

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

Injury No.: 02-084710

Employee: Daniel Hindle
Employer: Goldman Promotions
Insurer: Lumbermen's Mutual Casualty Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: August 6, 2002
Place and County of Accident: St. Louis, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. We have reviewed the evidence, heard oral argument, read the briefs of the parties, and considered the entire record. Pursuant to section 286.090 RSMo, the Commission modifies the award and decision of the administrative law judge dated July 17, 2006.

I. Preliminary Matters

The Commission affirms all findings and conclusions of law made by the administrative law judge, but for the determination concerning the issue of past medical bills and compensation rate. The administrative law judge determined the compensation rate to be \$120.03. The Commission modifies that determination, by concluding the proper rate for temporary total and permanent partial disability benefits is \$121.24 per week. As to the liability of the employer, the administrative law judge awarded unpaid medical expenses of \$9,186.42. The Commission modifies that determination, by concluding employee is entitled to reimbursement for medical bills in the sum of \$15,325.45.

II. Compensation Rate

This Commission disagrees with the administrative law judge's calculation of the employee's average weekly earnings and his corresponding compensation rate; however, agrees that section 287.250.1(4) RSMo, is the appropriate subsection to use as employee's earnings were based on his sales or output. *Adamson v. DTC Calhoun Trucking, Inc.*, 212 S.W.3d 207 (Mo.App S.D. 2007).

To determine the average weekly wage that is applicable under section 287.250 RSMo we must "commence with the first subsection and then descend in numerical order under the other subsections until the wage rate provision is found that applies to the particular facts of the case." *Stegeman v. St. Francis Xavier Parish*, 611 S.W.2d 204, 210 (Mo.banc 1981). Section 287.250.1 RSMo provides:

Except as otherwise provided for in this chapter, the method of computing an injured employee's average weekly earnings which will serve as the basis for compensation provided for in this chapter shall be as follows:

(4) If the wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be computed by dividing by thirteen the wages earned while actually employed by the employer in each of the last thirteen calendar weeks immediately preceding the week in which the employee was

injured . . .

Section 286.250.1(4) RSMo, requires the Commission to use the thirteen weeks immediately preceding the date of injury. Employee's earnings were based on his sales and the evidence shows that employee's wages totaled \$2,546.14 over a fourteen week period. In this case it is not possible to ascertain the wages earned using thirteen calendar weeks immediately preceding the date of injury; however, employee's weekly wage may be determined by using the last fourteen weeks preceding the week employee was injured. Therefore, to compute employee's average weekly earnings it is necessary to use the last fourteen weeks immediately preceding the week in which the employee was injured. Employee's wages were \$2,546.14 yielding an average weekly wage of \$181.87, and a corresponding compensation rate for temporary total and permanent partial disability of \$121.24.

This case is similar to *Bates*, where the Commission concluded under section 286.250.1(4) RSMo that it was fair and reasonable to calculate wages earned using a fourteen week period rather than a thirteen week period when the employee was paid every two weeks, and it was not possible to discern from the evidence adduced, the exact wages earned in any particular one-week time frame. *Bates*, 2006 MOWCLR Lexis 89 (MOWCLR 2006). The Court upheld this reasoning, finding no error of law on the part of the Commission. *Vester-Bates v. Ponderosa Steak House*, 209 S.W.3d 539 (Mo.App. E.D 2006).

As in *Bates*, this Commission is of the opinion that it would be fair and just to use the fourteen-week time frame since it encompasses the thirteen weeks immediately preceding the week in which the employee was injured. We are also of the opinion that doing so is in conformance with section 287.250.1(4) RSMo.

III. Past Medical Bills

We further disagree with the administrative law judge's determination as to unpaid medical expenses. A sufficient factual basis to award past medical expenses exists when employee identifies all of the medical bills as being related to and the product of his work related injury and the medical bills are shown to relate to the professional services rendered by medical records in evidence. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo.banc 1989). Employee satisfied his burden of proof as he properly offered into evidence all medical bills pertaining to treatment for his 2002 injury and testified that such medical bills and treatment were related to and the product of his 2002 work-related injury.

