

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

Injury No.: 00-081801

Employee: John Hoff

Employer: St. Clair R-XIII School District

Insurer: Missouri United School Insurance Council
c/o Gallagher Bassett Services

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 heard the parties' arguments, reviewed the evidence, read the briefs, 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 March 10, 2010, as modified and supplemented herein.

Introduction

The administrative law judge heard this matter to resolve the following issues: (1) past medical expenses; (2) future medical treatment; (3) whether additional interest is owed to employee on benefits awarded in the Temporary Award and paid by employer/insurer, on benefits awarded after final hearing, and on benefits voluntarily although belatedly paid, such as spousal nursing care; (4) doubling of the Temporary Award pursuant to § 287.510 RSMo; (5) whether employer or the Second Injury Fund is liable for permanent total disability benefits; (6) whether employer is obligated to pay additional amounts to employee for van modifications, over and above the \$25,000 already advanced to the employee; (7) whether employer is obligated to pay additional amounts to employee for supplies and other expenses incurred by employee during the period from 2001 to 2007; (8) whether employer is obligated to pay additional sums for past spousal nursing care, over and above those sums already paid by employer, specifically, whether employer/insurer is liable for the additional 725.1 hours in caring for Mr. Hoff between August 3, 2007 and October 8, 2007; (9) future spousal nursing care; (10) whether employer/insurer is entitled to a credit for weekly sums paid for benefits for the period beyond May 1, 2005; (11) costs under § 287.560 RSMo; and (12) approval of employee's attorney's fee on sums ordered in the Temporary Award, and on all sums subsequently paid or ordered paid, except sums paid after May 1, 2007, directly to health care providers.

The administrative law judge made the following findings: (1) employee is permanently and totally disabled as a result of the consequences of the last injury considered alone and thus employer is liable for permanent total disability benefits; (2) employer/insurer are liable for temporary total disability benefits from December 1, 2000 through November 1, 2003, and thereafter for permanent total disability for so long as such condition continues; (3) employer/insurer are entitled to credit of \$155,676.82 for

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temporary total and permanent total disability benefits previously paid to November 12, 2009; (4) employer/insurer are liable for future medical care consistent with the life care plan projections of Dr. Katz; (5) employer/insurer are liable for spousal nursing care at the rate of \$11.00 per hour from November 23, 2009, and continuing for four hours per day for so long as the need for spousal nursing care continues to exist, subject to further modification; (6) employer/insurer are liable for a total of \$266,479.90 for past medical expenses as detailed in the Final Award's "Index of Compensable Past Medical Expense" and for other past medical expenses found compensable in the Final Award and not previously paid by employer/insurer; (7) employer/insurer failed to establish that any of the adjustments showing on employee's medical bills extinguish the liability of employee for the related expenses, and that employer/insurer is not entitled to a credit or to otherwise reduce its liability for past medical expenses paid by employee's wife's insurer; (8) none of the medical expense associated with the care by Dr. Thanawalla is compensable; (9) employee needed 4 hours of spousal nursing care from August 3, 2007, to the date of hearing, and into the present for so long as the condition of paraplegia continues; (10) employee needed 2 hours of spousal nursing care per day from January 1, 2004 until August 3, 2007, and that employer/insurer are liable for the difference between this amount and amounts previously paid by employer/insurer for spousal nursing care; (11) employer/insurer are liable for an additional 391.1 hours of spousal nursing care from August 4, 2007 through October 8, 2007, at the rate of \$9.50 per hour; (12) employer's liability for van modification is \$24,661.00 and employer/insurer are not liable for van modifications over and above the \$25,000.00 previously paid to employee; (13) employer/insurer are liable for interest on past due temporary total disability benefits from May 15, 2005 to February 26, 2007, at the rate of ten percent per annum, and spousal nursing for the same time period, at the rate of nine percent per annum; (14) employer/insurer are liable for interest on all awarded past medical expenses that were actually paid by employee at the rate of nine percent per annum; (15) employer is entitled to a credit of \$15,523.02 for interest that was previously paid on May 18, 2007; (16) employee is not entitled to a doubling of any portion of the Temporary Award under § 287.510 RSMo; and (17) employee is not entitled to costs under § 287.560 RSMo.

Employer filed a timely Application for Review with this Commission, alleging that the administrative law judge erred in the following ways: (1) in ruling employee was permanently and totally disabled due to the consequences of the work injury considered alone; (2) in granting future spousal nursing care at the rate of \$11.00 per hour for 4 hours per day from November 23, 2009; (3) in ruling that employee was in need of 2 hours of spousal nursing care a day and that employer was liable for the difference between the amount previously paid by employer/insurer for the period January 1, 2004 through August 2, 2007; (4) in ruling that employee's wife provided a total of 319.1 compensable hours of spousal nursing care on 57 separate dates during the interval from August 4, 2007 through October 8, 2007, over and above the 4 hours of spousal nursing care a day previously paid for by employer; (5) in ruling employee was entitled to recover \$266,479.90 for past medical expenses; (6) in holding employer liable for the increased cost in sales tax incurred by the employee in purchasing a modified van; and (7) in ruling the employer was obligated to pay additional amounts to employee for interest. Employer's Application for Review also identifies numerous additional sub-

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points of contention, in which employer challenges many of the administrative law judge's findings which were part of or ancillary to the disputed issues.

Employee also filed a timely Application for Review with this Commission, alleging that the administrative law judge erred in the following ways: (1) in concluding he had no jurisdiction to award a penalty under the provisions of § 287.510 RSMo; (2) in finding there was no evidence upon which to conclude that home repairs could have been completed any time before the hearing on final award; (3) in concluding he had no discretion to award a penalty on the cost of van modifications; (4) in finding the cost of medical supplies to be speculative; (5) in concluding employee is not entitled to a doubling of the award of past medical expenses; (6) in concluding employee is not entitled to interest on the award of past medical expenses where employee did not personally pay the related medical bills; (7) in concluding that employee is not entitled to costs under § 287.560 RSMo; (8) in making an award of attorney's fees that does not specify whether the attorney's lien applies to sums paid or ordered to be paid for spousal nursing care after May 1, 2007; and (9) in concluding employee is not entitled to interest for weekly benefits that were paid for the period May 9, 2001 to February 26, 2007.

On September 21, 2010, the day before oral arguments in this matter, employee also filed with this Commission a Petition To Consider Additional Evidence. Employee's Petition To Consider Additional Evidence is denied because employee offers the evidence as support for employee's claim of constitutional error, an issue over which this Commission has no jurisdiction.

We have considered each of the parties' allegations of error as set forth above. The Commission affirms the award of the administrative law judge as supplemented and modified herein.

Discussion

Is employee entitled to an award of spousal nursing care for the period January 1, 2004 to August 3, 2007, over the 3.5 hours per week granted in the Temporary Award?

The parties agree that employee is entitled to spousal nursing care for this period; employer previously paid compensation to employee at a rate consistent with the 3.5 hours per week of spousal nursing care granted in the Temporary Award. In the Final Award, the administrative law judge increased the amount of compensation to 2 hours per day for the time period at issue.

We have carefully considered the record and agree with employer that there is insufficient evidence to warrant the increase of spousal nursing compensation for this time period.

Employee's wife, Ms. Hoff, provided very limited testimony on the subject. Ms. Hoff had difficulty answering questions about the care she provided during specific time periods; she forthrightly confessed she did not keep records of her spousal nursing activities. Ms. Hoff testified that she thought on bad days she averaged about 2 to 4 hours of caring for employee up until he broke his hip on August 3, 2007, but admitted that it was hard to say, because she did not keep track of her time on a daily basis. Ms. Hoff did

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not provide any indication as to whether bad days were a common occurrence or otherwise. Nor did Ms. Hoff identify any specific task of spousal nursing that she performed during this time period or indicate how much time she spent on any such task, other than the task of getting employee up in the morning and helping him to bed at night, which she estimated at a half hour per day. We note that Ms. Hoff did provide an in-depth description of a “good day” and “bad day” of providing care for employee, but it appears to us that she was describing the type of care she performed at the time of hearing, rather than the specific period from January 1, 2004 to August 3, 2007.

We find the expert testimony to be similarly lacking in probative value as to this issue. Dr. Katz estimated that employee needed 2 hours of care per day in 2004: “I think it would be fair to just say that he needed two hours of care in '04 and four hours of care in '09” (Tr. 369). Dr. Katz’s opinion strikes us as too speculative to support an increase in the spousal nursing award for the time period at issue: Dr. Katz literally opined as to what he thought was fair, rather than provide an opinion based on the specific tasks he believed employee would need to have performed, and the time that these tasks would take to perform. Dr. Katz’s testimony was also not directed to the time period at issue with sufficient focus to aid our analysis. Likewise, Ms. Klosterman’s testimony and report are of no assistance as to the specific time period in issue; Ms. Klosterman “ventures to say” employee needed 4 hours of care per day “in the month before August 3, 2007” (Tr. 128), without elaboration or explanation.

While we are sympathetic to employee’s condition and recognize his clear need for spousal nursing care during the time period at issue, the courts require that spousal nursing awards be based on more than speculation. *Jerome v. Farmers Produce Exchange*, 797 S.W.2d 565, 568 (Mo. App. 1990). Faced with a lack of evidence as to the tasks performed by Ms. Hoff and the average time spent on them during this time period, we find Ms. Hoff’s estimate that she spent 2 to 4 hours assisting employee during this time period to be unpersuasive, and find that employee has not met his burden of proving he is entitled to an increased amount of spousal nursing for the time period at issue.

We conclude that employee is not entitled to an additional amount of spousal nursing care from January 1, 2004 to August 3, 2007. We reinstate the 3.5 hours per week of spousal nursing care granted in the Temporary Award.

Did the administrative law judge enter findings that are contrary to the parties’ stipulation regarding certain past medical expenses?

Employer argues that the administrative law judge awarded certain past medical expenses that the parties stipulated were already paid by employer at the time of the final hearing. Employer’s brief misstates the actual stipulation of the parties found at page 1629 in the Transcript, fails to cite to the actual bills at issue, and fails to specifically state how the parties’ stipulation differs from the amounts granted in the administrative law judge’s Final Award.

In regard to this issue and the numerous other disputed issues in this case, to the extent the parties invite us to scour the record for evidence to support their various claims of error

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by failing to provide page citations, we have declined to do so in order to avoid becoming an advocate for the party that fails to identify evidentiary support for their position.

Nevertheless, we compared the stipulation (which states employer reimbursed employee for items 14, 24, 25, 27, 28, 29, 30, 31, 32, 33, and 34 listed in employee's "Special Damage Summary,") to the Final Award's "Index of Compensable Past Medical Expenses," and it does appear to us that in some instances, the administrative law judge awarded amounts which were (according to the stipulation) already paid by the employer. Specifically, the administrative law judge awarded \$72.82 for charges at St. Louis Medical Supply, \$19.95 for Sammons Preston, and \$60.36 for R&R Ace, which correspond exactly to items 29, 31, and 34 in the special damage summary.

Of course, the administrative law judge has no jurisdiction to enter findings contrary to the stipulations of the parties. See *Spacewalker, Inc. v. American Family*, 954 S.W.2d 420, 424 (Mo. App. 1997). Accordingly, we modify the award of past medical expenses to discount items 29, 31, and 34, as identified above, from the "Index of Compensable Past Medical Expenses"; however, due to the aforementioned deficiencies in employer's brief and argument, we leave undisturbed the other findings of the administrative law judge set forth in the "Index of Compensable Past Medical Expenses."

Did the administrative law judge err in calculating employer's liability for van modifications?

The administrative law judge found that employee paid \$43,411.00 for a modified van, and that the average cost of a new mid-priced sedan was \$18,750.00. Under *Mickey v. City Wide Maintenance*, 996 S.W.2d 144, 152-53 (Mo. App. 1999), the appropriate method of determining the compensation due to employee is to deduct the second figure from the first and award the balance to employee: \$24,661.00. The administrative law judge, however, increased the award to \$25,000.00 to account for "the increased cost in sales tax estimated by the employee" (Final Award, page 24).

