability to work above or below floor level. Although the standing/walking restrictions and lifting restrictions were also primarily based on the 2003 injury, Dr. Musich did mention the interplay involved with the prior left leg injuries and right elbow condition. He admitted that prior to 2003, Claimant was not under any restrictions, including no restrictions on his ability to stand and walk. Despite the overwhelming majority of Claimant's continued complaints, problems and restrictions being attributable to the 2003 work injury, Dr. Musich believed it would be really difficult for him to state within a reasonable degree of medical certainty if the last injury alone would make him totally disabled by

itself, because he already knew of the prior conditions and could not just eliminate them from consideration to give just an opinion on the last injury alone. He agreed that while he could not give an affirmative opinion in that regard, he also could not deny that it was certainly possible for Claimant to be permanently and totally disabled as a result of the conditions and problems he developed from the 2003 injury either.

44) The deposition of **Dr. Gregg Bassett** (Exhibit B) was taken on May 11, 2012 by Claimant to make his opinions in this case admissible at trial. Dr. Bassett is board certified in psychiatry. He examined and treated Claimant over the years since the February 2, 2003 injury at Employer's request, as detailed by his reports described above. In addition to the two reports detailed already, he also prepared a report for Claimant's attorney dated May 3, 2009, in which he clarified his rating of disability, opining that ¼ of the 20%, or 5% was related to non-injury factors, and ¾ of the 20%, or 15% was substantially caused by the February 2, 2003 injury. He also confirmed that Claimant would require lifelong maintenance psychiatric medications and psychiatric treatment sessions related to his PTSD from the work injury. Dr. Bassett commented that it would not surprise him if the combination of his physical and psychiatric disabilities and problems from this February 2, 2003 injury would prohibit him from being able to compete for employment. Dr. Bassett testified consistent with these previously summarized reports and opinions. He noted that as far as he is concerned, Claimant's treatment has still not concluded, but he acknowledged that he received a letter dated June 18, 2008 from Mr. Glenn Sanders at CCMSI (Employer's representative) notifying him that Employer was not authorizing any more of his treatment or any other medications. On cross-examination, Dr. Bassett testified that he could not find any effect that Claimant's pre-existing injuries had on the development of any psychiatric problems. With regard to his opinions on disability and treatment, he confirmed that the depression from the injury and from Claimant's personal (familial) disputes was inextricably intertwined and needed to be treated (cannot tell the antidepressants just to treat the work injury effects and not the personal—it treats it all), but from the disability side, he tried to divide out percentages that are directly related to the work injury, versus related to his personal (familial) issues. Despite his division of disability, he confirmed that any pre-existing psychiatric symptoms Claimant had were in remission leading up to the February 2, 2003 injury.

45) The deposition of **Dr. W. Chris Kostman** (Exhibit 1) was taken on March 21, 2012 by Employer to make his opinions in this case admissible at trial. Dr. Kostman is board certified in orthopaedic surgery. Dr. Kostman examined Claimant one time at Employer's request and provided no medical treatment. He testified consistent with the reports and opinions described above. Dr. Kostman testified that the X-rays he took of the right ankle did not show any osteopenia, which he said is a classic finding for late stage reflex sympathetic dystrophy, so he believed that was to a degree inconsistent with an RSD diagnosis for this case. He also stated that the findings on the bone scan from August 26, 2003 were inconsistent with an RSD diagnosis. He did not believe that Claimant needed any further medical care for the right ankle or right elbow. He also did not believe that Claimant had RSD based on his physical examination and his review of the medical records.

46) On cross-examination, Dr. Kostman admitted that he did not evaluate Claimant's low back, because he did not believe that Claimant mentioned any low back problems. Although he would not agree that Claimant had RSD, he did diagnose Claimant with a fracture and dislocation of the right ankle, with residual numbness along the medial aspect of the ankle. He opined that since he did not believe Claimant had RSD and since pain management had been tried without any resolution of his pain, he would not recommend any further physician intervention for pain management, no further prescription medication and no pain stimulator. He was also presented with a report from Dr. Andrew Wayne, a doctor in his office, whose October 12, 2004 report was included in Dr. Kostman's office file, but which he said he did not review and did not know about until the day of his deposition. He explained that although it is in the office file, he did not request it and did not review it when examining Claimant and offering his opinions in this matter. He said that the first time he had the office file in front of him was at the deposition, so he really was not aware of Dr. Wayne's report and conclusions. *[Any objections contained in the deposition regarding Dr. Wayne's report are specifically overruled.]* In Dr. Wayne's report, he specifically finds that "it would not be safe for him to drive due to the right lower extremity condition as well as the pain with sitting due to the implantable stimulator." He further finds that it would be difficult for Claimant to sit more than two hours over an eight-hour day, without alternating sitting and standing, and also markedly difficult for him to stand/walk for more than one hour during a typical workday. He also noted that Claimant would need an assistive device for ambulation at all times due to his right lower extremity problems. Dr. Wayne saw no limitation on Claimant's ability to use his upper extremities for fine motor activities, but he did not believe Claimant was capable of lifting or carrying more than 10 pounds.