As to the home care facilities of Delmar Gardens; because they are not medical institutions, it is not necessary for the records to be admitted into evidence. Based on the record as a whole, including employee's testimony and hospital records, there was sufficient evidence showing the need for employee's transfer to Delmar Gardens; thus warranting reimbursement for expenses associated with the home care facilities.

We agree with the unpaid medical expenses awarded by the administrative law judge totaling \$9,186.42. However, employee has demonstrated that medical bills, excluded by the administrative law judge, were medically causally related to an effort to cure and relieve the employee from the effects of the 2002 work-related injury as required by section 287.140 RSMo. We find that the medical record supports a causal relationship between the 2002 work injury and medical bills for the following home care facilities and medical providers which were excluded in the administrative law judge's award: Dr. Wiele (\$46.34); Tai M. Chiu (\$92.61), Tonya Brock (\$92.61), Joseph Scerba (\$87.18); Medical Resources, Inc. through October 2002 (\$574.23); 000006110 (\$301.70); EBILP (\$311.43); Dr. Burns through April 2003 (\$44.02); Delmar Gardens Home Care, Inc. (\$1,360.00); and Delmar Gardens of Meramec Valley (\$2,016.60); and SSM Rehabilitation Institute through November 2002 (\$1,212.31). The total amount employee is entitled to for medical expenses is \$15,325.45.

However, we find that not all medical bills were related to employee's 2002 work-related injury including medical bills for treatment received in 2004 from Dr. Burns (\$524.40); Medical Resources, Inc. (\$29.72); and SSM Rehabilitation Institute (\$406.08). The total of the unsupported medical expenses is \$960.20.

IV. Conclusion

Based on the above modification, the Commission ascertains and determines employee's average weekly earnings to be \$181.87 (\$2,546.14/14 weeks), resulting in a compensation rate for temporary total and permanent

partial disability benefits of \$121.24. Consequently, the amount of compensation payable is modified to the following amounts: \$1,476.20 temporary total disability (\$121.24 x 12 and 1/7 weeks) and \$11,886.37 permanent partial disability (\$121.24 x 98.04 weeks).

We award employee past medical bills but for \$960.20, the sum of medical bills not related to his work-related injury. Employer is liable to employee for past medical expenses in the amount of \$15,325.45.

The award and decision of Administrative Law Judge Suzette Carlisle issued July 17, 2006, as modified, 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 27th day of April 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee:	Daniel Hindle	Injury No.:	02-084710
Dependents:	N/A	Before the	
Employer:	Goldman Promotions	Division of Workers'	
Additional Party:	Second Injury Fund	Compensation	
Insurer:	Lumbermen's Mutual Casualty Co.	Department of Labor and Industrial	
Hearing Date:	April 21, 2006	Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	SC:tr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: August 6, 2002.
5. State location where accident occurred or occupational disease was contracted: St. Louis, Missouri.

6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: While walking down the Employer's hallway, the Employee collided with several other employees, causing him to fall and fracture both ankles.
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: Both ankles.
14. Nature and extent of any permanent disability: 35% referable to the left ankle at the 155 week level, 20% referable to the right ankle at the 155 week level, 15% multiplicity, and PTD against the Second Injury Fund.
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? -0-

Employee: Daniel Hindle

Injury No.: 02-084710

17. Value necessary medical aid not furnished by employer/insurer? \$9,186.42
18. Employee's average weekly wages: \$180.04
19. Weekly compensation rate: \$120.03/\$120.03
20. Method wages computation: Section 287.250.1(4)

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:	\$9,186.42
12 1/7 weeks of temporary total disability	\$1,457.51
98.04 weeks of permanent partial disability from Employer	\$11,764.14

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund
at the rate of \$120.03 per week beginning after 10-21-2004 and continuing
for the remainder of Claimant's lifetime

TOTAL: \$22, 408.07

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

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Daniel Hindle	Injury No.:	02-084710
Dependents:	N/A	Before the	
Employer:	Goldman Promotions	Division of Workers'	
		Compensation	
Additional Party:	Second Injury Fund	Department of Labor and Industrial	
		Relations of Missouri	
		Jefferson City, Missouri	
Insurer:	Lumbermen's Mutual Casualty Co.	Checked by:	SC:tr

