

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

Injury No.: 07-098904

Employee: William Hockersmith  
Employer: Medlin Transport, Inc.  
Insurer: None  
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 section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 18, 2009. The award and decision of Administrative Law Judge Victorine R. Mahon, issued May 18, 2009, 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 17<sup>th</sup> day of November 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

---

William F. Ringer, Chairman

---

Alice A. Bartlett, Member

---

John J. Hickey, Member

Attest:

---

Secretary

## FINAL AWARD

Employee: William Hockersmith

Injury No. 07-098904

Dependents: N/A

Employer: Medlin Transport, Inc.

Additional Party: Treasurer of Missouri, as custodian  
of the Second Injury Fund

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Insurer: None

Hearing Date: April 9, 2009

Checked by: VRM/db

### 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 22, 2007.
5. State location where accident occurred or occupational disease was contracted:  
Near Rolla, 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? Uninsured.
11. Describe work employee was doing and how accident occurred or occupational  
disease contracted: Claimant slipped and fell onto a cement wall.
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:
14. Nature and extent of any permanent disability: 5% to the body as a whole, 5% to right knee at the 160 week level, 5% to right ankle at the 155 week level.
15. Compensation paid to-date for temporary disability: \$0.
16. Value necessary medical aid paid to date by employer/insurer: \$0.
17. Value of necessary medial aid not furnished by employer/insurer: \$5,438.00.
18. Employee's average weekly wages: \$1500.00.
19. Weekly compensation rate: \$ 742.72 / \$389.04.
21. Method of wage computation: Agreement.

### **COMPENSATION PAYABLE**

22. Amount of compensation payable:

**For Permanent Partial Disability: \$13,908.18**

20.00 weeks (5% body as a whole for the neck) at \$389.04 per week.

8.00 weeks (5% of the right knee at the 160 week level) at \$389.04 per week.

7.75 weeks (5% of the right ankle at the 155 week level) at \$389.04 per week.

**For Past Temporary Total Disability: \$7,108.89.**

9 and 4/7 weeks of Temporary Total Disability from 8/22/07 to 10/28/07 at \$742.72 per week.

**For Unpaid Medical Expenses: \$5,438.00**

**TOTAL: \$26,455.07.**

23. Second Injury Fund liability:

Payment for above-referenced unpaid medical bills \$ **5,438.00.**

24. Future requirements awarded: None.

The compensation awarded to the claimant shall be subject to a lien of 25 percent of all payments in favor of the following attorney for necessary legal services rendered to the claimant: Becky Dias.

**FINDINGS OF FACT and RULINGS OF LAW**

Employee: William Hockersmith

Injury No. 07-098904

Dependents: N/A

Employer: Medlin Transport, Inc.

Additional Party: Treasurer of Missouri, as custodian  
of the Second Injury Fund

Insurer: None

Hearing Date: April 9, 2009

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Checked by: VRM/db

**Introduction**

The undersigned Administrative Law Judge conducted the final hearing in this case, on April 9, 2009 in Rolla, Missouri. Attorney Becky Dias represented William Hockersmith. Medlin Transport, Inc. (Employer) did not appear, despite having been provided with certified notice. Division records fail to show any insurance for Medlin Transport, Inc. Assistant Attorney General Heather C. Rowe appeared for the Treasurer of Missouri, as custodian of the Second Injury Fund.

Twenty-six exhibits were offered and admitted. The sole witness at the hearing was Claimant William Hockersmith.

**Issues**

The Second Injury Fund and Claimant stipulate to all issues except future medical and the amount of past bills for which the Second Injury Fund has liability. Based on stipulations between the parties present at the hearing, the admissions, the exhibits and testimony admitted, and administrative notice of the Division's records, I make the following Findings.