47) The deposition of **Ms. Delores Gonzalez** (Exhibit C) was taken on April 11, 2012 by Claimant to make her opinions in this case admissible at trial. Ms. Gonzalez is a certified vocational rehabilitation counselor. She evaluated Claimant on October 1, 2010 to determine whether Claimant was able to be employed in the open labor market. She reviewed the extensive medical treatment records and the medical and psychological opinions in the course of her evaluation. She issued a report dated November 19, 2010. She performed vocational testing that showed Claimant had the reading, spelling and math abilities to succeed in a post-secondary program. She was unable to identify any transferrable skills that he could use in other jobs because of his severely reduced functional capacity. She ultimately concluded that Claimant was not employable in the open labor market because of his severely reduced physical and mental residual functional capacities. She indicated that he was not capable of competitive work as a result of his work-related injuries in combination with his pre-existing conditions/disabilities, more specifically, the left ankle, left knee, the 2002 and 2003 work injuries and psychiatric conditions. However, on cross-examination, she testified that because employers conduct drug testing and because of the memory and concentration problems that they cause, Claimant will not be able to get a job based on the medications that he takes. She testified that if you just looked at some of the doctors' opinions in isolation with regard to work restrictions, then perhaps there would be jobs that fit within those restrictions, but looking at Claimant as a whole,

and all of the restrictions that he has, then he is not employable. She also testified that he would be unable to perform any work based on his psychiatric component. She admitted that Claimant had no complaints referable to the prior left knee and left ankle injuries and she also had none of the medical treatment records to review for those conditions, but she included them in her analysis because Dr. Musich included them and they were pre-existing conditions that Claimant had. She admitted that the prior left knee and left ankle conditions were not a hindrance or obstacle to Claimant's employment as a firefighter. She noted that 75% of the time she testifies for the defense and 25% for the plaintiff, with additional work that she performs for the Second Injury Fund and Social Security (Department of Labor). Finally, on cross-examination, she testified that if she just considered Claimant's symptoms, presentation and the physical restrictions due to his right ankle and low back injury, then Claimant was not employable based on those alone.

48) The deposition of **Mr. Michael McKee** (Exhibit 2) was taken on June 12, 2012 by Employer to make his opinions in this case admissible at trial. Mr. McKee is a certified vocational rehabilitation counselor, who was hired by Employer to assist Claimant in trying to return to employment within his current medical restrictions. He first met with Claimant on December 15, 2010 and issued his first report dated January 28, 2011, after he had the opportunity to review the extensive medical treatment records and reports in this case. In his first report, Mr. McKee determined that he needed to have a Functional Capacity Evaluation to be able to determine Claimant's overall physical capabilities, since there was a conflict among the medical providers as to Claimant's limitations and employability. He opined that "although his [Claimant's] limitations may hinder a job search and at times may be difficult to overcome, he is employable." Mr. McKee subsequently received the results of the Functional Capacity Evaluation performed on March 21, 2011 and in addition to the summary conclusions from that FCE that are already stated above, he also found Claimant capable of lifting and carrying within certain limits, from which he "made the conclusion from a medical standpoint as a result of the above medical findings vocational services can commence." He believed Claimant appeared to be employable and he would offer vocational rehabilitation services, including a Job Seeker Skills Training session and Individual Written Rehabilitation Program. Mr. McKee testified that he was never allowed to proceed with his plan because Claimant did not want to accept the vocational services he was offering. Mr. McKee continued to believe that Claimant was employable based on the opinions of a number of physicians who gave restrictions on Claimant's ability to work that ranged from sedentary to heavy levels of work. He opined that the main obstacle to Claimant returning to work was his attitude that he is unemployable. Because of his attitude, Mr. McKee opined that even if Claimant did participate in a vocational rehabilitation attempt, he would be a poor candidate to successfully complete it, even though he is physically qualified to do so. On cross-examination, Mr. McKee admitted that he has never performed a vocational evaluation for an employee or their attorney, nor even the Social Security Administration, but only for employers or insurance companies. He acknowledged that it was not just Claimant and his attorney who believed him to be totally disabled, but Ms. Gonzalez, another vocational expert, had reached that

same conclusion and Claimant was also awarded Social Security disability based on his inability to work.

49) In terms of his current complaints regarding his physical condition, Claimant testified that he is in constant pain in his right leg, right ankle and low back. He described the pain as being present 24 hours a day, 7 days a week. He noted that he is in bed in pain many days. He also noted some periodic pain in his right elbow if he lifts something wrong or twists it, as well as less strength in the arm. On a good day, Claimant testified that he will feed his dogs, go to the store and sit or stand near a field with his dogs. He said that he only drives a very limited amount and Dr. Guarino told him not to drive long distances. Claimant described problems sitting because of his low back, but, then, also problems standing because of the pain in the right ankle and leg.

50) Claimant testified that he does not believe he is capable of working at the current time. He said that he has looked for work at places like Ameren UE and a fire school, but he was told he could not work, either because of the pain medications he takes or because he would not be able to show up all the time with his complaints. He does not feel as though he could work a desk job or in an office because he cannot be depended on to show up every day for work with his pain complaints.