PRELIMINARY MATTERS

A hearing was held April 21, 2006, at the Missouri Division of Workers' Compensation office in St. Louis City pursuant to Section 287.450, at the request of Daniel Hindle (Claimant). Claimant was represented by Attorney Frank J. Lahey Jr. Goldman Promotions (Employer) and Lumbermen's Mutual Casualty Co. (Insurer) were represented by Attorney Martin Klug. The Second Injury Fund (SIF) was represented by Assistant Attorney General Jennifer R. Chestnut. The record closed after the hearing. Parties submitted post-hearing briefs by May 12, 2006. Venue is proper and jurisdiction properly lies with the Missouri Division of Workers' Compensation.

STIPULATIONS

- 1) On or about August 6, 2002, the Claimant, while in the employment of Employer, sustained an injury by accident arising out of and in the course of employment occurring in St. Louis, Missouri;
- 2) The Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law;
- 3) The Employer's liability was fully insured by Lumbermen's Mutual Casualty Co.;
- 4) The Employer had notice of the injury; and
- 5) A Claim for Compensation was filed within the time prescribed by law.

ISSUES

- 1) What is Claimant's average weekly wage and rate of compensation for temporary total disability (TTD) and permanent partial disability (PPD) and permanent total disability (PTD)?
- 2) Are TTD or temporary partial disability (TPD) benefits owed to Claimant? If so, what amount?
- 3) Is Claimant entitled to receive PTD or PPD benefits from Employer, and if so, to what degree?
- 4) Is Claimant entitled to receive either PTD or PPD benefits from the SIF, and if so, what amount?
- 5) What, if any portion of the \$16,285.65 Medicare payment is causally related to Claimant's August 6, 2002 work injury, and should Medicare be reimbursed?

SUMMARY OF EVIDENCE

Only evidence supporting this award will be summarized. Any objections not expressly ruled on in this award are overruled. Claimant offered Exhibits A-J which were admitted into evidence without objection. Employer offered Exhibits 1-3 which were admitted into evidence without objection. The SIF offered no exhibits.

Live Testimony

C. Daniel Hindle: Claimant is a 76 year old male who contracted polio at age 17, causing inability to move his left side. His leg, stomach and arm were affected. Claimant received three months of physical therapy and regained use of his left arm but not his stomach, which prevented him from doing sit-ups, and required him to roll to his side and push up to get out of bed. He regained 20% use of his left leg. Claimant did not serve in the military and saw a doctor once for polio between 1948 until 2002. Claimant had no medical restrictions or surgery to his ankles, legs or feet prior to 2002. He went to work after high school and lost no significant number of days from work due to polio.

Claimant became a salesman when he was 25 years old. He worked for Marketing Products Group from 1960 to 1963, and for Advantage Specialties in 1963, which was later purchased by Employer. Claimant sells personalized promotional items such as pens, mugs and t-shirts. Twenty five years ago he developed post polio syndrome (PPS), which is muscle loss and increased weakness, causing him to fall, experience difficulty climbing stairs and caused his right leg to perform double duty.

On January 1, 2001, Claimant entered into an independent contractor relationship with Employer to exclusively sell Employer's merchandise. Employer no longer withheld taxes and contributed to a 401-K plan. Claimant had no set hours, his wages were not fixed by the day, hour or production but were based on his sales. He took direction from the sales manager and both Don and Ken Goldman. Claimant structured his daily activities. The sales staff was not required to maintain a record of hours worked. Claimant sometime worked without earning pay. Employees sold coast to coast for Employer. Claimant worked straight commission; called "paid on paid", meaning when the Employer was paid the Claimant would be paid. Claimant earned a forty five percent commission on each sale and 55% went to the Employer.

In 1994 at age 64, due to declining health, he began receiving social security retirement and limited his income from earnings.