### **Findings of Fact**

1. The Division of Workers' Compensation provided separate notices to the last known addresses of Medlin Transport, Inc., Ted and Connie Medlin, and Duane Medlin. Each of these notices was mailed certified on March 18, 2009 for the final hearing in this case set at 10:30 a.m. on Thursday, April 9, 2009, Rolla, Missouri. The notices were returned to the Division as unclaimed.
2. Medlin Transport, Inc. failed to file an answer to the claim for compensation, which claim was filed timely on October 5, 2007.
3. Claimant Hockersmith was employed as a truck driver for Medlin Transport, Inc., on August 22, 2007. Claimant was paid by check on a Medlin Transportation account. Claimant said occasionally he received a check written by Ted and Connie Medlin. Taxes were withheld from his paycheck. Claimant's average weekly wage was \$1,500, yielding a compensation rate for Permanent Partial Disability at the maximum rate of \$389.04 and a Temporary Total Disability rate of \$742.72.
4. While working within the course and scope of his employment with Medlin Transportation, Inc., on that date, Claimant sustained injuries by accident when he slipped on animal fat that had accumulated on the ladder of his truck. He then fell on a concrete wall.
5. The accident occurred in Rolla, Missouri, the location where the final hearing was held. Jurisdiction and venue are proper.
6. After the fall, Claimant returned to Springfield, Missouri and advised Employer through his dispatcher, Duane, that he needed medical attention. At that time, Duane advised Claimant that Employer had let his workers' compensation coverage lapse. Claimant was instructed to put the medical care on his health insurance and Employer would pay his deductible. When Claimant went to the hospital, he learned that Medlin Transport had also allowed its employee health insurance policy lapse, even though premiums had been deducted from Claimant's paycheck. There is no evidence indicating that Employer was an authorized self-insurer. Claimant gave timely actual notice of the injuries by accident. There is no evidence that Employer was prejudiced by the lack of written notice.
7. On the date of the accident, all parties were subject to the Missouri Workers' Compensation Law. Medlin Transportation, Inc. was an employer within the meaning of the Workers' Compensation Law, having employed the requisite number of employees on that date. Claimant credibly testified that Medlin Transportation had 25 to 30 employee truck drivers as well as office staff. Duane Medlin was the dispatcher who directed Claimant's work.
8. As a result of the accident, Claimant suffered injuries to his neck, right knee, and right ankle. Claimant sought treatment from St. John's Emergency Room on August 22, 2007. He obtained follow-up care with various physicians.

9. Claimant was unable to work from the date of the accident until October 28, 2007. He requested that his physician release him to return to work because he had no income. Claimant made a demand on Employer for Temporary Total Disability, but received none.
10. Medical providers billed Claimant \$5,438.00 to cure and relieve the effects of these work-related injuries. Employer has paid no medical bills.
11. Dr. Habiger billed \$1,456.00 for services performed on September 24, 2007 (EE's Ex. V). The statement of account for physician services contains an entry under "payment activity" dated January 31, 2008, which states: "collection agency write offs...\$1456." Claimant was not aware of any collection activity. The remainder of the unpaid medical bills totals \$3,501.36.
12. Claimant's average weekly wage was \$1,500.00 per week, yielding the following rates: \$742.72 for Temporary Total Disability and \$389.04 for Permanent Partial Disability.
13. Dr. P. Brent Koprivica examined Claimant and credibly opined that the work-related fall was the prevailing factor necessitating the care and treatment of Claimant's injuries.
14. Dr. Koprivica further credibly opined that as a direct result of the fall on August 22, 2007, Claimant was temporarily and totally disabled until he returned to work in October 2007.
15. Dr. Koprivica further credibly opined that Claimant has reached maximum medical improvement as a result of the August 22, 2007 work accident, and suffered the following permanent and partial disabilities as a result of that accident: five percent to the body as a whole due to a neck injury, a five percent to the right ankle at the 155 week level, and a five percent to the right knee at the 160 week level.
16. Dr. Koprivica said the work injuries did not combine with any preexisting disabilities to create liability by the Second Injury Fund for Permanent Partial Disability.
17. Claimant continues to have aching in his neck, right knee and right ankle, and takes hydrocodone as needed. Claimant admitted, however, that he began taking prescribed pain medication for preexisting condition(s) prior to accident that is the subject of this case.
18. Dr. Koprivica made no statement suggesting that Claimant required future medical care for these work-related injuries.
19. Claimant believed Employer ceased operation subsequent to his work accident.