51) Claimant admitted that in 2007 and 2008, he tried to do yard duty at St. Stephen's. He said that he volunteered for a short time, but he could not continue because he could not be counted on to be there all the time with his pain complaints. He also admitted that while trying to knock a ball out of a tree, he was standing on a ledge, slipped and fractured his right heel. He admitted that he is still part of the Firefighters' Union and he also volunteered at Therapeutic Horsemanship in 2010.

52) Claimant testified that he is still on a number of medications, all since his 2003 injury. These medications include Percocet, gabapentin, methadone, Cymbalta, cyclobenzaprine, two others for arthritis and one for bowel movements.

53) On cross-examination, Claimant admitted that he had some trouble with his right elbow leading up to February 2, 2003, and even continuing beyond that date, until he had surgery in 2005. He reiterated that he had some continued problems after the surgery as well. He also admitted that he had some psychiatric treatment for a month or two prior to his 2003 injury, because of going through a child custody case. He said that he took a couple antidepressants and that was it. However, he admitted that he was pretty active leading up to his 2003 injury, working as a firefighter and his secondary jobs as well. Additionally, he worked out at the gym, ran, and played hockey, softball and soccer for fire department teams. He said that he really had no problems other than his elbow leading up to the 2003 injury. He noted that he also had no restrictions on his ability to work from 2002 leading up to 2003.

54) Claimant and Employer resolved their portion of the December 9, 2002 injury (Injury Number 02-137196) by **Stipulation for Compromise Settlement** (Exhibit F) for the payment of $17,400.00, or 24.36% permanent partial disability of the right elbow.

The Second Injury Fund claim was left open on the Stipulation. This Stipulation was approved by Chief Administrative Law Judge Lee B. Schaefer on December 29, 2011.

55) I observed Claimant during his time in the courtroom to be in obvious pain. He walked with a cane and had to stand up from the witness chair after approximately 20-30 minutes of sitting while testifying, because of his complaints. Despite having to stand up, he did not stand straight, but instead moved behind the witness chair and was leaning on the back of the chair, bent over, holding the chair while he continued to answer questions. I observed clear facial grimacing and his hands and arms visibly shaking while he was holding onto the back of the witness chair for support.

**RULINGS OF LAW:**

Based on a comprehensive review of the substantial and competent evidence, including Claimant's testimony, the expert medical opinions and depositions, the vocational opinions and depositions, the medical treatment records and bills, and the other documentary evidence, as well as my personal observations of Claimant at hearing, and based upon the applicable laws of the State of Missouri, I find:

Claimant sustained a compensable accidental injury on February 2, 2003, which arose out of and in the course of his employment for Employer. On that date, Claimant was fighting a fire at a three-story brick residence, and as he and his partner were exiting the structure on orders of their Chief, a window collapsed, causing bricks to fall down and causing the roof of the porch to collapse and bury them. I find that Claimant sustained injuries to his right ankle, low back and body as a whole referable to psychiatric issues, that are all attributable to the work injury on February 2, 2003. As a result of the injuries to his right ankle, low back and body as a whole, including the psychological effects of the injury, adequately described in the extensive medical treatment records and reports listed above, Claimant has continued to have significant pain, multiple other complaints, restricted activity levels, and has never returned to work.

***Issue 2: Is Employer responsible for the payment of past medical expenses in an amount to be determined?***

***Issue 3: Is Claimant entitled to future medical care on account of this accidental injury at work on February 2, 2003?***

Under **Mo. Rev. Stat. § 287.140.1 (2000)**, "the employee shall receive and the employer shall provide such medical, surgical, chiropractic and hospital treatment…as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury."

Claimant bears the burden of proof on all essential elements of his Workers' Compensation case. ***Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute***, 793 S.W.2d 195 (Mo. App. E.D. 1990) *overruled on other grounds by Hampton v. Big Boy Steel Erection,*

*121 S.W.3d 220 (Mo. 2003).* The fact finder is charged with passing on the credibility of all witnesses and may disbelieve testimony absent contradictory evidence. ***Id***. at 199.

Just as Claimant must prove all of the other material elements of his claim, the burden is also on him to prove entitlement to future medical treatment. ***Dean v. St. Luke's Hospital***, 936 S.W.2d 601, 603 (Mo. App. 1997) *overruled on other grounds by Hampton v. Big Boy Steel Erection,* 121 S.W.3d 220 (Mo. 2003). Claimant is entitled to an award of future medical treatment if he shows by a reasonable probability that future medical treatment is needed to cure and relieve the effects of the injury. ***Concepcion v. Lear Corporation***, 173 S.W.3d 368, 372 (Mo. App. 2005).