On August 6, 2002, while walking down a hallway to his office, four people entered the hallway from two different offices and collided with Claimant, causing him to fall backward to the floor with his ankles beneath him. He was taken to St. Mary's Hospital where Dr. Corders, his private physician, was called and referred him to Dr. Burns, who inserted a plate and screws into Claimant's left ankle and casted both legs from the knees down. Claimant was later transferred to Delmar Gardens Nursing Facility by ambulance at Dr. Corder's request.

For six days he received therapy and instruction on using a board to move from the bed, chair and commode before being discharged home in a wheelchair. Claimant required a bed with a trapeze, and armrests on the commode. A home health care nurse from Delmar Gardens provided Claimant with personal care and upper extremity therapy for six to eight weeks. Claimant made other modifications to his home. Claimant converted the hall bath into a walk-in restroom with a shower. He has a cushion lift in his chair to take pressure off his shoulders. He has a ramp at home to avoid stairs. He used a wheelchair but he could also drive.

Claimant submitted bills to Medicare and a supplemental Medicare plan. A medical supplier provided all of the appliances, the bed, and commode. Claimant paid for the wheelchair. It is not clear if the board was submitted to Medicare.

He participated in physical therapy from October to December of 2002 to strengthen and firm his legs. Claimant was more comfortable using a walker after Dr. Burns released him in December 2002. On February 18, 2004, Claimant's right ankle went out, causing him to fall as he was stepping into a car.

Claimant did not return to the Employer's office after the August 2002 injury but began working out of his home, contacting customers by telephone in October of 2002. Claimant's first sale after the August 2002 injury was in November 2002. His holiday business has remained brisk. He has not talked to the owners since August 2002. He continues to sell Employer's promotional products. Customers visit Claimant at his home where he displays catalogs and samples, and has placed orders for some customers for 15 years. Claimant placed one order by telephone in April 2006 and seven orders in March 2006.

Claimant uses a cane in the house, and a walker outside. He has severe weakness in his legs, and he needs the walker and ramp in order to stand. Since 2002 both ankles have collapsed, and people have had to get him up. Claimant fell two weeks prior to the hearing. He has not swam since the August 2002 work injury because he is fearful of falling on wet tile and he cannot rise from a stool.

Injuries Claimant sustained before August 2002 include lumbar discectomy in 1968, which caused problems lifting, and a fractured right foot in 1996.

Mrs. Janet Hindle, Claimant's wife of forty five years, testified that Claimant's right leg did not collapse until after the August of 2002 injury. Since August of 2002, he can no longer do laundry because he is unable to go down the stairs to the washing machine.

Donald Etherton Jr., employed by Employer for 18 years, is the Vice-President of Operations and he is responsible for Human Resources. He testified that both independent contract sales staff and hired sales staff were on the payroll in 2002. Claimant began as a hired salesperson and switched to an independent contract salesperson in 2001. The independent contract sales staff receive a 1099 form, pay their own taxes and do not participate in the 401K plan. Sales staff hired by Employer receive a W-2 form and participate in the 401K plan.

The entire sales force, also known as account managers, derive salary from commission, with no base salary. Account managers set the selling price and divide it with the Employer. Most account managers are paid by a "paid on booked" method, meaning they are paid when they place an order. Although he acknowledged some sales staff are still "pay on pay" and he is not sure which method is used by Claimant.

Mr. Etherton testified Claimant earned the following income: 1996- \$8,000.00; 1999- \$14,101.00; 2000- \$9,661.00; 2001- \$5,128.00; and 2002- \$5,802.00 (Exhibit 2). Four independent account managers across the country earned from \$6,000.00 to \$9,750.00 in 2002. Each received a form 1099. On cross examination, Mr. Etherton identified four account managers in the St. Louis area that were employed by Employer in 2002 with earnings ranging from \$54,000.00 to \$176,000.00 (Exhibit J). No account managers had a set schedule or minimum work hours. They sold similar products, controlled their daily activities and had no set territory. Employer provided sales staff with catalogues, samples and office space.

Prior to August 6, 2002, Mr. Etherton observed Claimant using a cane several times when he delivered orders, picked up catalogs, and used office space. Mr. Etherton has not seen Claimant in the office since the August 2002 injury, although he has arrived on the parking lot to drop off items. Employer called the ambulance in August 2002 but Claimant never asked Employer to pay for treatment, and Employer did not offer to pay. He visited Claimant at Delmar Gardens.