## **Conclusions of Law**

### **Permanent Partial Disability**

The fact finder is not bound by the exact percentages of any expert witness and has authority to find another percentage of disability supported by the record. *Ransburg v. Great Plains Drilling*, 22 S.W.3d 726, 732 (Mo. App. W.D. 2000) overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). In this case, Dr Koprivica's ratings appear reasonable. Absent contrary evidence, I conclude that Claimant suffered Permanent Partial Disability as outlined in Dr. Koprivica's report. Employer is liable for a total \$13,908.18, representing 35.75 weeks of Permanent Partial Disability at the weekly rate of \$389.04. This Permanent Partial Disability is for five percent to the body as a whole, attributable to the neck; five percent to the right ankle at the 155 week level, and five percent to the right knee at the 160 week level.

### **Temporary Total Disability**

The record as a whole substantiates that Claimant was unable to work for a period of nine weeks and 4/7 weeks, from the accident date until he returned to work on October 28, 2007. Employer is liable for nine and 4/7 weeks of Temporary Total Disability at the rate of \$742.72 per week for a total of \$7,108.89.

### **Bills for Past Medical Treatment**

Claimant has presented medical bills in the amount of \$5,438.00. Dr. Koprivica's report indicates that the medical treatment incurred was necessary to cure and relieve Claimant of the effects of his injury. Claimant has sustained his burden of demonstrating the reasonableness and

necessity of the whole amount of the medical bills, per the standard set forth in *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo. banc 1989). Employer is liable for \$5,438.00 in medical bills.

### **Future Medical Treatment**

To obtain an award of future medical, Claimant must demonstrate that there is more than a mere possibility that he will need such treatment and medical care. Claimant is not required to present evidence demonstrating with absolute certainty a need for future medical care and treatment. *Sifferman v. Sears, Roebuck & Co.*, 906 S.W.2d 823, 828 (Mo. App. S.D. 1995) *overruled on other grounds*, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). He must demonstrate only that there is a reasonable probability that additional treatment is needed and that such treatment is related to the work injury. *Bowers v. Hiland Dairy Co.*, 188 S.W.3d 79, 86 (Mo. App. S.D. 2006).

While Claimant testified that he takes a significant amount of medication, he has failed to demonstrate that the medication is needed to cure or relieve the effects of the injury sustained as a result of the accident in this case, as opposed to his preexisting or subsequent injuries. Moreover, his own rating physician did not indicate the need for future medical. Future medical treatment is denied.

### **Second Injury Fund Liability**

Section 287.220 RSMo 2000, creates the Second Injury Fund. There is no evidence suggesting that the Fund has liability for enhanced Permanent Partial Disability in this case, and none is awarded.

The dispute between Claimant and the Fund relates to payment of the medical bills.

Section 287.220.5 RSMo 2000, provides that if an employer fails to insure or self-insure, “funds from the second injury fund may be withdrawn to cover the fair, reasonable, and necessary expenses to cure and relieve the effects of the injury or disability of an injured employee in the employ of an uninsured employer....” Claimant alleges that this provision obligates the Fund to pay all \$5,438.00 of his past unpaid medical bills, including Dr. Habiger’s bill of \$1,456.00.

The Fund responds that because it appears Dr. Habiger has “written off” his bill, and Claimant is unable to state that collection agencies are pursuing payment, the Fund is not responsible for the payment of such bill. The Fund argues that payment of Dr. Habiger’s bill would provide Claimant with a windfall. Such windfall is contrary to the legislative intent in establishing the Second Injury Fund.

The Second Injury Fund first relies on *Mann v. Varney Construction*, 23 S.W.3d 231 (Mo. App. E.D. 2000), in which the appellate court ruled that the Fund need reimburse only that portion of medical expenses that an employee’s health care providers accepted from Medicaid, and not the total originally billed for his medical treatment. The *Mann* Court held that §287.220.5 RSMo, expressed the legislature’s intent to limit the liability of the Second Injury Fund for uninsured medical claims and pay only the employee’s actual expenses. To do otherwise, the Court reasoned, would “allow claimants to recover a windfall from the SIF when their employer had not made insurance contributions required by law.” 23 S.W.3d at 233. The *Mann* Court found that allowing a windfall would be against public policy.

Similarly, in *Phillips v. Par Electrical Contractors*, 92 S.W.3d 278 (Mo. App. W.D. 2002) *overruled on other grounds*, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo.banc 2003), the Missouri Court of Appeals, Western District, stated that the Second Injury

Fund “should not have to bear the cost of reimbursing an employee for claims or debts that have already been discharged by an employer’s insurance policy.” 26 S.W.3d at 288. In *Phillips*, the issue was whether the Fund could be required to pay employee for medical expenses that already had been paid by the employer’s automobile liability insurance policy. The Court of Appeals said that the Fund had no such liability.

A third case pertaining to this issue is *Leach v. Board of Police Commissioners of Kansas City*, 118 S.W.3d 646 (Mo. App. W.D. 2003), wherein the dependents of an “off duty” police officer, who was killed while performing work as a security guard, elected to pursue a claim against the uninsured security company and the Second Injury Fund. Because the police officer was killed while performing duties that also benefitted the Police Board—a self-insured entity—the Fund argued it should not be required to compensate an employee when one of two joint employers can bear the liability. The appellate court rejected the Fund’s argument, noting that the Fund’s role is analogous to a guarantor of an uninsured employer’s obligations to its employees, making it secondarily liable. The *Leach* Court distinguished the *Phillips* and *Mann* cases because they did not involve the payment of weekly death benefits. The Court further said that it “seems unjust” to punish claimants by denying them a recovery that they otherwise would have but for the security company’s failure to insure. 118 S.W.3d at 654.

The equities in the instant case are similar to those in *Leach*. It appears unjust to deny Claimant his right to the payment of all medical bills, a recovery that he normally would have, but for Medlin Transport’s failure to insure or self-insure. Conversely, if Claimant is no longer legally subject to liability, he should not be entitled to a windfall recovery, as recognized in *Mann* and *Phillips*.

This same dilemma was at issue in *Farmer-Cummings v. Personnel Pool of Platte County*, 110 S.W.3d 818, 822 (Mo. banc 2003), wherein the Supreme Court remarked that write-offs and fee adjustments “are often the product of a healthcare provider's decision to balance the provider's books in accordance with actual amounts received or a decision that the outstanding amount is not worth pursuing.” 110 S.W.3d 822. The Court held that “if [the employer] establishes by a preponderance of the evidence that the healthcare providers allowed write-offs and reductions for their own purposes and [the employee] is not legally subject to further liability, [the employee] is not entitled to any windfall recovery.” 110 S.W.3d at 823. The Court remanded the case for the Commission to make such a determination.

Here, as the Fund noted in its brief, “the only evidence presented on the issue indicates that \$1,456.00 owed to Dr. Habiger has been written off. Employee was unable to testify as to whether a collection agency was attempting to collect this debt from him.” (Fund brief 7). Such evidence is ambiguous, at best. There is no evidence, as in *Mann* and *Phillips*, that a third party (such as private automobile insurance or public assistance) had paid all or a portion of the bill in an exchange for a *discharge* of the remainder of the debt. I find no precedent, and the Fund cites none, wherein a patient's legal liability for a bill is always extinguished or discharged when a healthcare provider has written off the bill, apparently as a bad debt for tax purposes. It is unclear whether the bill will be pursued or whether the nonpayment will affect Claimant's credit. As noted in *Farmer-Cummings*, it is the defending party's burden (not that of Claimant) to demonstrate that the employee “is not legally subject to further liability....” 110 S.W.3d at 812. The evidence is insufficient to demonstrate that Claimant's obligation for this bill was extinguished. Therefore, it cannot be said that Claimant will obtain a windfall.

Having reviewed the specific facts of this case, considered the cases decided to date, and having applied a strict construction to the applicable statute, per § 287.800 Cum Supp. 2006, I fail to see an exception to the Fund's liability for the payment of all medical bills in this case.

The Fund will pay the full \$5,438.00 to Claimant.

Claimant's legal counsel, Becky Dias, shall have a lien in the amount of 25 percent of all amounts awarded for necessary and reasonable legal services provided to Claimant.

Date: May 18, 2009

Made by: /s/ Victorine R. Mahon  
Victorine R. Mahon  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

/s/ Naomi Pearson  
Naomi Pearson  
*Division of Workers' Compensation*