In order to determine, which, if any, past medical bills and what, if any, future treatment may need to be provided by Employer as a part of this compensable work injury Claim, it is first important to establish what injuries or conditions are properly considered medically causally related to the February 2, 2003 work injury. Based on my thorough review of the extensive medical treatment records and reports in evidence, I find that Claimant sustained a right ankle injury (dislocation, posterior malleolar fracture, symptomatic synovial proliferation, syndesmotic injury, right superficial peroneal nerve compression, neuroma of the right saphenous nerve, tarsal tunnel impingement and pain syndrome of the right lower extremity), resulting in significant chronic right ankle/foot pain and symptomology. I find that as a result of his guarded abnormal gait pattern attributable to the February 2003 work injury, he developed mechanical low back pain that remains symptomatic. Additionally, I find that Claimant developed post traumatic stress disorder (PTSD) as a result of the February 2, 2003 work injury.

The determination of the issue of whether Claimant is entitled to the payment of additional past or future medical benefits in this case is initially dependent on whether I find Dr. Graham's opinions on Claimant's condition and his need for treatment, or lack thereof, more competent, credible and reliable than the contrary opinions of other physicians in this case. In other words, if I find Dr. Graham's opinions that Claimant did not need monitored pain management (medications) or any other treatment, to be more persuasive and credible than the opinions of Drs. Guarino, Bassett and Musich, who all indicated an ongoing need for pain management treatment for Claimant, then I would determine that no additional past or future medical treatment is payable as a part of this case. However, I do not find Dr. Graham offered any such competent, credible or reliable opinion in this case, that allowed Employer to terminate Claimant's medical benefits or that eliminated Employer's obligation to provide ongoing future medical benefits to cure and relieve Claimant of the effects of this February 2, 2003 work injury.

Based on my review of the evidence, I find that Employer was authorizing ongoing extensive treatment and pain management for Claimant with Dr. Guarino, who a number of the physicians in the record of evidence noted is a highly qualified and very capable pain management physician. Regardless of whether you call the pain complaints, RSD, complex regional pain syndrome, sympathetically induced pain, or just a chronic pain of the right ankle, I found really no dispute in the treatment records that the complaints Claimant was having in the right lower extremity were related to the work injury on February 2, 2003. During this five-year period of time following the work injury, Dr. Guarino provided the pain management and Dr. Dave implanted a spinal cord stimulator, all of which Employer authorized and agreed was part of the care necessary to cure and relieve Claimant of the effects of this work injury.

Then, in the midst of this ongoing authorized treatment, Employer, as is their right, chose to send Claimant for an independent medical examination with Dr. Graham, who, contrary to the opinions of the other treating physicians who had come before him, opined that there was really nothing wrong with Claimant, he could return to work without restrictions (maybe even as a firefighter), he needed no more treatment of any kind and he needed to be taken off all of his pain medications. On the basis of these opinions from Dr. Graham, after his one examination of Claimant, Employer terminated TTD benefits, switched from Dr. Guarino to Dr. Graham as the authorized treating physician and refused to authorize any further treatment with any other physicians. Essentially, it was a complete reversal of how this case had been proceeding for over five years after this significant injury.

Having had the opportunity to review Dr. Graham's findings and conclusions and compare them to the rest of the findings and conclusions of the other treating and examining physicians in this case, I find that Dr. Graham's findings and conclusions are not competent, credible and reliable. His assertion that Claimant could return back to work without restrictions, perhaps even as a firefighter, is completely at odds with the findings of just about every other physician and every functional capacity evaluation in this case. His suggestion that some of Claimant's pain complaints may be attributable, at least in part, to the fact that he has a compensation case, is unfounded. Claimant testified that his life, health and recovery was affected by switching his care to Dr. Graham because of the withdrawal of trying to take him quickly off of all the medications and because Dr. Graham did nothing to deal with the implanted spinal cord stimulator. I believe Claimant's testimony in this regard.

In terms of the various medical opinions, conclusions and testimony in the record of evidence in this case, I find that the opinions, conclusions and testimony of Drs. Guarino, Bassett and Musich are more competent, credible and reliable than the opinions of Drs. Graham and Kostman. Drs. Guarino and Bassett are both treating physicians in this case, who are very familiar with Claimant from having treated him over the course of many years since this injury at work. Their opinions, and the opinions of Dr. Musich, are more consistent with the credible testimony of Claimant concerning his ongoing problems, complaints and limitations, and are more properly supported by the balance of his medical treatment findings, than the contrary opinions of Drs. Graham and Kostman.

Regarding the past medical issue for the right ankle, low back and psychiatric issues, Claimant submitted into evidence some of the medical bills and the corresponding medical records for his treatment with various providers over the period of time that he was forced to seek treatment for these conditions on his own. According to his contentions, Claimant is seeking repayment of a total of $25,473.47 in medical bills as a part of this Award. Since the date Claimant reached maximum medical improvement (MMI) from his February 2, 2003 work injury is at issue in this case, I want to be clear with regard to the bills that have been submitted in this matter, regardless of whether the treatment technically occurred before or after his date of MMI, I find that all of the treatment Claimant obtained from Drs. Guarino, Bassett, Field, Mackinnon, at Barnes-Jewish Hospital and all of the medications prescribed by those physicians, are related to his February 2, 2003 work injury. I also find that the treatment was offered to cure and relieve Claimant of the effects of that work injury. In other words, whether the treatment came before the MMI date or whether it came after the MMI date and technically would be considered future

medical, Employer is responsible for it because all of the treatment was related to curing and relieving Claimant of the effects of this injury.