Medical Records Review

Dr. J. Corder, Claimant's primary care physician, was called to perform Claimant's admission examination after the August 2002 work injury. Claimant provided a history of increased weakness from PPS, making it harder to walk, and requiring him to use a cane. Records indicate Claimant was retired and this was not a work injury. Dr. Corder received surgery clearance at St. Mary's Hospital (Exhibit C).

On August 7, 2002, Dr. Michael Burns performed surgery on Claimant's left ankle repairing a displaced trimalleolar fracture with a plate and screws on the lateral and medial sides. A splint was placed on Claimant's right ankle for a non-displaced oblique fracture to the distal fibula and an avulsion fracture. Dr. Corder recommended Delmar Gardens – Meramec Valley and Medicare authorized it for short term recovery on August 10, 2002. No Delmar Gardens treatment records were in evidence. Claimant was released from Delmar Gardens around August 17, 2002 (Exhibit C).

Claimant placed 1/3 of his weight on a left tibial walker by September 17, 2002. October 8, 2002, Claimant began wearing a regular shoe on the right foot and an air cast on the left. Claimant complained of weakness due to PPS in December 2002 when Claimant attained adequate range of motion in both legs and was released to all activities using common sense but no high level weight bearing.

On April 22, 2003, he returned to Dr. Burns for a flare up of the right ankle after he fell three weeks earlier, injuring his elbow. Claimant received physical therapy for a right sprained ankle (Exhibit C).

February 20, 2004, Claimant returned to Dr. Burns with complaints of injury to his right ankle on February 18, 2004 when he stepped off a curb and injured his ankle. X-rays revealed a new distal fibular fracture, which was casted. After a course of treatment, Claimant was released from care on April 27, 2004 with almost no complaints and no tenderness, swelling, deformity and good range of motion (Exhibit F).

In 1996, Claimant was diagnosed with a left foot fracture and complaints of knee buckling and falling which caused his great toe to hyper extend, injuring his right hand and knee. Dr. Evans prescribed orthotics and a Hapad for golf shoes to relieve discomfort. Claimant also complained of right knee pain and difficulty getting up and down. X-rays revealed degenerative changes on the patella (Exhibit B).

Deposition Testimony

Dr. Musich, a board certified family practitioner, examined Claimant on November 30, 2004, and opined the August 6, 2002 injury to be a significant factor in Claimant's bilateral ankle conditions. He also found the right ankle fracture from February 2004 to be causally related to the August 2002 injury due to bilateral pain, easy fatigability and diminished mobility. He acknowledged these symptoms are also associated with PPS. Dr. Musich diagnosed post traumatic stress disorder (PTSD), and recommended he seek evaluation/treatment, but did not perform psychiatric tests and was unaware of any treatment Claimant received for PTSD before or after the August 2002 work injury.

Dr. Musich found the combination of Claimant's disabilities to be greater than the simple sum and produced a hindrance to routine daily living, rendering Claimant unemployable in the open labor market (Exhibit H-12). Dr. Musich acknowledged he is not a vocational expert and has not performed vocational testing or obtained a full vocational history. He did not know Claimant's product line or job skills. He rated Claimant 75% PPD to the left ankle, 35% PPD to the right ankle and pre-existing 25% to the left ankle due to PPS.

Mr. Vincent F. Stock is a licensed psychologist and vocational rehabilitation expert who interviewed Claimant twice, on September 14, 2005 and September 19, 2005. He administered the Woodcock-Johnson psychological test and Claimant scored average results in reading and writing and above average in calculation and developmental skills compared to other seventy-five year olds. Claimant expressed a fear of falling. Mr. Stock determined Claimant to be permanently and totally disabled and unemployable in the open labor market based on Claimant's interview, chronic PTSD, age, PPS, and injuries from the August 2002 fall (Exhibit H-12). However, no diagnostic tests were performed. He conceded Claimant's fear of falling may have predated the August 2002 injury, based upon the impact of PPS. He admitted he did not include PPS in his report although he was aware of the diagnosis and Claimant's history of instability, problems getting up, knee buckling and falling.