Employer argues that the administrative law judge's award goes beyond the scope of the holding in *Mickey*. Employee fails to respond to this argument. We agree with employer. The *Mickey* court made clear that its holding was intended to be read narrowly. *Id.* at 152. The court also included the proviso that employee is responsible for extra costs such as repair, fuel, title, license, and insurance. *Id.* at 153. We conclude that, under *Mickey*, employee is entitled to the difference between the cost of the modified van (\$43,411.00) and the average cost of a new mid-priced sedan (\$18,750.00). Accordingly, we modify the award to find employee entitled to \$24,661.00 for van modifications.

Did the administrative law judge properly credit employer for an overpayment of interest on past due spousal nursing at the rate of 10% per annum?

Employer argues the administrative law judge should have credited employer for an interest overpayment, where the administrative law judge awarded interest on spousal nursing at the rate of 9% under § 408.020 RSMo, and where the parties stipulated that employer paid interest on the same amounts at 10%. Employee fails to respond to this argument.

Employer is correct that spousal nursing, a medical expense, is not covered under § 287.160.3 RSMo, and thus the appropriate rate of interest is 9% per annum. See

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McCormack v. Stewart Enters., 956 S.W.2d 310 (Mo. App. 1997). Accordingly, we supplement the award to specifically find that employer is liable for interest on spousal nursing at the rate of 9% per annum, and to recognize the parties' stipulation that employer previously made a payment of interest for spousal nursing at the rate of 10%.

We note that employer asks this Commission to award a "credit" in light of its previous voluntary payment of amounts intended to represent interest on the past due spousal nursing award. Employer fails to suggest the appropriate amount of such credit. The parties are certainly capable of reaching an accounting of interest consistent with the terms of our award. To the extent the parties ask this Commission to perform such an accounting on their behalf, we decline to go beyond our findings affirming the award of interest and setting the appropriate rate under the law.

The attorney's lien

Employee's attorney asks us to clarify whether the attorney's lien applies to the award of spousal nursing care. We find that it does. Accordingly, we supplement the language of the attorney's lien as follows, with our additional language underlined:

This award is subject to a lien in the amount of 25% thereof in favor of Daniel J. McMichael, Attorney at Law, for necessary legal services rendered, on all sums subsequently paid or ordered paid, including all amounts found due from the employer/insurer in the temporary award, and all amounts due from employer for spousal nursing care; and per stipulation submitted in the matter, to except sums paid after 5/1/07 directly to health care providers.

All other issues affirmed

We have thoroughly reviewed each of the parties' allegations of error and have carefully evaluated the administrative law judge's analysis, findings, and conclusions on the numerous disputed issues. In our view, the administrative law judge capably disposed of this complex matter, and because we agree with the findings of the administrative law judge as to all other issues, we affirm the remainder of the award and adopt the findings of the administrative law judge without additional modification or supplementation.

Conclusion

We supplement and modify the award of the administrative law judge with the foregoing findings and conclusions on the issues of spousal nursing, past medical expenses, the cost of van modifications, interest, and the attorney's lien. In all other respects, we affirm the award.

The award and decision of Administrative Law Judge Kevin Dinwiddie, issued March 10, 2010, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

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

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

Given at Jefferson City, State of Missouri, this 14th day of February 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

CONCURRING OPINION FILED

William F. Ringer, Chairman

Alice A. Bartlett, Member

SEPARATE OPINION FILED

John J. Hickey, Member

Attest:

Secretary

Employee: John Hoff

CONCURRING OPINION

I submit this concurring opinion to disclose the fact that I was previously employed as a partner in the law firm of Evans and Dixon. While I was a partner, the instant case was assigned to the law firm for defense purposes. I had no actual knowledge of this case as a partner with Evans and Dixon. However, recognizing that there may exist the appearance of impropriety because of my previous status with the law firm of Evans and Dixon, I wish to state that I had no involvement or participation in the decision in this case until a stalemate was reached between the other two members of the Commission. As a result, pursuant to the rule of necessity, I am compelled to participate in this case because there is no other mechanism in place to resolve the issues in the claim. *Barker v. Secretary of State's Office*, 752 S.W.2d 437 (Mo. App. 1988).

Having reviewed the evidence and considered the whole record, I join in the decision to modify the award with respect to spousal nursing, past medical expenses, the cost of van modifications, interest, and the attorney's lien, and to affirm the award of the administrative law judge in all other aspects.

William F. Ringer, Chairman

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SEPARATE OPINION

(Concurring in Part and Dissenting in Part)

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law I disagree with aspects of the majority's decision.

As a preliminary matter, I must reluctantly concur with the majority's decision to affirm the denial of employee's claim for a doubling of the compensation granted in the Temporary Award under § 287.510 RSMo. Although I am sympathetic to employee's argument that the holding in *Ball-Sawyers v. Blue Springs Sch. Dist.*, 286 S.W.3d 247 (Mo. App. 2009), effectively removes the incentive for the employer/insurer to promptly pay benefits granted in a temporary award (and thus deprives a temporary award of any real significance), I also recognize that we are bound by the decision. For this reason, even though the employer delayed for many months to pay the temporary total disability, medical expenses, and nursing care expenses it owed to employee under the Temporary Award, because these sums were satisfied as of the date of the hearing on the Final Award, we are not permitted to award a penalty in favor of employee.

I cannot join, however, in the decision of the majority to affirm the denial of employee's claim for costs under § 287.560 RSMo, which provides, in pertinent part:

All costs under this section shall be approved by the division and paid out of the state treasury from the fund for the support of the Missouri division of workers' compensation; provided, however, that if the division or the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them.

The foregoing section permits us to assess the whole cost of the proceedings against a party who defends a workers' compensation claim without reasonable grounds. Here, it is uncontested that the last injury rendered employee paraplegic with a neurogenic bowel and bladder, resulting in a need for daily nursing care. Following the last injury, employee is dependent on his wife for daily assistance. Every day, Ms. Hoff helps employee affix his catheter and maneuver out of bed. Employee has to sleep in a hospital-type bed with rails so that he can pull himself up. Employee can't lift his right leg and can't dress himself, so Ms. Hoff helps him. It takes approximately 45 minutes to dress employee. Ms. Hoff puts employee's shoes on for him. Employee spends most of his day in a power wheelchair. Employee takes baths in bed or Ms. Hoff helps him into a Hoyer lift for a regular shower. Employee washes as best he can but requires Ms. Hoff's help. In the evening, employee is unable to transfer from his wheelchair into bed due to his inability to lift his right leg, so Ms. Hoff has to assist him with the transfer, and also with undressing and the other usual preparations for bed. Assisting employee with transfers is a difficult process, and employee sometimes falls on the floor. When this occurs, Ms. Hoff uses the Hoyer lift to raise employee back up to the level of the

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wheelchair, at which point she begins the process of transferring employee to the bed all over again. Once employee is in bed, Ms. Hoff helps him attach his catheter.

The foregoing is a description of a “good day” for employee. A “bad day” involves bowel problems. As a result of his neurogenic bowel and bladder condition, employee suffers frequent and unpredictable episodes of constipation and incontinence. This can lead to serious medical emergencies; the record reveals that employee has been to the emergency room at least once for constipation. Ms. Hoff used to be able to help employee manage his bowel condition by using a portable toilet chair, but because employee has lost the ability to stand up in a walker, she must now assist employee while he is in bed. Bowel accidents require immediate attention and can happen at any time. There is no way to predict when bowel accidents will occur, and Ms. Hoff described having to assist and clean employee and his bed multiple times in the same day.

Employer argued up until the day of the final hearing in this matter that an employee with the foregoing limitations and conditions was capable of competing for gainful employment in the open labor market. In so doing, employer ignored the opinion of its own rating expert, Dr. Katz, who opined that employee is permanently and totally disabled and incapable of competing for gainful employment. Dr. Katz’s opinion was corroborated by Dr. Bernstein and Mr. England. At the time of the final hearing, employee was 69 years old with below average reading and math skills, no computer skills, and a job history as a laborer. It is uncontested that employee is not a candidate for retraining due to reduced cognitive functioning. Yet until the day of the final hearing, employer argued, incredibly, that this paraplegic employee who is not a candidate for sedentary jobs is capable of successfully competing for work. Employer had absolutely no evidence to support this position.

The conduct of employer in this case mirrors that of the employer in *Monroe v. Wal-Mart Assocs.*, 163 S.W.3d 501 (Mo. App. 2005). In *Monroe*, the court reversed the Commission’s decision to deny an award of costs under § 287.560 where the employer ignored the opinion of its own expert and denied compensation up until the time of the hearing, without the benefit of any evidence to support its position. *Id.* at 508. In so doing, the employer forced employee to undergo years of protracted litigation and the costs and effort associated therewith, even though it had no reasonable basis for its position. *Id.* Here, by waiting until the last possible moment to concede that employee is permanently and totally disabled, employer unnecessarily complicated and multiplied the proceedings in this matter, requiring employee to retain an additional expert and submit to yet another evaluation, and to incur the costs involved in preparing to litigate the issue of permanent total disability at the final hearing. All along, employer had no evidence or any other reasonable basis to support its position or justify the torment to which employee was subjected. This conduct is so clearly egregious and goes so radically against the public policy of Chapter 287 that I am convinced it warrants the imposition of the whole cost of proceedings against employer.

But this is not the only aspect of employer’s handling of this matter which I consider unreasonable to a degree as to warrant imposition of costs. After conceding permanent total disability at the last possible moment, employer continued to deny compensation on

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the theory that the Second Injury Fund, rather than employer, is liable for permanent total disability because employee is not permanently and totally disabled due to the last injury alone, but due to a combination of the last injury and employee's preexisting conditions.

The basis of employer's argument is that we should focus on employee's cognitive limitations, or his epileptic seizure disorder which caused him to have one or two seizures per year. But under § 287.220.1 RSMo, we are not permitted to delve into employee's preexisting conditions until we have determined the nature and extent of disability resulting from the last work injury considered in isolation. *APAC Kan., Inc. v. Smith*, 227 S.W.3d 1, 4 (Mo. App. 2007). I have already discussed the effects of the work injury. Employer asks us to imagine employee successfully competing for, securing, and performing a sedentary job from his wheelchair, despite the fact he is subjected to frequent and unpredictable bowel accidents and requires daily nursing assistance. Even Mr. England—the vocational expert who was originally retained by employer to identify the various jobs employee can supposedly compete for—agreed that employee's need for nursing care during the day permanently and totally disables him. Mr. England is right: no conceivable employer will hire an employee with a frequent and unpredictable need for nursing assistance due to his neurogenic bowel and bladder. The administrative law judge thus correctly found employer liable for permanent and total disability benefits, because this is the only rational conclusion to draw from the overwhelming evidence.

I am convinced that there is no reasonable basis—not even the “very tenuous thread” identified by the administrative law judge—for employer's defense on the issue of the nature and extent of its liability for employee's injuries. I would reverse the conclusion of the administrative law judge on this issue and enter an award for employee of costs under § 287.560.

I would also assess against employer the costs connected with this appeal. Employer continues to argue before this Commission that the administrative law judge was wrong to find it liable for permanent total disability. In so doing, the employer brazenly misrepresents the evidence on record, even the testimony provided by its own experts. The employer states in its petitioner's brief, page 31, that: “No medical or vocational expert found employee to be permanently and totally disabled as a result of his 12-1-00 fall and resulting paraplegia, alone.” This statement is so flatly untrue as to raise, at least in my mind, grave doubts as to the candor with which employer approaches this tribunal. Dr. Bernstein testified, unequivocally, that employee is permanently and totally disabled due to the last injury considered alone at pages 265 and 284 of the Transcript. James England originally gave a combination opinion but admitted, at page 1438 of the Transcript, that a need for nursing care during the day would render employee permanently and totally disabled, because no employer would allow that. Employer's misstatements compound the difficulty in discerning the true nature of the expert opinions in this matter, needlessly squander the resources of this tribunal, and provide a telling example of employer's approach to this case. I am convinced that employer's conduct is so egregious as to compel an award of costs.

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Finally, I must register my disagreement with the decision of the majority to reduce employee's compensation for the cost of the modified van. (That employer makes a point of appeal out of its liability for approximately \$339, once again multiplying the proceedings in this matter and imposing additional burdens upon the parties, the Division, and this tribunal, only serves to further demonstrate the need for an award of costs in this matter). The case of *Mickey v. City Wide Maintenance*, 996 S.W.2d 144 (Mo. App. 1999), does not specifically mention sales tax, but does indicate that an employer is liable for the difference between the "cost" of a modified van and the average price of a mid-priced automobile. Because sales tax is part of the "cost" employee paid to acquire the modified van, I think it is appropriate to include sales tax in the calculation of employer's liability.