Based on my extensive review of the medical treatment records and bills in evidence, I find that the following amounts and providers are properly payable as part of the past medical charges related to Claimant's compensable right ankle, low back and psychiatric claim:

| | |
|---|---|
| $10,220.00 | Washington University Physician Services (Drs. Guarino, Field & Mackinnon) |
| $835.00 | Allied Behavioral Consultants (Dr. Bassett) |
| $11,293.13 | Barnes-Jewish Hospital |
| $3,052.44 | Walgreen Drug Stores |

With the submission of these medical bills, the corresponding medical treatment records, Claimant's credible testimony linking this treatment to his injury at work on February 2, 2003 and the credible testimony from the physicians medically causally linking these bills to the reasonable and necessary medical treatment for this work injury, I find that Claimant has met his burden of proof on the submission of the medical bills. ***Martin v. Mid-America Farm Lines, Inc.***, 769 S.W.2d 105 (Mo. 1989). Therefore, I find that Employer is responsible for the payment of, and Claimant is entitled to recover, the above-stated amount of the medical bills in this case, or $25,400.57.

On the issue of the need for future medical treatment for the right ankle, low back and psychiatric conditions, I find that both Dr. Bassett and Dr. Musich offered similar opinions that Claimant would need treatment in the future for his right ankle, low back and psychiatric conditions on account of the work injury. Dr. Bassett testified that Claimant eventually reached the point of maximum medical improvement for his psychiatric problems, but he believed he would require future medical care (psychiatric medications, psychotherapy and pain management for monitoring his pain medications and implanted device) on account of the February 2, 2003 work injury. Dr. Musich also opined that he was at maximum medical improvement and not in need of surgery, but he would require ongoing care, including persistent pain management and narcotic analgesic medications, as well as continuing treatment for his psychiatric issues, related to the February 2003 work injury. On the other hand, Employer's examining physicians, Drs. Graham and Kostman, based primarily on their previously stated medical opinions, did not believe Claimant needed further medical treatment on account of this work injury.

Based on my review of the extensive medical treatment records and opinions in this case, with regard to the future medical issue, I again find the opinions of Drs. Bassett and Musich more competent, credible and persuasive than the other medical opinions and testimony in this case on that issue. I reached this conclusion based first and foremost on the fact that Dr. Bassett was a treating physician for Claimant in this matter. In that respect, I find that he is in the best position to know whether or not additional treatment may be needed on account of this work injury to cure and relieve Claimant of the effects of it. Therefore, I find that Claimant has met his burden of proof to show an entitlement to future medical treatment for his right ankle, low back and psychiatric conditions, on account of this compensable work injury.

Under **Mo. Rev. Stat. § 287.140.2 (2000)**, "If it be shown to the division or the commission that the requirements are being furnished in such a manner that there is reasonable ground for believing the life, health, or recovery of the employee is endangered thereby, the division or the commission may order a change in the physician, surgeon, hospital or other requirement."

In this case, Employer provided Claimant with extensive treatment for a significant period of time with Dr. Anthony Guarino and Dr. Gregg Bassett as authorized treating physicians. Then, in the midst of that treatment, cut off all benefits and ongoing medical treatment based on the opinions of Dr. John Graham, whose opinions I have now found are not competent, credible or reliable. Based on these actions and Claimant's credible testimony to this effect, I find that Claimant's health and recovery were endangered by Employer's choice of Dr. Graham as the authorized treating physician and the subsequent termination of all treatment when Dr. Graham dismissed Claimant from his office. In finding that Claimant is entitled to future medical treatment in this case, I am concerned that leaving the decision on the provider open to Employer, would have the possibility to only cause further issues down the road that would delay the provision of the care, if Employer again chose to deviate from their authorized treating physicians in an attempt to foreclose Claimant's right to benefits. While, by choosing Dr. Guarino for pain management and Dr. Bassett for psychiatric treatment, I find that we have physicians who are not only qualified and willing to treat Claimant, but also already were chosen and authorized by Employer for treatment earlier in this case. In essence, I find that it would eliminate any further undue delay and would prevent further detriment to Claimant's health and recovery from this injury.

Based on these findings, I direct Employer to provide continued and ongoing future medical care for Claimant's right ankle, low back and psychiatric conditions, including but not limited to chronic pain management, medications (pain and psychological/psychiatric), medication management (doctors' visits), psychotherapy, and any other testing, treatment or evaluation that the treating doctors deem necessary to cure and relieve Claimant of the effects of the February 2, 2003 injury. To prevent the health and recovery of Claimant from being further endangered in this case, I further direct Employer to return Claimant to Dr. Anthony Guarino for ongoing pain management and to Dr. Gregg Bassett for ongoing psychiatric therapy and medications, as well as any other treatment they may deem reasonable and necessary to cure and relieve Claimant of the effects of the February 2, 2003 work injury.