On cross examination, Mr. Stock admitted his certification as a rehabilitation counselor lapsed in 1986. He admitted he was placed on probation two and a half years ago for misconduct that was incompetent or grossly negligent, and that he breached ethical standards of the profession, by exploiting his professional relationship with a patient (Exhibit I-26), and continues to meet the requirements imposed. He also admitted his psychology degree did not require medical school, he cannot prescribe medication and his resume does not show his probationary status or lapsed certification.

Dr. Craig E. Aubuchon, a board certified orthopedic surgeon, examined Claimant once and found marked weakness of both lower extremities from the knees to the ankles. He attributed the increased PPS weakness to Claimant's age.

He also expected Claimant to have weakness from the three bone fracture in August 2002. Examination revealed left leg atrophy which he attributed to both the PPS and the trimalleolar fracture. He attributed the loss of dorsiflexion and plantar flexion of both feet to both PPS and the bilateral fractures. He opined Claimant needed a walker due to PPS.

He concluded the August 2002 fall was related to Claimant's work activities but not the February 2004 right ankle fracture. Dr. Aubuchon determined Claimant to be at maximum medical improvement and rated each ankle 5% PPD from the August 2002 work injury.

FINDINGS OF FACT AND RULING OF LAW

Having given careful consideration to the entire record, and based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

Issues relating to compensation rate

Claimant contends his compensation rate should be based upon the earnings of the Employer's full-time employees pursuant to Section 287.250.3. Employer contends Section 287.250.1(4) applies because wages are fixed by Claimant's sales output.

Section 287.250.3 does not apply because Claimant was not hired for a set number of hours per week. In fact, he was paid according to what he sold, not by the hour. Claimant limited his hours, not the Employer.

Section 287.250.1(4) provides if the wages were fixed by the day, hour, or output of the employee, the average weekly wage shall be computed by dividing by thirteen the wages earned while actually employed by the employer in each

of the last thirteen calendar weeks immediately preceding the week ... the employee was injured. The term "output" is not defined. There is no restriction that "output" is limited to piecemeal or assembly work. Claimant testified his income was based on a percentage of sales generated. I find the income from sales revenue may be viewed as "output", therefore Section 287.250.1(4) is applicable. Exhibit 2 provides Claimant's wages which total \$2,546.14 during a 99 day period from April 29, 2002 to August 5, 2002. I find that \$2,546.14 divided by 99 days yields a daily rate of \$25.72 and results in an average weekly wage of \$180.04, resulting in a compensation rate of \$120.03 for TTD and PPD benefits.

Issues related to temporary total disability

Claimant is seeking temporary total disability benefits from August 6, 2002 to October 31, 2002, a twelve week period. Employer conceded Claimant may have been unable to work for some period of time after the August 2002 injury but denies Claimant should be paid TTD because the exact period he was unable to work cannot be identified because he worked from home.

Section 287.020.7 RSMo defines the term "total disability" as the "inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident." The test for entitlement to TTD "is not whether an employee is able to do some work, but whether the employee is able to compete in the open labor market under his physical condition." *Thorsen v. Sach Electric Co.*, 52 S.W. 3d 611, 621 (Mo. App. W.D. 2001). TTD benefits are intended to cover the employee's healing period from a work-related accident until he or she can find employment or his condition has reached a level of maximum medical improvement. *Id.* Once further medical progress is no longer expected, a temporary award is no longer warranted. *Id.* The claimant bears the burden of proving his entitlement to TTD benefits by a reasonable probability. *Id.*

Claimant wore an air cast on the right side and tibial walker on the left with partial weight bearing on the left until October 8, 2002. The remainder of October, he progressed to a normal shoe on the right and an air cast on the left. I find Claimant was unable to compete in open labor market under these physical conditions. By November 5, 2002, there is no further mention of Claimant wearing an air cast, and his only complaint involved lower left extremity weakness due to the preexisting polio. I find Claimant is entitled to TTD benefits from August 7, 2002 through October 31, 2002, totaling 12 and 1/7 weeks @ \$120.03 per week, or \$1,457.51.