In sum, I concur in the majority's decision with respect to doubling of the award under § 287.510. I do not agree, however, with the majority's decision as to costs under § 287.560, and the issue of sales tax on the modified van. I would assess the costs of this proceeding against employer, and leave undisturbed the findings of the administrative law judge with regard to the cost of the modified van.

John J. Hickey, Member

FINAL AWARD

Employee: John Hoff Injury No.: 00-081801
Dependents: N/A
Employer: St. Clair R-XIII School District
Additional Party: State Treasurer, as Custodian of the
Second Injury Fund
Insurer: MUSIC c/o Gallagher Bassett Services
Hearing Date: Monday, November 23, 2009

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

Checked by: KD/cmh

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 alleged accident or onset of occupational disease: July 26, 2000
5. State location where accident occurred or occupational disease was contracted: Franklin County, 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 is alleged to have occurred: Claimant suffered injury at work to his knee while performing duties of a custodian; subsequent injuries suffered to the back and right hip compensable as natural consequences of the initial work injury
12. Did accident or occupational disease cause death? No Date of death: N/A
13. Part(s) of body alleged to be injured by accident or occupational disease: Right knee; back; right hip
14. Nature and extent of any permanent disability: Permanent total disability
15. Compensation paid to-date for temporary disability: See award
16. Value necessary medical aid paid to date by employer/insurer: See award

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- 17. Value necessary medical aid not furnished by employer/insurer: See award
- 18. Employee's average weekly wages: \$528.82
- 19. Weekly compensation rate: \$352.21/\$314.26
- 20. Method wages computation: by agreement of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable:

The following amounts are found to be due from the employer/insurer:

for temporary total disability, at the rate of \$352.21 per week
from 12/01/00 through 11/1/03, for 152 and 2/7 weeks\$53,636.56

for permanent total disability, at the rate of \$352.21 per week
from 11/2/03 through the date of hearing, 11/23/09, for 316 and 2/7 weeks\$111,399.00

In addition to the spousal nursing care previously paid:
for past spousal nursing care, \$99.75 per week for the period from
1/1/04 through 8/2/07..... \$18,667.50
for past spousal nursing care from 8/3/07 through 10/8/07,
391.1 hours of care at the rate of \$9.50 per hour \$3,715.45

Past medical expense- payable to the claimant, John Hoff \$269,365.65

TOTAL COMPENSATION PAYABLE..... \$456,784.16

Less previous payment by employer/insurer in temporary total and
permanent total disability benefits through 11/12/09..... \$155,676.82

TOTAL COMPENSATION DUE..... 301,107.34

Employer/insurer liable for permanent total disability, at the rate of \$352.21 per week, continuing from
11/23/09 and for so long as the condition of permanent total disability continues to subsist.

Employer /insurer to further pay interest on temporary award of \$31,257.05 in professional nursing services
and \$37,905.00 for spousal nursing services, a total of \$69,162.05, for the period from 5/15/05 to 2/26/07 at
the rate of nine percent per annum; and to further pay interest on temporary award of \$7,949.89 in temporary
total disability for a period from 5/15/05 to 2/26/07 at the rate of ten percent per annum. Employer/insurer is
entitled to a credit of \$15,523.02 for interest previously paid on 5/18/07.

- 22. The claim as against the Second Injury Fund is denied.

23. Future requirements awarded:

The employer/insurer is liable for such future medical care as is necessary to cure and relieve Mr. Hoff of the
effects of his work injury, per this award. The employer/insurer is liable for spousal nursing care at the rate
of \$11.00 per hour from 11/23/09, the date of hearing in this matter, and continuing for 4 hours per day for so
long as the need for such spousal nursing care continues to subsist, and further subject to modification to meet
the needs of the claimant.

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This award is subject to a lien in the amount of 25% thereof in favor of Daniel J. McMichael, Attorney at Law, for necessary legal services rendered, on all sums subsequently paid or ordered paid, including all amounts found due from the employer/insurer in the temporary award; and per stipulation submitted in the matter, to except sums paid after 5/1/07 directly to health care providers.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: John Hoff

Injury No: 00-081801

Dependents: N/A

Employer: St. Clair R-XIII School District

Additional Party State Treasurer, as Custodian of the
Second Injury Fund

Insurer: MUSIC c/o Gallagher Bassett Services

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

Checked by: KD/cmh

FINDINGS OF FACT AND RULINGS OF LAW

The claimant, Mr. John Hoff, appeared at hearing represented by his counsel, Attorney Dan McMichael. The employer, St. Clair R-XIII School District, as insured by the Missouri United School Insurance Council (MUSIC), appeared by its counsel, Timothy Tierney and Mary Anne Lindsey. Assistant Attorney General M. Jennifer Sommers appeared on behalf of the State Treasurer as Custodian of the Second Injury Fund. The parties agreed that a final award was being requested in the matter. The matter comes on for a final award following a temporary or partial award issued in April of 2005, finding the employer liable to the claimant for benefits due following a compensable injury by accident occurring on July 26, 2000. Further hearing was held on November 23, 2009, after the employer exhausted its right of appeal as to the temporary award. The parties have further submitted a written stipulation in the matter, marked as EE/EI/SIF Joint Exhibit No. 1, that is instructive as to the procedural

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history, and as to history of benefit payment by the employer and insurer (including a partial health history as to the claimant having suffered a right hip fracture during physical therapy on 8/3/07). The written stipulation, at paragraph 41, also sets forth the issues remaining for resolution. Those stipulations as to the issues, taken verbatim from the written stipulation, are as follows:

ISSUES

- a) Past medical expense;
- b) Future medical treatment (employer contends this is an issue, employee contends that this has been decided by the Temporary Award);
- c) whether, and in what amount, additional interest is owed to the employee on benefits awarded in the Temporary award and paid by employer/insurer, on benefits awarded after final hearing, and on benefits voluntarily although belatedly paid, such as spousal nursing care;
- d) doubling of the Award pursuant to Section 287.510;
- e) nature and extent of permanent disability (permanent partial disability versus permanent total disability);
- f) liability of the Second Injury Fund;
- g) whether employer is obliged to pay additional amounts to employee for van modifications, over and above the \$25,000.00 already advanced to the employee;
- h) whether employer is obligated to pay additional amounts to employee for supplies and other expenses incurred by employee during the period from 2001 to 2007;
- i) whether employer is obligated to pay additional sums for past spousal nursing care, over and above those sums already paid by employer, specifically, whether employer/insurer has paid for the additional 725.1 hours in caring for Mr. Hoff between 8/3/07 and 10/08/07 referred to in Jan Klosterman's supplemental report of 10/10/07;
- j) future spousal nursing care (employee contends that only the amount and appropriate source of the care is in dispute, as the Temporary Award ordered all necessary medical care);
- k) whether employer/insurer is entitled to a credit for weekly sums paid for benefits for the period beyond 5/1/01;
- l) costs under Section 287.560 (parties agree to leave open the amount of costs to be awarded. If the ALJ finds that costs are to be awarded, then further evidence will be permitted on the amount of costs);
- m) approval of employee's attorney's 25% fee on sums ordered in the Temporary Award, and on all sums subsequently paid or ordered paid, except sums paid after 5/1/07, directly to health care providers.

Further, on the record at hearing prior to the taking of testimony in the matter, Attorneys McMichael and Tierney further clarified that with respect to the issue of permanent disability, the employer and insurer stipulate that Mr. Hoff suffers a permanent total disability, but seek a determination whether the Second Injury Fund is liable for such permanent total disability.

Employee: John Hoff

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The claimant, Mr. John Hoff, testified on his own behalf; elicited the testimony of his wife, Ms. Joyce Hoff; and also submitted the deposition testimony of Jan Klosterman; Robert F. Morgan, M.D.; and of Samuel Bernstein, PhD. The employer and insurer took the deposition of Dr. Richard Katz, submitted in evidence as Claimant's Exhibit RR.

EXHIBITS

The parties offered further exhibits to supplement the record made during the original hearing in this matter. The various depositions offered into evidence are received subject to the objections contained therein. The employer and insurer objects that Claimant's Exhibit UU is to an extent cumulative of Claimant's Q as previously submitted, and objects that Claimant's TT and UU contain medical records or billings for treatment unrelated to the involved work injury. The employer and insurer had the opportunity to submit an affidavit, properly signed and attested, by 12/07/2009, and did so; see Employer/Insurer's Exhibit No. 5. Subject to the objections made at hearing, the record in this matter is supplemented by the following exhibits in evidence:

Claimant's Exhibits

- KK. Missouri Court of Appeals Order and LIRC Temporary or Partial Award affirming decision of Administrative Law Judge
- LL. Fawe Construction contract and bid
- MM. United Access of St. Louis Van Purchase
- NN. Prescription and other medical expense
- OO. Deposition of Jan Klosterman, taken by the employee on 4/10/09
- PP. Deposition of Robert F. Morgan, M.D., taken by the employee on 5/29/09
- QQ. Deposition of Samuel Bernstein, Ph.D., taken on behalf of the employee on 5/07/07
- RR. Deposition of Dr. Richard Katz, taken on behalf of the employer and insurer on 6/25/09
- SS. Report of F. Ray Martin dated 8/27/2008
- TT. Compilation of medical records
- UU. Compilation of medical billings
- VV. Deposition of James M. England, Jr., taken on behalf of the employer/insurer on August 12, 2009
- WW. Report of Richard T. Katz, M.D., dated June 18, 2007
- XX. Report of Jan Klosterman dated October 10, 2007
- ZZ. Copy of correspondence between counsel for the employee and the employer/insurer

Employer and Insurer's Exhibits

4. Letter from Centers for Medicare and Medicaid Services (CMS) dated July 21, 2009
5. Affidavit of Robin Gladwill dated 11/24/09

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Joint Exhibits

1. Written stipulations as to certain facts, and as to the issues for hearing on 11/23/09
2. Chronology of Claim and Proceedings

Joyce and John Hoff provided testimony at hearing that was thoroughly and wholly credible, and that testimony supports the following findings of fact.

Findings of fact supported by the testimony of Joyce and John Hoff

Joyce Hoff

Subsequent to the original hearing held in this matter, Mr. John Hoff went on to suffer a right hip fracture in August of 2007, and a subsequent gall bladder attack, leading to a hip replacement and to surgery to remove the gall bladder. Those two health events caused Joyce Hoff to spend more time to care for Mr. Hoff than she had previously. In October of 2007 Ms. Hoff sat down with Jan Klosterman to discuss the extra time spent with Mr. Hoff following his hip fracture, and she had subsequent telephone conversations with Ms. Klosterman thereafter. Ms. Hoff reviewed the report of Jan Klosterman, marked as Exhibit 3.1 to Claimant's Exhibit OO. Ms. Klosterman recorded into a calendar the extra time spent by Ms. Hoff caring for John Hoff post his hip fracture. Ms. Hoff believes the calendar of care hours contained in Exhibit 3.1 is accurate.

Ms. Hoff acknowledges receiving a check from the employer/insurer for four hours a day of care provided back to August 3rd of 2007. Ms. Hoff acknowledges that John Hoff made some recovery and improvement following his hip fracture, and that he is somewhat close to his baseline as of the date he fractured the hip, except that he is now unable to lift the right leg.

At the original hearing on this matter Joyce Hoff testified that she spent ½ an hour each day providing care to John Hoff. Ms. Hoff notes that the ½ hour did not include time cooking, cleaning house, doing laundry, shopping, performing household chores such as light bulb changing, or performing the occasional unexpected chore such as cleaning up a toileting incident. For the last three months or so prior to the hip fracture in August of 2007, and since the last time she testified in 2004, Ms. Hoff has spent anywhere from 2 to 4 hours a day caring for the claimant. Ms. Hoff notes that it is difficult to give a more accurate accounting when you provide 15 or 30 minutes of care here and there in the course of a 24 hour day, and without keeping a formal accounting each day of every minute spent providing care.

From the date of the Hoff's marriage in 1963, and until March of 2000, the claimant continued to suffer as many as two or three seizures a year. Ms. Hoff notes that since claimant's medication was changed in February of 2001 following his back injury in 2000, she can recall the claimant having had only two seizures, both while in the hospital following his hip fracture.

Employee: John Hoff

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At some point the employer and insurer began to pay the claimant's medical bills. Ms. Hoff requests that the employer pay any outstanding bills for medical care related to the work injury. Ms. Hoff confirms that the Hoff's never received a stove with front controls, a home modification recommended by Jan Klosterman.

When Ms. Hoff first testified in 2004, she was working at a factory for eight hours a day, five or six days a week. The factory closed and moved its operations in January of 2005, and for a year or so, during 2004, claimant would be home alone without any other care giver. Although Ms. Hoff did not keep track of the hours of care she provided herself, she did keep track of the hours provided by paid care givers, and paid taxes accordingly.

The Hoff's hired Jan Klosterman for assistance on various issues, including as to the need for nursing care. Jan Klosterman came out to their home on an occasion to discuss care needs; at that time the home modifications had yet to be completed. The home modifications have made it easier for Mr. Hoff to care for himself and to get around in the home.

Ms. Klosterman visited the home in October of 2007, some six to eight weeks after John suffered his hip fracture, but some two days prior to the date he had a hip replacement surgery, and Ms. Klosterman has not been back to the home since the modifications have been completed.

John received physical rehabilitation post his hip surgery; he has the use of his upper extremities; is capable of feeding himself; needs some assistance clothing his upper body; and since at least March of 2009 has been able to bathe himself with minimal assistance. Ms. Hoff has slight disagreement with the conclusion reached by Dr. Volshteyn in March of 2009 that John is completely independent with level transfers, and Ms. Hoff acknowledges that claimant is independent with the use of his powered wheelchair.

Ms. Hoff further acknowledges that from the last hearing in 2004 until the hip fracture in 2007, Mr. Hoff had reached a plateau or consistency in the level of his functionality, and that during that time period, and with the exception of physical therapy, claimant had not been receiving any other ongoing medical care, save for regular blood monitoring for his epilepsy. Ms. Hoff confirms that the claimant is taking three medications on a daily basis for his seizure disorder. Ms. Hoff also confirms that more recently John has been seeking medical evaluation of an enlarged lymph node located in his abdomen.

Ms. Hoff relates that subsequent to the hip fracture, John has become somewhat less functional, to the extent that performing transfers has become more of a struggle, and his overall ability to balance himself has suffered.

The employer and insurer has honored the Hoff's preference that Dr. Volshteyn be the treating physician; John now sees Dr. Volshteyn regularly every six months; and claimant is not seeing any other physicians for consequences of his paraplegia. Dr. Thanawalla is John's primary care physician, and provides treatment for such conditions as common colds and arthritis complaints. Ms. Hoff is unable to say whether or to what extent any of the bills in evidence relate to treatment received by John for conditions unrelated to his paraplegia.

Ms. Hoff acknowledges that the only modification that has yet to be completed is the installation of a stove with front controls. The bid for the stove is separate from the home modifications completed by Fawe.

Ms. Hoff believes the majority of the medical bills have been paid, and that a few small bills have become an issue and have been referred on to the employer and insurer for payment.

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Ms. Hoff acknowledges that Mr. Hoff has good days and bad days. On good days Ms. Hoff assists her husband from bed, and he may take either a bed bath or use the lift to take a shower. Bad days occur unpredictably, and usually involve bowel problems that require extra attention. Perhaps once or twice a month Mr. Hoff will have back and /or leg complaints, and will choose to remain in bed.

On redirect, Ms. Hoff acknowledges a third visit with Dr. Katz after Mr. Hoff suffered his hip fracture, and that Dr. Katz asked several questions as to the nature of the disabilities suffered by John, and as to the care rendered to him. She further acknowledges that a bill in the amount of over \$5000.00 for in- hospital physical therapy was recently referred on to the insurer.

John Hoff

Mr. Hoff was present during the testimony of his wife, Joyce, and believes she gave an accurate history as to the care she has provided. Mr. Hoff believes he is becoming less disabled over time, but also acknowledges that he can no longer lift his right leg as high as he once was able. He also acknowledges that at one time he was capable of standing long enough to switch to a commode chair, but is now no longer able to do so. Mr. Hoff notes that he has suffered bowel accidents ever since his spinal fracture, and that those incidents have remained constant since he last testified in 2004.

The claimant has had a seizure disorder since he was fifteen years old. Prior to the change in his medication in 2001, he suffered seizures once or twice a year. Since the change in medication he has only suffered two seizures, both occurring while in the hospital with his hip fracture.

Mr. Hoff has worked his entire adult life, and his seizure disorder never prevented him from working. The claimant has carried groceries; operated heavy equipment; performed furnace repair; and since 1970 or 1980 he has worked for the school district, performing manual labor as a custodian, or performing maintenance.

Mr. Hoff considers himself to be a below average in reading and in math skills, and believes his paraplegia has rendered him incapable of performing the employment duties he had performed in the past.

On cross examination, Mr. Hoff acknowledges that back in 2004, and for about a year or so, he was able to be home alone for eight hours on the days his wife worked, and supposes that currently he would be able to be home alone for four to eight hour stretches, depending on the type of day he was having.

The custodial and maintenance work performed by Mr. Hoff involved manual labor; he did not operate a computer at work, nor does he have any computer skills. Claimant acknowledges that there were as many as 20 custodians for the school district and that he was "in charge" and supervised whenever his immediate supervisor was away from work.

BRIEF SUMMARY OF INJURY AND MEDICAL HISTORY

On 7/26/00 Mr. Hoff suffered a work related tear of the posterior cruciate ligament of his right knee. On 12/1/00 Mr. Hoff suffered a fall on steps and suffered further compensable injury to his back. On 12/07/00 Dr. James T. Merenda performed an open reduction with

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internal fixation of the T5 fracture dislocation, using bone grafting from the claimant's right iliac, and with Isola rods between T2 and T11, and with screws, hooks, and Songer cables used to reduce the fracture. As a result of his back injury, Mr. Hoff has suffered paraplegia.

Ms. Joyce Hoff, the claimant's wife, has provided spousal nursing services to Mr. Hoff since his return home on 5/8/01 after a period of rehabilitation. While at home Mr. Hoff continued to receive treatment in the form of outpatient therapy. On 8/3/07, Mr. Hoff suffered a fracture of his right hip while undergoing physical therapy. The fracture was deemed not amenable to repair, and claimant was returned home to heal.

On 9/24/07 Mr. Hoff treated for abdominal pain at St. John's Mercy. Claimant was found to have acute cholecystitis, and on 9/25/07 Mr. Hoff had his gall bladder removed.

On 10/9/07 Mr. Hoff was readmitted to Missouri Baptist Hospital. Mr. Hoff was found to have avascular necrosis and non-healing of the comminuted fracture of the femoral neck of the hip joint. On 10/10/07 Dr. Merkel performed an endoprosthetic replacement of the right hip. Claimant was discharged on 10/14/07, and thereafter his wife continued to provide spousal nursing care.

In January of 2008, Mr. Hoff treated for a diagnosis of possible non-Hodgkin's lymphoma.

Mr. Hoff further suffers from a chronic seizure disorder, and since childhood has been on medication to control his epilepsy.

NATURE AND EXTENT OF PERMANENT DISABILITY/TEMPORARY TOTAL DISABILITY/LIABILITY OF THE SECOND INJURY FUND

These are the two issues raised by the parties in paragraph 41 e) and f) of EE/EI/SIF Joint Exhibit No.1. Also to be addressed herein is the issue identified in paragraph k) whether employer/insurer is entitled to a credit for weekly sums paid for benefits for the period beyond 5/1/01. Further, at hearing on the record and while in the course of narrowing the issues, the employer/insurer stipulated that the claimant suffered from permanent total disability, but was disputing employer/insurer's liability for that condition.

Total disability means the inability to return to any reasonable employment; it does not require that the employee be completely inactive or inert. Brown v. Treasurer of Missouri, 795 S.W.2d 479, 483 (Mo.App. 1990). The test for permanent total disability is whether, given the claimant's situation and condition, he is competent to compete in the open labor market. Lurno v. Carnahan, 640 S.W.2d 470, 472 (Mo.App. 1982). This test measures the worker's prospects for returning to employment. Patchin v. National Supermarkets, Inc., 738 S.W.2d 166, 167 (Mo.App. 1987). The question is whether in the ordinary course of business an employer would reasonably be expected to hire the claimant in his present physical condition, reasonably expecting him to perform the work for which he is hired. Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919, 922 (Mo.App. 1982).

Section 287.220 RSMo imposes liability upon the Second Injury Fund in certain cases of permanent disability where there has been a preexisting disability. The Second Injury Fund is to provide compensation to employees for that portion of the disability attributable to the preexisting condition. Gassen v. Liebgood, 134 S.W.3d 75, 79 (Mo.App.2004) (citation omitted). The Second Injury Fund is liable where a claimant establishes either that the

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preexisting partial disability combined with a disability from a subsequent injury to create a permanent and total disability, or the two disabilities combined result in a greater disability than that which would have occurred from the last injury alone. *Id.*; (citing Karoutzos v. Treasurer of State, 55 S.W.3d 493, 498 (Mo.App.2001)). Whether the combination of injuries resulted in permanent and total disability is determined based upon the worker's ability to compete in the open labor market. Knisley v. Charleswood Corp., 211 S. W.3d 629, 635 (Mo.App.2007) (citations omitted).

The liability of the employer for disability related to a work injury must first be determined before the liability of the Second Injury Fund, if any, can be determined. For example, if the last injury, considered alone, is the sole cause of a permanent and total disability, the employer shall be responsible for that liability, and the Second Injury Fund shall have no liability for the combination of disabilities that are pre-existing and work related. Section 287.220 RSMo; Vaught v. Vaughns, Inc., 938 S.W.2d 931 (Mo.App. S.D. 1997); Stewart v. Johnson, 398 S.W.2d 850 (Mo. 1966).

All those to have rendered an expert opinion, be it medical, or as an expert in vocational training, have opined that Mr. Hoff is unable to compete for employment on the open labor market. Dr. Katz, a certified physiatrist in physical medicine and rehabilitation, has expressed the most comprehensive and informed medical opinion as to the condition of Mr. Hoff as it has progressed throughout the years, to the extent that Dr. Katz was chosen by the employer/insurer to medically evaluate Mr. Hoff from time to time, and has had the opportunity, as a result of his evaluations from 2002 through 2009, to update his ongoing analysis as to the medical condition of Mr. Hoff, and to update his life care plan as to the future treatment needs of the claimant.

Dr. Katz opines that Mr. Hoff is permanently and totally disabled from the workplace. Dr. Katz is further aware and appreciates that the work related injury to the knee, followed by the traumatic injury to the back resulted in an incomplete paraplegia (per the report of Dr. Katz, this incomplete paraplegia is exacerbated by the other work injuries, meaning the right knee posterior cruciate ligament tear and right hip fracture and subsequent replacement; and includes the inability to stand; neurogenic bladder and bowel; an inability to get into a seated position; clothe himself; manage transfers to bed, to the wheelchair, to the commode; or to a vehicle unassisted; or to manage his bowel regiment; all necessitating at least four hours of nursing care on a daily basis).

Dr. Katz finds the claimant to suffer from an accelerated osteoporosis secondary to the paraplegia that will progress over time. Dr. Katz further acknowledges that the claimant's condition has clearly worsened since he fractured his hip during physical therapy in 2007, with his function further limited after the hip fracture to the extent Mr. Hoff can no longer lift his right leg.

Mr. Hoff has a pre-existing history of epilepsy, currently well controlled, that admittedly would have disqualified him from certain occupations, such as driving vehicles; working at heights; and working around dangerous machinery. Mr. Hoff is further acknowledged as having a limited education, being relatively unskilled, and has been observed as being slow in processing information.

In May of 2004 Dr. Samuel Bernstein performed a vocational evaluation of Mr. Hoff; prepared his written report; and determined that the combination of advanced age, unskilled background, cognitive deficits, multiple physical deficits, and confinement to a wheelchair

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rendered Mr. Hoff unemployable on the open labor market. At deposition taken on 5/7/07, Dr. Bernstein further stated that he believed the combination of the claimant's age; incontinence; degree of loss of function due to paraplegia; and apparent cognitive deficits rendered Mr. Hoff unemployable. Dr. Bernstein further elucidated that the cognitive defects and history of epilepsy notwithstanding, and given that Mr. Hoff had spent his working life as a custodian, it was the paraplegia that rendered him unable to work.

Dr. Katz opined that he believed the claimant to be capable of employment in the workplace prior to his paraplegia, and incapable of employment post the paraplegia. The most instructive testimony bearing on the issue of the cause of the inability to work is provided by Dr. Katz in his deposition, Claimant's Exhibit RR, at pp. 24-25. Dr. Katz was asked to assume that Mr. Hoff's personal history did not include seizure disorder, and he was able to function as a custodian all his life in a satisfactory manner. When asked whether, in the absence of the history of seizure disorder, the paraplegia suffered by Mr. Hoff would have disabled him from the workplace, Dr. Katz opined as follows:

If I might make sure I understand your question. Does paraplegia prevent this man from working? For the most part, yes. It would be--- here's how I would comment. We look to all the persons with complete paraplegia. He's not complete. But if we look at most people with complete, most of them are not working. Many are but most are not. If we then say well, his paraplegia isn't complete, that would be a point in his favor. He still has partial use of the legs, yes, but he is someone with low intellectual skills and essentially was depending on physical skills to make a living. It's a very valid point. So that would in all essence, in my opinion, make it, if not impossible, highly unlikely that he could be employed.

Mr. Jim England, a rehabilitation counselor, offered his opinion as to the ability of Mr. Hoff to be employable in the open labor market (See Claimant's Exhibit VV). Mr. England concludes that the combination of age, learning problems, the seizures, and various medical problems would render the claimant unemployable, (Claimant's Exhibit VV, at page 9). When asked whether the paraplegia itself would render the claimant unemployable, Mr. England states, "I don't think by itself necessarily because there are obviously a lot of paraplegics that still work. I don't think paraplegia in and of itself rules out the--- the ability to return to some type of at least sedentary work activity...."

The opinion of Mr. England as to the effect of the paraplegia alone on the ability of Mr. Hoff to become employable is based on an incomplete and inadequate understanding of the entire history of injury and treatment afforded to Mr. Hoff. Mr. England based his testimony for the most part on his report dated August 29, 2007. Mr. England was aware of the history of hip fracture in August of 2007, but had not reviewed any further information as to the medical condition since 2007. Mr. England was not only unaware of the further limitations afforded by the right hip fracture and subsequent replacement, but he was further unaware that Mr. Hoff was in need of nursing care on a daily basis; nor was he aware of the current status as to control of the epilepsy suffered by Mr. Hoff. Mr. England further seemed uninformed as to the totality of the bowel and bladder problems suffered by Mr. Hoff post his traumatic back injury, and

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acknowledges that bowel and bladder control problems by themselves could affect employability on the open labor market, depending on their extent (Claimant's Exhibit VV, at pp. 20, 21).

Compensable as part and parcel of his work injury are those permanent disabilities suffered by Mr. Hoff as a result of his right knee posterior cruciate ligament tear; paraplegia induced by the fall and traumatic injury to his thoracic spine; and right hip fracture, resulting in the need of hip replacement surgery. The testimony of Dr. Katz and of Dr. Bernstein persuades that permanent disability from these three injuries, all a result of the compensable work injury, are the sole cause of the permanent total disability suffered by Mr. Hoff. The employer/insurer are found liable for permanent total disability suffered as a result of the involved work injury.

The claimant has failed to persuade that he suffered an injury compensable as against the Second Injury Fund. The Second Injury Fund claim is denied.

The employer/insurer is obliged to pay temporary total disability benefits to Mr. Hoff for so long as Mr. Hoff suffers a temporary and total disability. Temporary total disability awards are owed until the claimant can find employment or the condition has reached the point of maximum medical progress. Vinson v. Curators of Univ. of Missouri, 822 S.W.2d 504, 508 (Mo.App. 1991). "A nonexclusive list of other factors relevant to a claimant's employability on the open labor market includes the anticipated length of time until the claimant's condition has reached the point of maximum medical progress, the nature of the continuing course of treatment, and whether there is a reasonable expectation that the claimant will return to the claimant's former employment." Cooper v. Medical Center of Independence, 955 S.W.2d 570, 576 (Mo.App. W.D. 1997).

Finding the employer/insurer liable for permanent total disability renders the issue as to when the claimant reached maximum medical improvement somewhat academic, inasmuch as the parties have stipulated that the rates for both temporary total and permanent total disability are the same, \$352.21. Dr. Morgan has testified persuasively that the claimant reached maximum medical improvement in November of 2003, subsequent to his release from physical therapy at that time. Medical records indicate that Mr. Hoff was treating at Rehabilitation Institute of St. Louis through 10/16/03.

The employer/insurer is found liable for a condition of temporary total disability from the date of the fall and subsequent traumatic back injury on 12/01/00, through 11/1/03. Thereafter, the employer/insurer are liable to Mr. Hoff for payments of permanent total disability from 11/2/03 through 11/23/09, the date of hearing on the request for a final award, and continuing each week thereafter for so long as the condition of permanent total disability continues to subsist.

The total due for temporary total disability, at the rate of \$352.21 per week from 12/01/00 through 11/1/03, is for 152 and 2/7 weeks, or \$53,636.56. The total due for permanent total disability, at the rate of \$352.21 per week, from 11/2/03 through the date of hearing, 11/23/09, is for 316 and 2/7 weeks, or \$111,399.00. The total due for both temporary total and permanent total disability through 11/23/09 is \$165,035.56. The parties further stipulated that as of 11/12/09 the employer/insurer have paid the employee \$155,676.82 in temporary total/permanent total disability benefits. The employer/insurer is entitled to a credit of \$155,676.82 for temporary total and permanent total disability benefits previously paid to 11/12/09.

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FUTURE MEDICAL CARE/FUTURE NURSING CARE

The parties have included the following issues, taken verbatim from their written stipulation:

b) future medical treatment(employer contends this is an issue; employee contends that this has been decided by the Temporary Award; and

j) future spousal nursing care (employee contends that only the amount and appropriate source of the care is in dispute, as the Temporary Award ordered all necessary all necessary medical care)

Section 287.510 RSMo provides as follows:

In any case a temporary or partial award of compensation may be made, and the same may be modified from time to time to meet the needs of the case, and the same may be kept open until a final award can be made, and if the same be not complied with, the amount equal to the value of compensation ordered and unpaid may be doubled in the final award, if the final award shall be in accordance with the temporary or partial award.

It is self-evident that the merits and the rationale of future medical treatment awarded in a temporary award may be put to the test, as the history of the ongoing medical treatment and its efficacy become challenged over the course of time. Clearly, what passed as necessary medical treatment to cure and relieve Mr. Hoff of his injuries as of the time the temporary award issued in April of 2005 has evolved as the condition of Mr. Hoff has progressed. The statute recognized this reality, and provides for modification of the award to meet the needs of the case. Further, to the extent Mr. Hoff has been found to be at a maximum medical improvement from his condition of ill being, and liability for both temporary total and permanent total disability has been determined, the fact that a final award can now be issued does not change the dynamic involved in cases as complex as this; the nature and the need for future medical care will change as the condition of Mr. Hoff progresses; the court can not speculate or see into the future as to what those needs and costs will be; and the life care plans submitted in the matter serve as educated guesses as to those needs and costs, by those with the necessary expertise to guide the parties and the courts.

Dr. Katz and Jan Klosterman have recognized the dynamic of change, as events have unfolded, and as the care needs of Mr. Hoff have increased over the course of time. Both life care planners recognize the reality that the health care needs of Mr. Hoff relative to his work injuries will increase as he ages, and that the ability of Mrs. Hoff to provide spousal care may change as she ages, and as those needs for nursing care increase.

Section 287.140.1 RSMo requires that the employer provide “such medical, surgical, chiropractic and hospital treatment...as may reasonably be required...to cure and relieve [the employee] from the effects of the injury.” This has been held to mean that the worker is entitled to treatment that gives comfort or relieves even though restoration to soundness [a cure] is beyond avail. Bowers v. Highland Dairy Co., 132 S.W.3d 260, 266 (Mo. App. 2004); Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 277 (Mo. App. 1996). The employee must prove beyond speculation and by competent and substantial evidence that his or her work related injury

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is in need of treatment. Williams v. A.B. Chance Co., 676 S.W.2d 1 (Mo. App. 1984). However, conclusive evidence is not required. It is sufficient if employee shows by reasonable probability that he or she is in need of additional medical treatment. Bowers, 132 S.W.3d at 270.

An award of future care to cure or relieve, per section 287.140 RSMo, is not necessarily inconsistent with a finding that the claimant may have achieved maximum medical improvement. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271 (Mo.App. S.D. 1996). Further, the claimant is not obliged to present evidence of specific medical treatment or procedures that would be necessary in the future in order to receive an award for medical care. Bradshaw v. Brown Shoe Co., 660 S.W.2d 390 (Mo.App.1983). It is sufficient to show "by reasonable probability" the need for additional medical treatment as a result of the work injury. Sifferman v. Sears, Roebuck and Co., 906 S.W.2d 823,828 (Mo.App. S.D. 1995).

Dr. Katz has provided the most current of life care plans, produced after he had the opportunity to examine Mr. Hoff on 1/08/09 (See p. 34 of Exhibit 2 to Exhibit RR). His report includes projections as to medical needs and evaluation of cost, see pages 46-56 of Exhibit 2 to Exhibit RR. Dr. Katz notes in his projections that his calculations are in 2009 dollars, and he also includes the need for financial adjustment for such things as future interest rates, inflation, and so on. The employer/insurer is liable for such future medical care as is necessary to cure and relieve Mr. Hoff of the effects of his work injury, consistent with the life care plan projections of Dr. Katz as shown in pages 46-56 of Exhibit 2 to Exhibit RR.

As to the issue of future spousal care, both Dr Katz and Jan Klosterman propose an appropriate rate of pay for spousal care provided akin to a nurse's aide. Dr. Katz proposes \$10.00 per hour (p.48 of aforementioned Exhibit 2); Jan Klosterman testified that the open market price for the type of assistance provided by Joyce Hoff was closer to \$11.00 an hour. Employer/insurer further submitted the affidavit of Robin Gladwill on the issue of rates of pay for certified nurse's assistants.

The evidence persuades that the market value of the nursing service provided by Ms. Hoff as of the date of hearing in the matter is \$11.00 per hour. The employer/insurer is found liable for spousal nursing care at the rate of \$11.00 per hour from 11/23/09, the date of hearing in this matter, and continuing for 4 hours per day for so long as the need for such spousal nursing care continues to subsist, and further subject to modification to meet the needs of the claimant.

PAST MEDICAL EXPENSE

The following issues as identified by the parties in their written stipulations, paragraph 41 to EE/EI/SIF Joint Exhibit No. 1, relate to the issue of past medical: a) past medical expenses; g) whether employer is obliged to pay additional amounts to employee for van modifications over and above the \$25,000.00 already advanced to the employee; h) whether employer is obligated to pay additional amounts to employee for supplies and other expenses incurred by employee during the period from 2001 to 2007; and i) whether employer is obligated to pay additional sums for past spousal nursing care, over and above those sums already paid by employer, specifically, whether employer/insurer has paid for the additional 725.1 hours in caring for Mr. Hoff between 8/3/07 and 10/08/07 referred to in Jan Klosterman's supplemental report of 10/10/07.

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a) past medical expense

Counsel for the claimant has provided a useful template for addressing the issue as to a) past medical expense by providing a SPECIAL DAMAGE SUMMARY as a part of his written argument submitted in the matter. This template will be used to identify those past medical expenses for which the employer/insurer are to be found liable, as contained in the following INDEX OF COMPENSABLE PAST MEDICAL EXPENSE .

A summary of medical bills, in lieu of the actual medical bills, will not serve as an adequate substitute when past medical is in dispute. Farmer-Cummings v. Personnel Pool of Platte County, 2002 WL 31654578 at *5 (Mo.App. W.D.), rev'd on other grounds, 110 S.W.3d 818 (Mo. banc 2003). Likewise, an explanation of benefits from an insurer is not a medical bill, and will not serve the same purpose as its substitute, unless the parties otherwise agree.

An attempt to calculate the amounts due for past medical was complicated, in part, by the duplication of medical billings from the St. John's Mercy, easily the provider of the lion's share of the medical afforded to Mr. Hoff post his work related injuries. This fact finder made every effort to cull through the various copies of certified medical from St. John's Mercy to verify the actual amount of medical expense involved. The task was made easier, in part, by the fact that billings were coded or identified by a description as to inpatient, emergency room, icu, and so on. To the extent that the calculation of billing amounts on the SPECIAL DAMAGE SUMMARY differs from the medical expense awarded herein, the rationale for such a difference, besides a simple mistake, may be explained by separate notation within the INDEX OF COMPENSABLE PAST MEDICAL EXPENSE. Further, some expense was not awarded on the basis that the necessary billing documentation was lacking, or the receipt submitted to document the expense was simply not sufficiently legible to support an award. Further, to the extent that some of the supplies were purchased on receipts that included other, noncompensable items on the receipt, taxes were included in the calculation of the award of expense only in those instances where the only purchases on the receipt were for compensable supplies, and for that reason clearly capable of being calculated as a part of the expense for necessary supplies.

The claimant has made the requisite proof to support the award of past medical expense per Martin v. Mid-America Farm Lines, Inc., 769 S.W.2d 105 (Mo banc 1989) and Meyer v. Superior Insulating Tape, 882 S.W.2d 735 (Mo.App. E.D. 1994). The following medical expense was for treatment necessary to cure and relieve of the effects of the work injury:

INDEX OF COMPENSABLE PAST MEDICAL EXPENSE

<u>Provider</u>	<u>Date</u>	<u>Description</u>	<u>Amount of medical awarded</u>
St. Clair Ambulance	12/1/00	Transport	\$455.15
St. John's Mercy	12/1/00-2/14/01	Inpatient	\$174,667.25
St. John's Mercy Trauma/ Dept of Surgery	12/1/00-1/3/01	Hospital Care	\$2,819.00
West County Radiological/ West County MRI	12/1/00-4/25/02	Diagnostics	\$4,859.00

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INDEX OF COMPENSABLE PAST MEDICAL EXPENSE (continued)

<u>Provider</u>	<u>Date</u>	<u>Description</u>	<u>Amount of medical awarded</u>
David Carpenter, M.D.	12/6/00-2/13/01	Hospital care	\$870.00
Brian Troop, M.D.	12/01/00-1/03/01	Hospital care	\$2819.00
James Merenda, M.D.	12/7/00	Surgery/back	\$10,311.00
Western Anesthesia (bills in Exh. UU)	12/7/00	Anesthesia	\$3,075.00
S.P. Taylor, M.D.	12/7/00-12/9/00	Critical care	\$433.25
Gateway Gastroenterology	12/15/00-12/19/00	Inpatient consult	\$425.00
Rehab Medicine Specialists	12/18/00-7/5/01	Inpatient consult	\$2,954.00
St. Clair Nursing	Feb-May 2001	occup/pt therapy	\$2,459.89
Abbott Ambulance	5/14/02	Transport	\$841.20
Wal-Mart	5/6/01-4/18/02	Supplies	\$394.55
MOMS	8/29/01	Supplies	\$966.14
B&H Orthopedic Lab s	1/11/01	Body brace	\$1,350.00
Byrnes Medical Center	2/15/01	E&M nursing	\$279.00
St. John's Mercy Home Care Unity Health (no bills in evidence, only explanation of benefits)	2001	Physical Therapy	0.00
St. John's Mercy (amount awarded recognizes duplicate billings found at pp. 1563-1566 and pp. 1594-1597, Exh. Q)	9/27/00-9/18/03	ER/ICU/PT	\$40,321.72
Christina Sadowsky, M.D.	4/08/03	Initial visit	\$280.00
Rehab Inst. STL	6/24/03-10/16/03	Eval, therapy	\$5,922.00
St. Clair Rexall (Exh. Q)	5/8/01-5/29/03	Supplies	\$354.14
Medicine Shoppe	1/8/02-9/27/03	Supplies	\$201.48
Provide Medical (no bills in evidence)	5/4/01-7/4/01	Medical equipment	0.00

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INDEX OF COMPENSABLE PAST MEDICAL EXPENSE (continued)

<u>Provider</u>	<u>Date</u>	<u>Description</u>	<u>Amount of medical awarded</u>
Interlock Pharmacy (medication expense for non work related epileptic condition not included)	2/14/01-5/11/01	Medication	\$521.11
St Louis Med Supplies	5/24/03-6/23/03	Supplies	\$72.82
Wal-Mart (amount awarded recognizes duplicate billings in pp.1662-1664 and pp. 1489-1497 of Exh Q, and duplicates for 1/11/02;1/30/02; 12/27/02; 3/29/02; 4/18/02)	1/11/02-9/27/02	Supplies	\$419.26
Sammons Preston	3/27/01	Supplies	\$19.95
Schroeder Drug (amount awarded recognizes duplicates for 9/2/01, 8/27/01,7/16/01, pp. 1674, 1635 Exh Q)	7/16/01-8/31/02	Supplies	\$66.10
Heartland Discount Pharmacy (all other bills not legible)	8/31/02	Supplies	\$1.21
R&R Ace (amount recognizes multiple duplicate billings for the same supplies)		Supplies	\$60.36
Cash Saver	5/16/01	Supplies	\$13.47
Prosthetic Design, Inc.	7/24/03	KAFO, full plastic, Double, free knee LT RT	\$10,223.10
Washington University Physicians (no billings found for 7/13/04-6/22/07 as per Special Damage Summary)	7/13/04-6/22/07	office visits	\$0.00
Subtotal of medical expense-----			\$268,455.15
Less treatment for seizure disorder in 2001 -----			- \$939.00
(See Appendix A to Klosterman Report dated 7/9/08, within Exh OO)			
Less charges 10/24/00 for seizure disorder, p.1588-89 Exh Q -----			-\$1,036.25
Total of compensable medical expense-----			\$266,479.90

The total amount of compensable past medical expense found under the aforementioned INDEX OF COMPENSABLE PAST MEDICAL EXPENSE is \$266,479.90. The Special Damage Summary submitted by the claimant as a part of his written argument also included a charge of \$10,081.40 from Missouri Baptist of Sullivan. This charge is for treatment following the claimant's hip fracture, see pp. 2207-2220, Claimant's Exhibit UU. The records indicate, and the parties have stipulated that employer/insurer provided all necessary medical treatment to cure

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and relieve of the hip fracture (paragraph 39, EE/EI/SIF Joint Exhibit No.1). Inasmuch as those expenses have been previously paid by employer/insurer, they are not in issue.

Other past medical expense found within the record include certain receipts for supplies contained within Claimant's Exhibit NN. The only receipts sufficiently legible in Exhibit NN to support an award of compensation are for supplies purchased at St. Clair Rexall on 1/15/08 and 2/20/08, for a total of \$45.90. Employer and insurer are found liable for this expense.

Claimant has also submitted charges of \$1,094.85 for treatment at St. John's Mercy on 3-15-09. Medical records indicate that on 3/15/09 Mr. Hoff was evaluated and treated for complaints of constipation. The medical records are replete with findings that Mr. Hoff suffers from both a neurogenic bowel and bladder. The testimony of Mr. and Ms. Hoff confirms that after his spinal injury Mr. Hoff began to have bowel and bladder problems. Dr. Katz acknowledged that Mr. Hoff treated with a laxative and stool softeners; related the need for both to the trauma to the thoracic spine (Claimant's Exhibit RR, Deposition of Dr. Katz, pp. 12, 13) and included the cost of both in his life care plan cost analysis (Exhibit 2 to Claimant's Exhibit RR, at p. 28). Dr. Katz further acknowledges that constipation is known as a long term complication from spinal cord injury (Exhibit 2 to Claimant's Exhibit RR, at p. 18). Treatment rendered for complaints of constipation are found compensable. The employer/insurer are found liable for the charges of \$1,094.85 incurred, as documented at Claimant's Exhibit UU, pp.2221-2223, and Claimant's Exhibit TT, pp. 2100-2116.

Lastly, Claimant's Exhibit UU, at pp. 2224-2227, contains billings for treatment provided by Dr. Volshetyn from 3/24/09 -5/1/09. Dr. Volshetyn was an authorized provider of care for the spinal cord injury suffered by Mr. Hoff. The charges of \$1,745.00 are for treatment necessary to cure and relieve of the effects of the work injury. The employer/insurer is found liable for these expenses (employer/insurer allege in their written argument that this expense has been previously paid by employer/insurer). The total due from the employer insurer for past medical expense is \$269,365.65.

Per the written stipulation of the parties, it is acknowledged that on 9/13/07 employer/insurer made a payment of \$3,000.00 for reimbursement for supplies purchased by employee from 2001 to 2007; and on 9/17/09, the employer/insurer made reimbursement on certain of the medications and supplies purchased from 6/2/01 to 9/27/03.

The past medical expense awarded herein is found compensable. The claimant has provided the requisite proof that the bills were necessary to cure and relieve of the effects of the work injury, and that the charges were reasonable. The proof is in the relevant bills and receipts in evidence, along with the testimony of the Hoff's and the expert testimony of Dr. Morgan. Martin v. Mid-America Farm Lines, Inc., 769 S.W.2d 105 (Mo banc 1989) Meyer v. Superior Insulating Tape, 882 S.W.2d 735 (Mo.App. E.D. 1994).

The medical billings are replete with references to adjustments and payments made by Blue Cross/Blue Shield, the group health insurer providing the health insurance Joyce Hoff received through her employer. The employer/insurer and the employee are on opposite sides of the issue as to the import of any adjustments to charges made by the health care providers, or insurance payments made by a collateral source, on the liability of the employer/insurer to pay to the claimant the amount of medical expense necessary to cure and relieve of the effects of his work injury. The employer/insurer argue that they have no liability for the past medical expense absent a showing by the employee of the amounts "actually" owed by the employee, and argue that write offs and adjustments that extinguish the liability of the injured employee are not "fees

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and charges” within the meaning of Section 287.140 RSMo, citing Farmer-Cummings v. Personnel Pool of Platte County, 110 S.W.3d 818 (Mo. banc 2003).

Section 287.270 RSMo provides as follows:

No savings or insurance of the injured employee, nor any benefits derived from any other source than the employer or the employer's insurer for liability under this chapter, shall be considered in determining the compensation due hereunder; except as provided in subsection 3 of section 287.170, and employers of professional athletes under contract shall be entitled to full credit for wages or benefits paid to the employee after the injury including medical, surgical or hospital benefits paid to or for the employee or his dependents on account of the injury, disability, or death, pursuant to the provisions of the contract.

Expenditures for medical aid and hospitalization which are required under the act to be paid for by the employer constitute payments of compensation. Sommers v. Hartford Accident and Indemnity Company, 277 S.W.2d 645, 648[1] (Mo.App.1955). However, in cases where the employer has initially denied liability, the courts have affirmed awards of medical costs to the employee. Hendricks v. Motor Freight Corporation, 570 S.W.2d 702 (Mo.App.1978); Wilson v. Emery Bird Thayer Company, 403 S.W.2d 953 (Mo.App.1966); Schutz v. Great American Insurance Company, 231 Mo.App. 640, 103 S.W.2d 904 (1937). The fact that claimant has accepted benefits from another source does not estop him for asserting his rights to compensation under the act. Davies v. Carter Carburetor, Division of ACF Industries, Inc., 429 S.W.2d 738, 752 (Mo.1968). “Payments from an insurance company or from any source other than the employer or the employer's insurer for liability for Workmen's Compensation are not to be credited on Workmen's Compensation benefits.” Ellis v. Western Elec. Co., 664 S.W.2d at 643, cited in Shaffer v. St. John's Regional Health Center, 943 S.W.2d 803, 807 (Mo. App. S.D. 1997)

The concern in this case is whether an award of the cost of medical expense will result in some sort of windfall to the employee that is proscribed by law. This issue will arise in cases where the claimant seeks compensation, and, in particular, the medical to be provided and paid by the employer/insurer, and the employer/insurer denies such benefit. The employee necessarily pursues unauthorized medical care, and in the course of time some of the disputed medical is either picked up by a collateral source of insurance, and/or the involved medical billings are “adjusted”; “discounted”; or otherwise “written off” by the health care provider.

What is to be made of the likelihood that some of the past medical expense has been adjusted by the health care providers, or that a part of the medical is picked up by a collateral source of insurance? Who has the burden of proving an adjustment to the medical expense is in effect that absolves the employee of any liability therefor?

The issue as to an award of compensation for medical expense that had been otherwise written off or adjusted was addressed in Farmer-Cummings v. Personnel Pool of Platte County, 110 S.W.3d 818 (Mo. banc 2003). The Court noted that under Section 290.140 RSMo an employer/insurer is responsible for all medical expenses resulting from a compensable injury. The Court further noted prior precedent on the issue of the compensable nature of Medicaid write-off amounts where the total amount will never be sought from claimant, Mann v. Varney Construction, 23 S.W.3d 231, 233 (Mo. App E.D.2000), and a case where the court reduced a workers' compensation award by an amount that “had already been written off by those health

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care providers”, Lenzini v. Columbia Foods 829 S.W.2d 482, 487 (Mo. App. W.D. 1992). The Missouri Supreme Court in Farmer-Cummings, at p. 821-822, states as follows:

Implicit in both decisions is the requirement of actual liability on the part of the employee. See Samsel v. Allstate Ins. Co., 204 Ariz. 1, 59 P.3d 281, 286 (2002). The fee or charge is the amount the healthcare provider actually requires the employee to pay, initially or thereafter, for the service provided. Write-offs and adjustments that extinguish the liability of an injured employee, absent evidence that such a fee adjustment or write-off is the result of a collateral source benefit not provided by the employer (see below), are not “fees and charges”, but simply reductions thereof.*822 Thus, Ms. Farmer-Cummings' fees and charges include only those amounts that must be paid for her healthcare for which she would otherwise be liable.

The Court further concluded that in the context of construing Section 287.270 RSMo, “Such write-offs and fee adjustments are neither “savings ... of the injured employee” nor “benefits derived from any other source than the employer or the employer's insurer for liability”. Farmer-Cummings, at p. 822.

The Court goes on to note that to reduce an award by an amount when the claimant may still be held liable for those reduced amounts would vitiate the policy behind workers' compensation to place upon the shoulders of industry the burden of workplace injury, and that the employer should not receive an advantage for failing to timely pay medical bills incurred as a result of a work injury. More importantly, as to the burden of proof concerning the issue as to the actual liability of the claimant for the medical expense at issue, the Court states:

Ms. Farmer-Cummings had the burden and has produced documentation detailing her past medical expenses and has testified to the relationship of such expenses to her compensable workplace injury. See *823 Martin v. Mid-America Farm Lines, Inc., 769 S.W.2d 105, 111-12 (Mo. banc 1989); Esquivel v. Day's Inn, 959 S.W.2d 486, 489 (Mo.App.1998). It is a defense of Personnel Pool, as employer, to establish that Ms. Farmer-Cummings was not required to pay the billed amounts, that her liability for the disputed amounts was extinguished, and that the reason that her liability was extinguished does not otherwise fall within the provisions of section 287.270. See Martin, 769 S.W.2d at 112; Esquivel, 959 S.W.2d at 489. Id., at p. 822-823.

The Court further stated:

The Commission's decision is reversed, and the case is remanded for a determination of Ms. Farmer-Cummings' continuing liability for any of the past medical expenses at issue. If Ms. Farmer-Cummings remains personally liable for any of the reductions, she is entitled to recover them as “fees and charges” pursuant to section 287.140. If any of the reductions resulted from collateral sources independent of the employer, they are not to be considered pursuant to section 287.270, and Ms. Farmer-Cummings shall recover those amounts. However, if Personnel Pool establishes by a preponderance of the evidence that the healthcare providers allowed write-offs and reductions for their own purposes and Ms. Farmer-Cummings is not legally subject to further liability, she

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is not entitled to any windfall recovery. Id., at p. 283

There is little in the record by way of testimony or other evidence bearing on the issue as to the actual liability of Mr. Hoff for any amounts of the disputed medical expense that may have been adjusted, or as to the import of those adjustments on the liability of Mr. Hoff. There is nothing in the record to suggest that the adjustments were negotiated by Mr. Hoff and the health care provider, or otherwise allowed by the health care provider “for their own purposes”. As it relates to the ongoing liability of Mr. Hoff for the medical expense at issue, the administrative law judge is left to speculate on the effect of scant reference to adjustment within the billing records. For example, at p.1310 of Claimant’s Exhibit Q there is a billing relating to total charges for inpatient services provided to Mr. Hoff immediately after he suffered his traumatic back injury. A reduction of the total charges is described as “748 BC OUT OF STATE A-M ADJ”; similar references are contained in other billings. The inference to draw from those adjustments, along with the various explanation of benefits from Blue Cross/ Blue Shield, is that the adjustments were a matter of compromise between Ms. Hoff’s group health insurer and the involved health care provider.

The thrust of the Court’s finding in Farmer-Cummings suggests that once the claimant has made the requisite proof as per Martin, it is a defense of the employer to establish that Mr. Hoff was not required to pay any of the disputed medical fees and charges; that his liability for the disputed amounts was extinguished; and that the provisions of Section 287.270 RSMo do not otherwise apply.

Per Section 287.270 RSMO, the employer/insurer is not entitled to a credit, or to otherwise reduce its liability for any of the compensable past medical expense paid by Blue Cross/ Blue Shield. Further, per Farmer-Cummings, the employer/insurer has failed to establish, by a preponderance of the evidence, that any of the adjustments showing in the involved medical billings were allowed by the health care provider for their own purposes, or that those adjustments otherwise extinguish the liability of Mr. Hoff for the involved medical expense. The employer/insurer is to pay to the claimant, Mr. Hoff, per the INDEX OF COMPENSABLE PAST MEDICAL EXPENSE, \$266,479.90 for past medical expense, and such other past medical expense found compensable herein and that has not been previously paid.

h) whether employer is obligated to pay additional amounts to employee for supplies and other expenses incurred by employee during the period from 2001 to 2007

The claimant has not provided any further proof as to necessary medical expense or supply expense incurred from 2001 to 2007 that remains unpaid. Claimant’s Exhibit UU includes certain medical billings from Drs. Merkel; Hogan; Eckhardt; and Thanawalla. Dr. Merkel provided treatment for the right hip fracture, and that expense has been paid by the employer/insurer and is not in issue. Dr. Hogan treated Mr. Hoff for the seizure disorder that pre-existed the involved work injury, and that medical expense is not compensable. Dr. Eckhardt treated Mr. Hoff for a finding of non-Hodgkin’s lymphoma, a condition which has not been medically and causally related to the involved work injury. Dr. Thanawalla is Mr. Hoff’s personal care physician. There is nothing in the record to support the conclusion that any of the medical care afforded by Dr. Thanawalla was necessary to cure and relieve of the effects of the

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work injury. None of the medical expense associated with the care of Dr. Thanawalla is found compensable.

The parties also stipulated that employer/insurer has paid employee \$31,257.05 as reimbursement for the nursing services of Ms. Pendergraft and Ms. Reed, in compliance with the temporary award issued in this matter; that employer/insurer have provided both a manual and an electric wheelchair; that employer/insurer has paid \$25,000.00 in partial compromise of issue as to wheelchair accessible van; and has paid employee \$49,741.70 for home modifications.

i) whether employer is obligated to pay additional sums for past spousal nursing care, over and above those sums already paid by employer, specifically, whether employer/insurer has paid for the additional 725.1 hours in caring for Mr. Hoff between 8/3/07 and 10/08/07 referred to in Jan Klosterman's supplemental report of 10/10/07.

The parties have made several stipulations bearing on the issue of payments for spousal nursing care made by the employer/insurer; those stipulations can be found at paragraphs 31, 32, 34, 35, and 36.

Those stipulations reveal a payment history as follows. Based on the evidence at the temporary award hearing held in this matter, the employee was awarded the cost of spousal nursing care for a total of 3,990 hours, from 5/8/01 to 12/31/03, at the rate of \$9.50 per hour, or a total of \$37,905.00. Employer/insurer made that payment on 2/26/07.

Thereafter, and pursuant to the temporary award of 3 and ½ hours of spousal care per week at \$9.50 per hour beginning on 1/1/04, the employer /insurer made the requisite payment of \$33.25 per week from 1/1/04 through 7/13/09.

Dr. Katz has authored multiple reports containing life care plans for Mr. Hoff, and has twice provided his deposition testimony in this matter. Dr. Katz testified a second time in June of 2009, and his deposition was admitted in evidence as Claimant's Exhibit RR. Dr. Katz acknowledged that he had the opportunity to meet with the claimant, John Hoff, on January 8th of 2009. Dr. Katz reviewed current medical records and completed an updated life care plan from the one he authored previously.

The parties stipulate that pursuant to the recommendation of Dr. Katz, for the periods from 8/3/07 to 4/27/09, and the period from 4/28/09 to 7/13/09, payments were made by the employer/insurer to the employee on 7/22/09 in the amount of \$20,714.75, and a payment of \$2,560.25 on 7/23/09, calculated to reimburse the claimant for the difference between the 3 and ½ hours paid to the claimant from 1/1/04 to 7/13/09 per the temporary award, and the 4 hours a day that was recommended by Dr. Katz. The parties further stipulate that from 7/14/09 to the present, employer/insurer have continued to pay Joyce Hoff \$266.00 per week for spousal care, representing 4 hours of nursing care per day, at \$9.50 an hour.

In fairness to employer/insurer, the decision to increase reimbursement for nursing care from a half an hour a day to 4 hours a day was not mandated by the temporary award, but rather was driven by what the evidence would be as to the history of Mr. Hoff's need for care as it progressed and developed, at least to the extent Dr. Katz believed that as of late August of 2007 Mr. Hoff was in need of 2 hours of care twice a day. The opinion of Dr. Katz supports the conclusion that the testimony of Ms. Hoff as to spending a half an hour a day caring for Mr. Hoff

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was an underestimate as far as it applies to care post the right hip fracture in 2007. Mr. Hoff is found to have need of 4 hours per day of spousal nursing care from 8/3/07 to the present, and into the future for so long as condition of paraplegia continues to subsist. Dr. Katz and Jan Klosterman have further testified, and it is hereby acknowledged that the nursing care needs of Mr. Hoff with respect to his paraplegia are expected to increase along with his advance in age.

At hearing on 11/23/09 Joyce Hoff testified persuasively as to the hours of care she provided to the claimant post the hearings held in 2004 on the request for a temporary award. The claimant testified that her estimate would be 2 to 4 hours a day. Dr. Katz acknowledges that Mr. Hoff had become less mobile since his earlier evaluation, and at pages 27 and 28 of his testimony he makes it clear that despite his failure in the 2004 plan to cite a specific number of care hours needed at that time, it was his opinion that "I think it would be fair to just say that he needed two hours of care in '04 and four hours of care in '09" (Exh. RR, at p. 28). Dr. Katz further acknowledges the history of hip fracture in 2007, and that an additional two hours of care a day is needed post the fracture (Exh. RR, at p. 32).

The evidence persuades that from 1/1/04 to 8/3/07, the date Mr. Hoff suffered his hip fracture, Mr. Hoff was in need of 2 hours of spousal nursing care a day. By stipulation of the parties, the employer/insurer has made the payment of \$33.25 a week for this time period, as per the temporary award. Two hours of care a day, at the rate of \$9.50 per hour, entitles the claimant to a payment of \$19.00 a day, or \$133.00 per week. Employer/insurer are liable for the difference, $\$133.00 - \$33.25 = \$99.75$ per week for the period from 1/1/04 through 8/2/07.

Claimant further requests that an additional sum be awarded for the time period of 8/3/07 to 10/08/07, representing the days between the initial fracture of the hip, and the days spent at home with the hip fracture prior to being hospitalized on 10/9/07 for the hip replacement surgery. Ms. Klosterman, as certified life care planner, visited with both Joyce and John Hoff on 10/8/07, the day prior to Mr. Hoff's hospital admission for his hip replacement surgery, to perform an onsite assessment and interview. Ms. Klosterman indicates in her report (Exh. 3.1 to Claimants' Exh. OO) that Mr. Hoff became nonweight bearing for this period of time so as to allow the fracture to heal on its own; that claimant was not able to transfer from bed to wheelchair on his own independently; and that Ms. Hoff could not leave the claimant alone in the house unattended while he was confined to bed. Exh. 3.1 contains a calculation of care hours by Jan Klosterman, based upon her in home interview with the Hoff's on 10/8/07, and subsequent telephone calls on 10/22/07 and 11/12/07. The calculation of care hours accurately reflects the days when Mr. Hoff was in hospital for his hip fracture and for his gall bladder surgery, and no care hours were included for those dates. At hearing Ms. Hoff was asked to review the care hours identified in Exh. 3.1, and she provided credible testimony confirming that the care hours listed in the exhibit accurately reflected the time she spent caring for Mr. Hoff.

The evidence persuades that from 8/4/07 through 10/8/07, Ms. Hoff provided a total of 619.1 compensable hours of care on 57 separate days. The employer/insurer has previously paid four hours a day, for a total of 228 hours. The employer/insurer are found liable for the difference, $619.1 - 228 = 391.1$ hours of care x \$9.50 per hour = \$3,715.45.

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g) whether employer is obliged to pay additional amounts to employee for van modifications over and above the \$25,000.00 already advanced to the employee

Van modifications to accommodate the wheelchair needs of a paraplegic employee qualify as medical treatment necessary to cure and relieve per Section 290.140 RSMo. Mickey v. City Wide Maintenance, 996 S.W.2d 144 Mo App. W.D., 1999). Claimant is awarded van modification as is necessary to cure and relieve of his injury. As shown in Claimant's Exhibit MM, the total expense incurred by Mr. Hoff for the purchase of a modified van was \$43,411.00, while cost of a new mid priced sedan comparable to the sedan owned by the Hoff's was estimated to be between \$16,200.00 and \$21,300. The difference between the cost of the modified van (\$43,411.00) and the average in estimate for a new mid priced sedan (\$18,750.00) is \$24,661.00. This method of computing the liability of the employer/insurer for the expense of a modified van is consistent with the rationale adopted by the court in Mickey. Employee argues that the employer/insurer should be liable for the difference in cost of insuring the van versus a mid priced sedan. The court in Mickey determined that the claimant will be responsible for the van's repair, fuel, title, license, and insurance costs. Employee also argues that the difference in sales tax between the vehicles should be compensable. The parties have acknowledged that the employer/insurer has made a payment of \$25,000.00 toward the cost of a modified van, paragraph 26, EE/EI/SIF Joint Exhibit No. 1. The employer's liability for van modification is \$24,661.00. The difference between the payment of \$25,000.00 by the employer/insurer and the van modification expense of \$24,661.00 closely approximates the increase cost in sales tax estimated by the employee. The issue as to the liability of the employer/insurer for van modification expense over and above the \$25,000.00 previously paid is found in favor of the employer/insurer.

c) Whether, and in what amount, additional interest is owed to the employee on benefits awarded in the Temporary award and paid by employer/insurer, on benefits awarded after final hearing, and on benefits voluntarily although belatedly paid, such as spousal nursing care;

The courts have determined that the general interest statutes apply to award of claimant's medical expenses by the Labor and Industrial Relations Commission. State ex rel. Otte v Missouri State Treasurer, 182 S.W.3d (Mo.App.E.D. 2005); McCormack v. Stewart Enter., Inc., 956 S.W.2d 310, 312-314. The court determined that for a claimant to be entitled to interest on his medical expenses, he must establish 1) that the expenses were "due", i.e., he actually paid the expense, his providers were demanding interest of him, or he suffered a loss by the delay of payment; 2) the amount due was readily ascertainable by computation or by reference to a legal standard; and 3) he had demanded the employer to pay the legal expenses. McCormack, 956 S.W.2d at 314.

No interest is awarded on any of the past medical expense in issue that wasn't actually paid by Mr. Hoff. As for all those amounts either adjusted by the health care provider or paid by a

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group health insurer, in any event Mr. Hoff has failed to show that he actually paid the expense; that his providers demanded interest of him; or that he suffered a loss by the delay of payment.

Pursuant to the temporary award employer/insurer was obliged to pay the claimant temporary total disability for the period from 12/01/00 through 5/8/01, for a total of \$7,949.89 (the parties stipulated that the employer paid a total of \$8,453.04 for this period). Section 287.160.3 RSMo provides that from thirty days after the award of weekly compensation by the administrative law judge, the employer is to pay interest on the lump sum previously ordered at the rate of ten percent per annum. By stipulation, the temporary total disability was paid by employer on 2/26/07. The employer is liable for interest on a total of \$7,949.89 from 5/15/05 to 2/26/07 at the rate of ten percent per annum.

On 2/26/07 the employer further paid the temporary award of \$31,257.05 for professional nursing services and \$37,905.00 for spousal nursing services, or a total of \$69,162.05. These payments are akin to medical expense, and are subject to interest as provided in McCormack. The applicable rate under Section 408.020 RSMo is nine percent per annum. The employer is further to pay interest on the \$69,162.05 in nursing care as medical expense from 5/15/05 to 2/26/07 at the rate of nine percent per annum. The employer is entitled to a credit of \$15,523.02 for interest that has been previously paid on 5/18/07.

For all of the past medical expense awarded herein and actually paid by Mr. Hoff, the employer is found liable for interest at the rate of nine percent per annum.

d) doubling of the Award pursuant to Section 287.510;

Section 287.510 provides that in the event the temporary award is not complied with," the amount equal to the value of compensation ordered and unpaid may be doubled in the final award, if the final award shall be in accordance with the temporary or partial award. " Section 287.510 RSMo, as amended in 2005 and as quoted herein, is a remedial statute to be applied retroactively. Ball-Sawyers v. Blue Springs School Dist., 286 S.W.3d 247, 256-257 (Mo.App.W.D.2009). Only the unpaid portions of the temporary award may be doubled.

The only temporary total disability benefits ordered to be paid in the temporary award was for the period from 12/01/00 to 5/8/01, the date Mr. Hoff was released from the nursing home. In the absence of proof as to whether and when Mr. Hoff had reached a state of maximum medical improvement, a ruling as to any further temporary total disability was held in abeyance. The amount due was for 22 and 4/7 weeks, or a total of \$7,949.89.

The only past medical expense awarded per the temporary award was \$31,257.05 for professional nursing care and \$37,905.00 for spousal nursing care, or a total of \$69,162.05.

As for both past and future medical care awarded per the temporary award, a lengthy delay as to the provision of necessary supplies and other medical needs as ordered in the temporary award appears unconscionable, given the circumstances that the work related paraplegia has caused Mr. Hoff to endure. Supposing, for the purposes of argument, that home modifications paid prior to the final award hearing can be doubled as a penalty, this fact finder is not able to come to a conclusion as to whether and at what point the home modifications could reasonably have been expected to be completed, given all the circumstances, and no doubling of that expense is awarded.

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Further, van modification was not awarded per the temporary award, as Dr. Katz did not deem van modification necessary until such time as Mr. Hoff fractured his hip in August of 2007. The expense of van modification is not subject to doubling.

Whether, and to what extent the employer delayed on the payment of other medical supplies awarded as future medical care is speculative, as the necessary proof as to actual expenditures is not a part of the proof in this matter. It is not enough to know that at some point the employer made reimbursement for certain medical supplies purchased between 2001 and 2007.

The parties have stipulated that the temporary total disability, professional nursing care expense, and spousal nursing care expense awarded at hearing on the temporary award was paid by the employer/insurer on 2/26/07, or approximately 22 months after the temporary award issued on 4/15/05; approximately 3 months after the Court of Appeals, Eastern District, issued its Mandate; and some 33 months prior to the hearing for final award. The employer/insurer argues that the case law supports the conclusion that a penalty is only appropriate where an employer is in continuing non-compliance at the time of the final award. The claimant argues that any delay would support a penalty.

The court addressed the issue as to benefits subject to a double penalty in Ball-Sawyers. In that claim, the administrative law judge (alj) issued a temporary award of certain past temporary total disability (ttd), future temporary total disability, and medical treatment as necessary. At final hearing, the alj determined that the employer/insurer had not paid \$176,127.90 in medical expenses incurred by the claimant following the temporary award, and did not begin paying ttd benefits until more than seven months after the temporary award was entered. In the final award the alj doubled the amount of medical expense, and, also doubled \$60,062.00 in ttd benefits. The Labor and Industrial Relations Commission affirmed.

The employer/insurer appealed, alleging that no penalty should have been assessed on the ttd since employer/insurer had paid over \$65,074.10 in ttd benefits, and Section 287.150 only allows a penalty on "the amount" of the award that is "unpaid". In the context of discussing Section 287.510 as amended, the court concluded:

The Commission erred in applying the penalty in the prior version of Section 587.210 by doubling the entire amount of the temporary award. Under the amended statute, the double penalty can be imposed only on the amount of the temporary award that was unpaid. At the time of the final hearing in 2007, the only part of the temporary award that the District and Hartford had not paid was Ms. Sawyers's medical expenses. Accordingly, the double penalty is solely applicable to those expenses. (Ball-Sawyers, 286 S.W.3d at 256,257).

Ball-Sawyers appears to stand for the proposition that an alj cannot exercise discretion to award a penalty, and double the amount of ttd or medical expense awarded in a temporary award, in an instance where the benefits awarded have been paid at the time of the final hearing.

Although it would appear that the laudable intent behind Section 287.150, to provide an expeditious resolution of the benefit entitlement of an injured worker, is dashed by following the holding in Ball-Sawyers, this administrative law judge feels bound by that decision. The issue as to a penalty under Section 287.510 is found in favor of the employer/insurer, and no penalty is awarded.

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j) costs under Section 287.560 (parties agree to leave open the amount of costs to be awarded. If the ALJ finds that costs are to be awarded, then further evidence will be permitted on the amount of costs);

Section 287.560 RSMo provides, in part, “.... if the division or the commission determines any proceedings have been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them. In Phoenix v. Sandberg, Phoenix, & Von Gontard, 1998 WL 831865 (Mo.Lab.Ind.Rel.Com.), the Commission noted the similarity in rationale between claims for costs under Section 287.560 and an award of damages for frivolous appeal under Missouri Supreme Court Rule 84.19. The Commission noted, at page three, as follows:

Breshears v. Malan Oil Co., 671 S.W.2d 402, 404[3] (Mo.App.1984), states that damages for frivolous appeals are awarded with the greatest caution; the court must not chill appeals of even slight or colorable merit. Awarding damages for a frivolous appeal is a drastic and unusual remedy, reserved for those rare occasions when an appeal on its face is totally devoid of merit. O'Bar v. Nichols, 698 S.W.2d 950, 957 (Mo. App. 1985). An appeal frivolous if it presents no justiciable question and is so readily recognizable as devoid of merit on the face of the record that there is little prospect that it can ever succeed. Papineau v. Baier, 901 S.W.2d 190, 192 (Mo.App.1995). The purpose of sanctions under Rule 84.19 is (1) to prevent congestion of appellate court dockets with meritless cases which, by their presence, contribute to delaying resolution of meritorious cases and (2) to compensate respondents for the expenses they incur in the course of defending these meritless appeals. Fravel v. Guaranty Land Title, 934 S.W.2d 23, 24 (Mo.App.1996).

The conduct of the employer/insurer in defense of the claim as of the issuance of the temporary award has already been determined not so devoid of merit as to be deemed unreasonable, and that ruling will not be disturbed. It is further worth note in this matter that on appeal, the Missouri Court of Appeals, Eastern District denied the motion of Mr. Hoff seeking damages for a frivolous appeal.

The defense of the claim for permanent total disability on the part of the employer/insurer most assuredly hung on a very tenuous thread, given the testimony provided by the various medical and vocational experts as to the effect of the paraplegia alone on the ability of Mr. Hoff to compete for employment on the open labor market. To the extent that the determination of liability for permanent total disability was in part based on the conclusion that the expert testimony of Mr. England was not credible, this fact finder is disinclined to conclude that the defense was without reasonable ground. The employer/insurer is entitled to defend the claim of liability for permanent total disability, even to the extent that the merits of that defense are, at best, slight. Further, the issue of liability for permanent total disability was one of a multitude of issues raised by the parties, and there is nothing in the proof to suggest that the defense of the other issues raised in this matter were devoid of merit. The issue as to costs under Section 287.560 RSMo is found in favor of the employer/insurer. No costs are awarded in the matter.

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This fact finder means for this award to be a final determination of the issues raised at hearing on this claim for workers' compensation benefits, and to be ripe for appeal under the act.

Made by: /s/ KEVIN DINWIDDIE
KEVIN DINWIDDIE
Administrative Law Judge
Division of Workers' Compensation

This award is dated and attested to this 10th day of March, 2010.

/s/ NAOMI PEARSON
Naomi Pearson
Division of Workers' Compensation