Since the rest of the issues are so interrelated in this case, I will address all four of them together in the same section of the award.

***Issue 1: On what date did Claimant reach maximum medical improvement from his injury on February 2, 2003?***

***Issue 4: Is Claimant entitled to a payment for past total disability benefits for any amount underpaid based on the rate?***

***Issue 5: What is the nature and extent of Claimant's permanent partial and/or permanent total disability attributable to this accident?***

***Issue 6: What is the liability, if any, of the Second Injury Fund?***

Pursuant to **Mo. Rev. Stat. § 287.170 (2000)**, an injured employee is entitled to receive temporary total disability compensation benefits for not more than 400 weeks during the continuance of such disability at the weekly rate of compensation in effect for the date of injury for which the claim is made.

It is clear that Claimant continued to receive his regular salary from Employer, despite the fact that he never returned to work after the February 2, 2003 injury, until Employer terminated his salary benefits in May 2005, because he began to receive his disability pension in June 2005. At that point Employer paid temporary total disability benefits in this case for 154 weeks at a rate of $608.42, until such time as Employer terminated those benefits based on the opinion of Dr. Graham. Claimant has remained off work, and, in fact, has never returned to any work since then in any capacity.

It is important to determine the appropriate date at which Claimant reached maximum medical improvement for this February 2, 2003 injury, so that the complete period of temporary total disability benefits can be calculated. There are a number of different opinions in the record of evidence as to when Claimant may have reached maximum medical improvement for this injury. Dr. Bassett opined that Claimant reached maximum medical improvement regarding his psychiatric condition related to the February 2, 2003 injury on August 12, 2005, but noted that ongoing treatment was necessary. Dr. Ritchie opined that Claimant reached maximum medical improvement regarding his ankle condition on April 19, 2006. However, Claimant continued to treat with Dr. Guarino for pain management, who also sent him for another course of treatment and surgery with Dr. Mackinnon, aimed at alleviating his complaints in his right ankle. I find that Dr. Mackinnon's treatment, did, indeed, bring Claimant some relief of his complaints, and she ultimately released him from care on July 21, 2010. Finally, Dr. Musich opined that he reached maximum medical improvement as of June 24, 2010 and Dr. Kostman provided a date of January 19, 2011.

Given the significant continued treatment and surgery Claimant received from Dr. Mackinnon and the fact that it did bring some overall relief to his complaints in his right ankle, and given that her release of Claimant from care on July 21, 2010 and Dr. Musich's opinion on maximum medical improvement as of June 24, 2010 are very close in time to each other, I find that Claimant reached maximum medical improvement from his February 2, 2003 injury on July 21, 2010.

Employer, therefore, had responsibility to continue to pay temporary total disability benefits during this period of time from June 1, 2005 until July 21, 2010, or 268 weeks, at the appropriate (stipulated) rate of compensation for total disability benefits of $627.88. That equals a total dollar figure of $168,271.84 for temporary total disability benefits in this case that Employer should have paid.

The parties stipulated that Employer actually paid temporary total disability benefits in this case in the amount of $93,696.68 for 154 weeks at a rate of $608.42. Therefore, not only did Employer not pay for the entire appropriate period, but they also paid at an incorrect rate, resulting in a net underpayment of temporary total disability benefits to Claimant in this case. Giving Employer credit for the amount they have previously paid in this matter for this benefit, I find that Employer owes an additional $74,575.16 for temporary total disability benefits attributable the February 2, 2003 work injury.

Under **Mo. Rev. Stat. § 287.190.6 (2000)**, "'permanent partial disability' means a disability that is permanent in nature and partial in degree…" The claimant bears the burden of proving the nature and extent of any disability by a reasonable degree of certainty. ***Elrod v. Treasurer of Missouri as Custodian of Second Injury Fund***, 138 S.W.3d 714, 717 (Mo. banc 2004). Proof is made only by competent substantial evidence and may not rest on surmise or speculation. ***Griggs v. A.B. Chance Co.***, 503 S.W.2d 697, 703 (Mo. App. 1973). Expert testimony may be required when there are complicated medical issues. ***Id***. at 704. Extent and percentage of disability is a finding of fact within the special province of the [fact finding body, which] is not bound by the medical testimony but may consider all the evidence, including the testimony of the Claimant, and draw all reasonable inferences from other testimony in arriving at the percentage of disability. ***Fogelsong v. Banquet Foods Corp.***, 526 S.W.2d 886, 892 (Mo. App. 1975)(citations omitted).

Under **Mo. Rev. Stat. § 287.020.7 (2000)**, "total disability" is defined as the "inability to return to any employment and not merely … inability to return to the employment in which the employee was engaged at the time of the accident." The test for permanent total disability is claimant's ability to compete in the open labor market. The central question is whether any employer in the usual course of business could reasonably be expected to employ claimant in his present physical condition. ***Searcy v. McDonnell Douglas Aircraft Co***., 894 S.W.2d 173 (Mo. App. E.D. 1995) *overruled on other grounds by Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. 2003).*

In reviewing and weighing the evidence in this case, it is important to remember that according to **Mo. Rev. Stat. § 287.800 (2000)**, "All of the provisions of this chapter shall be liberally construed with a view to the public welfare…" All reasonable doubts as to an employee's right to compensation should be resolved in favor of the employee. ***Wolfgeher v. Wagner Cartage Service, Inc.***, 646 S.W.2d 781, 783 (Mo. 1983). Additionally, the Court in ***Kelley v. Banta & Stude Construction Co., Inc***., 1 S.W.3d 43 (Mo. App. E.D. 1999) noted, "Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible."

In cases such as this one where the Second Injury Fund is involved and there is an allegation of permanent total disability, we must also look to **Mo. Rev. Stat. § 287.220 (2000)**

for the appropriate apportionment of benefits under the statute. The analysis of the case essentially takes on a three-step process:

First, is Claimant permanently and totally disabled?;

Second, what is the extent of Employer's liability for that disability from the last injury alone?; and

Finally, is the permanent total disability caused by a combination of the disability from the last injury and any pre-existing disabilities?

In determining this case, I will follow this three-step approach to award all appropriate benefits under the statute.

Based on the competent and substantial evidence referenced above, including the medical treatment records, the expert opinions from the doctors and vocational experts, as well as based on my personal observations of Claimant at hearing, I find that Claimant is permanently and totally disabled under the statute. In arriving at this conclusion it is necessary to make findings, not only on the credibility of Claimant, but also to weigh the medical evidence and the expert opinions to determine who among them provided the most competent and persuasive evidence regarding the nature and extent of Claimant's disability from this injury.

At the outset, I find that Claimant was credible when he testified about the continued problems and complaints that he attributes to this injury and the subsequent treatment he received for his diagnosed physical and psychiatric conditions. Claimant's testimony regarding his complaints and functional limitations was consistent with the descriptions of his problems and complaints enumerated in the medical records. His testimony in this regard was also bolstered by his presentation in court, as described above. I believed Claimant when he testified to the profound effect that the 2003 injury had on his life and his ability to function on a daily basis.

As noted above with regard to the past and future medical issues, I find that the opinions and conclusions of Drs. Bassett and Musich are more competent, credible and reliable than those of Drs. Graham and Kostman in this case. Both Drs. Bassett and Musich essentially opined that Claimant was permanently and totally disabled and unable to compete for employment in the open labor market as a result of his physical and psychiatric conditions. Their opinions in this regard were bolstered by the medical treatment records of Dr. Guarino, wherein he indicated in a letter dated December 8, 2008, that the medications Claimant takes for his intractable pain state cause some sedation, and, so, he is not even a good candidate for jury duty. If he is not a good candidate for jury duty for a short period of time, it stands to reason he is also not suited for regular employment in the open labor market.

Just as there were competing medical opinions in this matter, there were also competing vocational opinions, with Claimant's expert, Ms. Gonzalez, finding Claimant to be unable to compete in the open labor market, and Employer's expert, Mr. McKee, finding that Claimant appeared to be employable. Having thoroughly reviewed their opinions and compared them against the balance of the medical treatment records and opinions, as well as Claimant's credible testimony, I find the vocational opinion and conclusions of Ms. Gonzalez, more competent, credible and reliable than the contrary opinion of Mr. McKee. I find that the vocational opinion of Ms. Gonzalez bolsters Claimant's testimony and the credible medical opinions of Drs. Bassett and Musich in support of a finding that Claimant is permanently and totally disabled.

Therefore, based on Claimant's credible testimony, the extensive functional restrictions from the physicians, Dr. Bassett's and Dr. Musich's opinions that Claimant is permanently and totally disabled and the credible vocational opinion from Ms. Gonzalez, I find that Claimant has met his burden of proof to show that he is permanently and totally disabled under the statute. I find that no reasonable employer in the usual course of business could reasonably be expected to employ Claimant in his present physical or psychological condition.

The next step in the analysis then, is determining the extent of Employer's disability from the last injury alone, and specifically determining if Employer is responsible for the permanent total disability. Although Claimant has admittedly had some prior work injuries that resulted in prior findings of permanent partial disability, the statute requires that I look, first, at the disability (injuries, diagnoses, functional restrictions, limitations, complaints and problems) attributable solely to the last injury alone to determine if the effects of the last injury alone are enough to render Claimant permanently and totally disabled, without even considering the prior injuries or disabilities. Having thoroughly reviewed the evidence in the record, I find that Claimant is permanently and totally disabled as a result of the effects of the February 2, 2003 injury alone.

In reviewing the medical and vocational opinions in the record of evidence in this case, I must admit that, on their face, most of them talk about a combination of Claimant's disabilities resulting in Claimant's permanent total disability in this matter. That would suggest Second Injury Fund liability for this permanent total disability. However, upon close review of their opinions and testimony in this case, and noting that I must by statute, first, look at the last injury in isolation to see if that alone is enough to cause the permanent total disability, I find that in reality, the experts in this case support a finding that the effects of Claimant's last injury on February 2, 2003, alone, are enough to render Claimant permanently and totally disabled, without even having to consider the pre-existing disabilities.

First, I find that Claimant's own testimony supports this conclusion that the effects of the injury of February 2, 2003 resulted in Claimant being permanently and totally disabled. Claimant clearly and credibly described the profound effects the 2003 injury has had on him and on his ability to function, even in everyday life. He also clearly testified as to the minimal, at best, effects that the pre-existing injuries/conditions had on his ability to function, leading up to the February 2, 2003 injury. Prior to February 2, 2003, he was working full duty without restrictions or limitations in a very heavy occupation, as a firefighter. Following the February 2, 2003 injury, he has never returned to work nor returned to any level of functioning even close to what he was able to do prior to that injury.

In terms of the medical and vocational opinions, as noted above, Dr. Guarino opined that Claimant was not even able to perform jury duty on account of the effects of the pain medications that Claimant takes for his intractable pain. The intractable pain and the need for those medications are related to the February 2, 2003 injury alone. Similarly, although Dr. Musich talks about combination, he also notes that Claimant's permanent total disability is the result of his "need for large amounts of narcotic analgesic medication," which again is related solely to the February 2, 2003 injury. Ms. Gonzalez also reached a similar conclusion regarding Claimant being unable to obtain a job based on the medications that he takes from the last injury,

despite her earlier opinion that it was a combination of disabilities that totaled him. Finally, despite talking about combination, Dr. Bassett confirmed in his testimony that any pre-existing psychiatric symptoms Claimant had were in remission leading up to the February 2, 2003 injury. I find that the competent, credible and persuasive evidence in the record points to Employer being responsible for the permanent total disability based on the effects of the last injury alone.

Since I have found that the exposure for the permanent total disability rests squarely on Employer as a consequence of the last injury on February 2, 2003 standing alone, and since I have previously found that Claimant achieved maximum medical improvement from the February 2, 2003 injury on July 21, 2010, I find that Claimant became permanently and totally disabled as of July 22, 2010. Since the permanent total disability is solely attributable to the February 2, 2003 injury, for which Employer has liability, I find that Employer is liable for the payment of those permanent total disability benefits to Claimant.

Accordingly, Employer is responsible for the payment of $627.88 per week for Claimant's lifetime beginning on July 22, 2010, subject to review and modification as provided by law.

As Employer is responsible for the permanent total disability in this case, I further find that the Second Injury Fund has no liability for the payment of any benefits in connection with this injury. Claimant's Second Injury Fund Claim is, thus, denied and no benefits are awarded from the Second Injury Fund.

**CONCLUSION:**

Claimant sustained a compensable accidental injury on February 2, 2003, which arose out of and in the course of his employment for Employer. On that date, Claimant was fighting a fire at a three-story brick residence, and as he and his partner were exiting the structure on orders of their Chief, a window collapsed, causing bricks to fall down and causing the roof of the porch to collapse and bury them. Claimant sustained injuries to his right ankle, low back and body as a whole referable to psychiatric issues, that are all medically causally related to the work injury on February 2, 2003. As a result of the injuries to his right ankle, low back and body as a whole, including the psychological effects of the injury, adequately described in the extensive medical treatment records and reports listed above, Claimant has continued to have significant pain, multiple other complaints, restricted activity levels, and has never returned to work.

Employer is responsible for the payment of, and Claimant is entitled to recover, the past medical bills in this case in the amount of $25,400.57. Employer is directed to provide continued and ongoing future medical care for Claimant's right ankle, low back and psychiatric conditions, including but not limited to chronic pain management, medications (pain and psychological/psychiatric), medication management (doctors' visits), psychotherapy, and any other testing, treatment or evaluation that the treating doctors deem necessary to cure and relieve Claimant of the effects of the February 2, 2003 injury. To prevent the health and recovery of Claimant from being further endangered in this case, Employer is further directed to return Claimant to Dr. Anthony Guarino for ongoing pain management and to Dr. Gregg Bassett for ongoing psychiatric therapy and medications, as well as any other treatment they may deem reasonable and necessary to cure and relieve Claimant of the effects of the February 2, 2003 work injury.

Claimant reached maximum medical improvement from his February 2, 2003 injury on July 21, 2010. Employer owes an additional $74,575.16 for temporary total disability benefits attributable the February 2, 2003 work injury. Claimant has successfully proven that he is permanently and totally disabled as a result of the effects of this February 2, 2003 injury, based on his own credible testimony, the medical treatment records, the credible and persuasive opinions of Drs. Bassett and Musich and the credible and persuasive vocational opinion of Ms. Gonzalez. Employer is responsible for the payment of $627.88 per week for Claimant's lifetime beginning on July 22, 2010, subject to review and modification as provided by law. Claimant's Second Injury Fund Claim is denied, and no benefits are awarded from the Second Injury Fund, since Employer is responsible for the permanent total disability in this case. Compensation awarded is subject to a lien in the amount of 25% of all payments in favor of Christopher A. Wagner, for necessary legal services.

Made by: _____

JOHN K. OTTENAD
*Administrative Law Judge*
*Division of Workers' Compensation*