Issues related to permanent partial disability

Claimant sustained fractures to three bones surrounding his left ankle in the August 2002 work injury. The right ankle sustained a non displaced fracture and was casted. Prior to August 2002, Claimant visited the Employer's office for supplies, samples and meetings with other employees and customers. After August 2002, he has fallen more often, relies on a walker and cane and does not go into the office. Customers visit him or he contacts them by telephone.

I find Claimant sustained 35% PPD referable to the left ankle at the 155 week level, 20% PPD referable to the right ankle, for 85.25 weeks of PPD plus a 15 % multiplicity factor of 12.7875 weeks, resulting in a total of 98.04 weeks of PPD or \$11,767.74 (\$120.03 x 98.04 weeks). I do not find the February 2004 right ankle injury to be causally related to the August 2002 work injury.

Issues related to permanent total disability

Claimant contends he is PTD due to a combination of his age, the August 2002 work injury, and prior PPS. The Employer contends Claimant is PPD from the August 2002 injury. The SIF contends Claimant is not PTD as he continues to work for Employer.

The Employee has the burden to prove by a preponderance of credible evidence all material elements of his claim, including Second Injury Fund liability. *Meilves v. Morris*, 422, S.W. 2d 335, 339 (Mo. 1968). To determine if a claimant is totally disabled, the central question is whether, in the ordinary course of business, any employer would reasonably be expected to hire claimant in his present physical condition. *Massey v. Missouri Butcher & Café Supply*, 890 S.W. 2d 761, 763 (Mo. App. E.D. 1995). Section 287.020.7 RSMo. 2000, defines total disability 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. Dr. Aubuchon's opinion regarding disability is more credible than either Dr. Musich or Mr. Stock.

Dr. Musich admitted he is not a vocational expert, but found Claimant PTD based on his age, diminished ambulatory ability, chronic pain, fatigue and PTSD. He did not take Claimant's vocational history or perform vocational testing. He was not knowledgeable of the products Claimant sold, his job skills or job description. He did not know if Claimant took prescribed medications. Dr. Musich diagnosed PTSD and recommended treatment without administering psychiatric tests and despite no history of psychiatric treatment before the August 2002 work injury. Claimant did not seek psychiatric treatment after Dr. Musich's recommendation. I do not find competent and substantial evidence to support a diagnosis for PTSD.

Mr. Stock's opinion is not credible. He knew of Claimant's PPS and use of a cane prior to August 2002, but failed to

include it in his report. He was disciplined and placed on probation for incompetent or grossly negligent conduct. His license as a rehabilitation counselor lapsed 19 years ago but it is still listed on his resume.

Dr. Aubuchon is an orthopedic doctor and has reasonably explained the impact of Claimant's past and current injuries. He attributed tenderness across Claimant's ankles to the August 2002 injury. Left calf atrophy and loss of dorsiflexion and plantar flexion of both ankles are the result of the August 2002 ankle fractures and polio. Claimant's inability to extend the knee, weakness of both hips and use of a walker are attributable to PPS, which results in more weakness with age.

Although Claimant continues to produce occasional sales for Employer, it is not likely another Employer would hire him in any capacity. Even though a claimant might be able to work for brief periods of time, or on a part-time basis it does not establish they are employable. *Grgic v. P&G Construction*, 904 S.W. 2d 464, 466 (Mo. App. 1995). I find Claimant to be credible. He uses a cane at home and a walker when he goes out. He has fallen numerous times before and after the August 2002 work injury. Claimant sustained twenty years of muscle loss to the left leg prior to August 2002 and he was 72 years old at that time. Claimant had more difficulty lifting items after he had back surgery in 1968.

I find Claimant to be unable to compete in the open labor market and to be permanently and totally disabled due to a combination of the pre-existing PPS, back injury, age and the August 2002 work injury. I find Claimant's pre-existing conditions to be a hindrance or obstacle to employment or re-employment. I find Claimant reached maximum medical improvement on December 3, 2002. I find Employer is responsible for \$120.03 per week beginning December 4, 2002 for 98.04 weeks, and the SIF is responsible for \$120.03 per week thereafter for the remainder of Claimant's life.

Issues related to a Medicare lien for \$16,285.65

Claimant asserts the Employer and Insurer are responsible for reimbursing Medicare for fair and reasonable medical treatment totaling \$16,285.65 because the Employer made no effort to control or direct treatment, including treatment for the February 2004 right ankle fracture. Employer contends Claimant pursued treatment on his own and did not request treatment.

Section 287.127.1(2) RSMo, provides that employees must report all injuries immediately to the employer by advising the employer personally, the employer's designated individual or the employee's immediate boss, supervisor or foreman and the employee may lose the right to receive compensation if the injury or illness is not reported within thirty days. Mr. Ethertone knew Claimant was injured because the ambulance was called to the office and he visited Claimant at Delmar Gardens.

If the employer had no notice or no opportunity to procure medical aid, then it is not liable. *Schutz v. Great American Ins. Co. et al.*, 103 S.W. 2d 904, 910 (Mo. App. W.D.1937). Mr. Ethertone, the Human Resource officer, provided Employer with notice and an opportunity to direct treatment when the ambulance was called. Employer had more notice and opportunity when Mr. Ethertone visited Claimant at Delmar Gardens.

In *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105, 111 (Mo.banc 1989) the court held: when testimony accompanies the bills, which the employee identifies as being related to and the product of her injury and when the bills relate to the professional services rendered as **shown by the medical records in evidence**, a sufficient factual basis exists for the commission to award compensation (emphasis added). Claimant testified Employer called an ambulance and his physician was called at the hospital. Initial admission records show the injury was not work related, and for payment, Claimant provided his Medicare cards Part A, B, and AARP supplemental cards.

Claimant testified to receiving treatment at St. Mary's Hospital and Delmar Gardens – Meramec Valley for the August 2002 injury. A statement from Medicare shows payments made to Dr. Corder (8-7-07 to 8-12-02), Robert Wiele (8-6-02), Tai Chiu (8-7-02), 000006110 (8-6-02), Med Resources (8-15-02 to 10 16-02), Dr. Burns(8-6-02 to 4-27-04), EBILP (11-5-02 to 4-23-03), Joseph Scerba (8-7-02), SSM St. Mary's Health Center (8-6-02 to 4-5-04), SSM Rehabilitation Institute (8-10-02 to 8-16-02), and Delmar Gardens Home Care (8-19-02 to 10-10-02). Claimant introduced medical records from St. Mary's Health Center showing treatment he received and bills paid by Medicare. No medical records were entered into evidence for treatment or equipment provided by Delmar Gardens – Meramec Valley or the other providers.

I find Employer had notice and an opportunity to direct care but did not after calling the ambulance. I find Claimant provided medical records to support a causal relationship between the August 2002 work injury for following medical providers: Dr. Corder (\$144.23), Dr. Burns through December 2002 (\$1,029.96), and SSM St. Mary's Health Center (\$8,012.23). I do not find a causal relationship has been established between the August 2002 work injury and the medical bills paid by Medicare for services provided by Robert Wiele, Tai Chiu, Tonya Brock, 000006110, Med Resources Inc., EBILP, SSM Rehabilitation Institute or Delmar Gardens Home Care. I find Employer is liable to reimburse Claimant for unpaid medical expenses totaling 9,186.42. Claimant may have an obligation under federal law to reimburse Medicare for these expenses.

CONCLUSION

Claimant is permanently and totally disabled due to a combination of his pre-existing injuries and the August 6, 2002 work injury. Employer is liable for \$1,457.51 in Temporary Total Disability benefits (12 1/7 weeks @ \$120.03 per week), reimbursement to Claimant for unpaid medical expenses totaling \$9,186.42, PPD of 35% of the left ankle, 20% of the right ankle plus a 15% load factor, totaling \$11,767.74, beginning December 4, 2002 for 98.04 weeks @ \$120.03 per week. The Second Injury Fund is responsible for \$120.03 per week thereafter for the remainder of Claimant's life.

Date: _____

Made by: _____

Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation