

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

Injury No.: 05-096654

Employee: Charles Jones
Dependents: Christine Jones and Melissa Jones
Employer: SEMO Electric Cooperative
Insurer: Missouri Electric Cooperatives Insurance Plan
(TPA: Cannon Cochran Management 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 section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated March 17, 2010. The award and decision of Administrative Law Judge Carl Strange, issued March 17, 2010, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 19th day of August 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

AWARD

Employee: Charles Jones

Injury No. 05-096654

Dependents: Christine Jones & Melissa Jones

Employer: SEMO Electric Cooperative

Additional Party: Second Injury Fund

Insurer: Missouri Electric Cooperatives Insurance Plan
(TPA: Cannon Cochran Management Services)

Hearing Date: December 14, 2009

Checked by: CS/rf

SUMMARY OF FINDINGS

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease? September 12, 2005.
5. State location where accident occurred or occupational disease contracted: State of Mississippi – Employer's principal place of employment is Scott 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 happened or occupational disease contracted: Employee was working during Hurricane Katrina when he picked up a cut wire to hook a house up. The wire went into his index finger on the side between his thumb which later caused the employee to develop RSD (CRPS).
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: bilateral upper extremities, neck, back, and body as a whole.
14. Nature and extent of any permanent disability: Permanent total disability.
15. Compensation paid to date for temporary total disability: \$49,183.64
16. Value necessary medical aid paid to date by employer-insurer: \$281,266.85
17. Value necessary medical aid not furnished by employer-insurer: Not applicable.
18. Employee's average weekly wage: Not calculated.
19. Weekly compensation rate:

\$696.97 for temporary total disability
\$365.08 for permanent partial disability
20. Method wages computation: By agreement.
21. Amount of compensation payable:
 - a. Employee awarded permanent total disability from the employer-insurer. (See Findings.)
 - b. Employee awarded 16 weeks of disfigurement at \$365.08 per week for a total of \$5,841.28. (See Findings.)
22. Second Injury Fund liability: None. (See Findings.)
23. Future requirements awarded: Employer-insurer directed to pay future medical aid pursuant to Section 287.140 RSMo (See Findings).

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

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

FINDINGS OF FACT AND RULINGS OF LAW

On December 14, 2009, the employee, Charles Jones, appeared in person and by his attorney, Dean Christianson, for a hearing for a final award. The employer-insurer was represented at the hearing by its attorney, Joseph Page. The Second Injury Fund was represented by Assistant Attorney General Clifton Verhines. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows.

UNDISPUTED FACTS:

1. On or about September 12, 2005, SEMO Electric Cooperative was operating under and subject to the provisions of the Missouri Workers' Compensation Act and its liability was insured by Missouri Electric Cooperatives Insurance Plan with a third party administrator of Cannon Cochran Management Services.
2. On or about September 12, 2005, the employee was an employee of SEMO Electric Cooperative and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. On or about September 12, 2005, the employee sustained an accident or occupational disease during the course of his employment.
4. The employer had notice of employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's rate for temporary total disability and permanent total disability is \$696.97, and his rate for permanent partial disability is \$365.08.
7. The employee's injury is medically causally related to the work injury on or about September 12, 2005.
8. The employer has furnished \$281,266.85 in medical aid to employee.
9. The employer has paid temporary total disability benefits at a rate of \$696.97 per week for a total of \$49,183.64 covering the time periods of September 19, 2005 to December 26, 2005, June 1, 2006 to November 5, 2006, November 17, 2006, December 22, 2006, January 5, 2007, October 4, 2007 to November 18, 2007, and November 21, 2007 to May 19, 2008.
10. The employee reached maximum medical improvement on May 19, 2008.
11. On or about September 12, 2005, the employee had two dependents namely, his spouse Christine Jones and his daughter Melissa Jones born July 28, 1992.

ISSUES:

1. Future Medical Aid
2. Nature and Extent
3. Liability of the Employer
4. Liability of the Fund

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Deposition of Dr. Lichtenfeld
- B. Deposition of Dr. Stillings
- C. Deposition of Timothy Lalk
- D. Medical Records of Midwest Physicians and Surgeons
- E. Medical Records of St. Francis Medical Center #1
- F. Medical Records of St. Francis Medical Center #2
- G. Medical Records of St. Francis Medical Center #3
- H. Medical Records of Dr. Chaudhari #1
- I. Medical Records of Dr. Chaudhari #2
- J. Medical Records of Dr. Chaudhari #3
- K. Medical Records of Dr. Mackinnon
- L. Medical Records of Orthopedic Associates
- M. Medical Records of Southeast Missouri Hospital
- N. Medical Records of Brain and Neurospine Clinic of Missouri #1
- O. Medical Records of Brain and Neurospine Clinic of Missouri #2
- P. Medical Records of Barnes Jewish Hospital
- Q. Certificate of Marriage and birth certificates

Employer-Insurer's Exhibits

- 1. Deposition of Dr. Guidos
- 2. Deposition of Dr. Jarvis
- 3. Deposition of June Blaine

FINDINGS OF FACT:

Based on the testimony of Charles Jones ("employee") and the medical records and reports admitted, I find as follows:

At the time of the hearing, the employee was 40 years old and had worked for SEMO Electric Cooperative ("employer") out of Sikeston, Missouri, since the time he had been hired in October 2004. Other than working in the State of Mississippi for the employer after Hurricane Katrina, the employee had performed all of his prior work for the employer in Missouri except for a small amount of work on lines at the tip of Kentucky. Although he left school in the ninth grade, the employee eventually obtained his GED. His only other education involved a three day course in working on office equipment. Following his departure from school, the employee worked as a hod carrier until the age 15. After he did odd jobs for a couple of years, the employee entered the military at age 17. While in the Navy from October of 1986 to May of 1988, the employee was trained on firefighting. Once he left the military, he performed a number

of different jobs in construction and in factories. His next employment involved heavy manual labor while working with office equipment, which he performed for about five years. In 1997, the employee began his career in the electrical field for Midwest Power Lines. In the beginning, the employee simply ran a shovel. He was later able to work himself up to being a lineman and eventually a working foreman. During the time he worked for the employer and up to the time of his accident on September 12, 2005, the employee worked as a lineman on both underground and overhead electrical lines.

Prior to his work accident of September 12, 2005, the employee had received medical treatment for his right wrist, low back, and right knee (Employee Exhibit A, Deposition Exhibit 2). During the seventh grade, the employee fell and fractured his wrist which was placed in a cast for six weeks. Although he had previously noted occasional stiffness with cold and rainy weather, the employee testified at the hearing that he really was not having any problems with his wrist. In 1989, the employee fell off of the top of a machine. Although he had a mild bulge or herniation, the employee treated conservatively with just physical therapy. His main current complaint with his back is soreness and tenderness during cold weather. In April 2004, the employee injured his right knee. Dr. Patrick Knight performed a partial medial meniscectomy, partial lateral meniscectomy, limited synovectomy, and right knee arthroscopy on June 7, 2004 (Employee Exhibit L, Pages 2-4 & 8-9). The employee continued to perform his job for the employer but did have aching in his knee during cold weather.

On September 12, 2005, the employee was working for the employer in Mississippi following Hurricane Katrina. The employee's primary job in Mississippi was to restore power to houses. While attempting to hook the power line back to the house, the employee picked up the cut wire and it went through his glove and into the side of his left index finger. After he cleaned his finger, the employee returned to working. At the end of the day, the employee reported the incident to his supervisor, Marty Vineyard. On the next day, the employee was unable to bend his finger, and it was very swollen. A coworker took the employee to a medical tent in a parking lot for treatment. A doctor performed surgery by placing a drain into his finger to relieve the swelling. The employee stayed in Mississippi for a few more days and then rode back to Missouri with the other workers. Upon his return to Missouri the employee was referred to a hand specialist, Dr. Thomas Tobin.

Dr. Tobin first saw the employee on September 20, 2005 and performed an exploration of the left hand wound and irrigation and drainage of the left index finger flexor tendon sheath on the very next day (Employee Exhibit D, Page 3 & 30). Following the surgery, the employee initially showed improvement and was referred to physical therapy at Saint Francis Center for Health and Rehabilitation beginning September 28, 2005 (Employee Exhibit E, Page 20). On October 20, 2005, Dr. Tobin noted that the employee's pain and swelling persists and that he saw visible vasal motor changes in terms of sweating to the index finger and part of the palm. Additionally, Dr. Tobin "saw some change in the color during the time that he was here in the office from a dark bluish red to a much, much lighter color and then went back down to the dark blue again" (Employee Exhibit D, Page 14). At his next visit, Dr. Tobin opined that "we definitely have a sympathetic mediate component here and it could be call RSD". As a result, Dr. Tobin noted on October 25, 2005 that he planned to continue the active motion and not do

the dystrophile and stellate ganglion blocks, but eventually referred him to Dr. Chaudhari for stellate ganglion blocks on November 8, 2005 (Employee Exhibit D, Page 17 & 20).

Dr. Chaudhari evaluated the employee on November 15, 2008 and opined that the employee has complex regional pain syndrome (CRPS) Type I, also known as reflex sympathetic dystrophy (RSD), in his left hand and forearm. Further, Dr. Chaudhari noted that the puncture wound followed by local sepsis was perhaps the triggering event (Employee Exhibit H, Pages 2-4). Following a series of nerve blocks and medication, Dr. Chaudhari opined that the employee could resume work and should notify him if he has a recurrence of pain (Employee Exhibit H, Page 11). The employee also concluded his initial round of physical therapy on December 20, 2005 (Employee Exhibit E). On January 31, 2006, Dr. Chaudhari noted that the employee was now having thickening in the flexor tendon and fibrous sheath in the left index finger and having panic attacks (Employee Exhibit H, Pages 12-13). Over the next few months, the employee's RSD symptoms returned with stabbing pain in the C7 dermatomal distribution of the left arm reaching up to the neck (Employee Exhibit H, Pages 15-17). The employee was then referred to Dr. Susan Mackinnon for treatment.

Following her examination of the employee on May 6, 2006, Dr. Susan Mackinnon performed a release of the left carpal tunnel, a release of the left median nerve and proximal forearm with step-lengthening tenotomy of the pronator teres tendon, and a release of the left radial sensory nerve and forearm with tenotomy of the brachioradialis tendon on June 26, 2006 (Employee Exhibit K, Pages 2-5). On July 5, 2006, the employee returned to Dr. Chaudhari with continued RSD complaints including swelling and edema in the left arm with tingling paresthesia in the lateral 3½ fingers of the left hand (Employee Exhibit I, Pages 2-3). On July 14, 2006, Dr. Mackinnon noted that the employee had not improved after surgery and recommended that the employee receive either a median nerve stimulator or a cervical dorsal column stimulator (Employee Exhibit K, Page 8). At that same time, the employee began his second round of physical therapy at Saint Francis Center for Health and Rehabilitation (Employee Exhibit F). Following his surgery with Dr. Mackinnon, the employee was evaluated by Washington University Pain Management Center who recommended a cervical MRI among other things (Employee Exhibit P).

Eventually, the employee returned to treatment with Dr. Chaudhari with complaints in his left upper extremity running up to the left side of his neck (Employee Exhibit I, Pages 6-12). Dr. Chaudhari administered medication and nerve blocks which eventually led to the employee believing that he was on the right track to recovery and that he would be able to go back to work as of October 31, 2006 (Employee Exhibit I, Page 13-14). The employee continued to treat with Dr. Chaudhari over the next several months and was referred to Dr. Terry Cleaver since he performed radiofrequency stellate ganglion block neurolysis. The first one was performed on February 14, 2007 (Employee Exhibit G, Pages 1-2). The employee responded to the treatment and even returned to work for a short time. As a result, Dr. Chaudhari placed the employee at maximum medical improvement on May 3, 2007 (Employee Exhibit I, Pages 23-24).

On June 28, 2007, the employee returned to Dr. Chaudhari with returned pain complaints in his left upper extremity (Employee Exhibit J, Pages 1-2). The employee then received another

radiofrequency stellate ganglion block neurolysis from Dr. Cleaver on July 25, 2007 (Employee Exhibit G, Pages 3-4). A week later, the employee returned to Dr. Chaudhari with headaches and twitching of the eyelids following the radiofrequency blocks (Employee Exhibit G, Pages 3-4). The employee's pain management was then switched to Dr. Annamaria Guidos who is also in Dr. Cleaver's office. Following Dr. Guidos' recommendation of an MRI, the employee had a MRI of his left shoulder which indicated markedly severe supraspinatus tendinopathy with bursal sided fraying (Employee Exhibit L, Pages 10-11). As a result, Dr. Schafer referred the employee to physical therapy and gave him Naprosyn (Employee Exhibit L, Page 7). On December 12, 2007, Dr. Cleaver performed a percutaneous implantation of single octapolar spinal cord stimulator electrode array under fluoroscopic guidance (Employee Exhibit N, Pages 8-9). Since the employee received a benefit from the temporary placement, Dr. Cleaver and Dr. Vaught decided to make the stimulator permanent.

On January 8, 2008, Dr. Vaught performed placement of a cervical dorsal column stimulator resume TL4 electrode paddle with rechargeable battery in the employee (Employee Exhibit M, Pages 22-23). Although the employee responded well to the stimulator, it malfunctioned and increased his pain (Employee Exhibit N, Pages 15-16). Dr. Vaught removed the broken dorsal column stimulator lead extension and placed two new extensions through two separate incisions and performed an intraoperative programming of the dorsal column stimulator on January 18, 2008 (Employee Exhibit M, Pages 25-26). After a few weeks, the stimulator malfunctioned again and Dr. Vaught noted that the employee will likely need an additional surgery (Employee Exhibit N, Pages 20-22). On February 19, 2008, Dr. Vaught removed a fractured 60 centimeter extension and damaged 20 centimeter lead extension and replaced them with new 60 centimeter and 40 centimeter lead extensions (Employee Exhibit M, Pages 29-30). Following this surgery, the employee noted that the stimulator was doing exceptionally well and he was able to decrease the amount of oral pain medication that he was taking. Approximately one week later, the employee had a coughing spell, felt a twinge in his arms, and had a return of his RSD symptoms in both arms. On March 12, 2008, Dr. Vaught indicated that a new surgery was needed to repair the stimulator failure (Employee Exhibit N, Pages 25-27). Dr. Vaught performed a revision of malfunctioning and fractured dorsal column stimulator lead extension on March 20, 2008 (Employee Exhibit M, Pages 31-32).

Dr. Vaught placed the employee at maximum medical improvement from a neurological standpoint on April 28, 2008 and noted that the employee no longer had CRPS symptoms but still had pain and muscle spasms. After recommending follow up care with Dr. Cleaver for narcotic medication management, Dr. Vaught discharged the employee to work on a light duty basis with a maximum lifting of 15 pounds with no overhead work and no highly repetitive bending, stooping or twisting (Employee Exhibit N, Pages 30-32). The employee followed up with Dr. Cleaver on May 19, 2008 with continued complaints of muscle spasms although he had pain relief from the stimulator. At that time, Dr. Cleaver noted that "the patient also has had some difficulty maintaining employment with release with limitations which is causing him some anxiety and depression type symptoms" and diagnosed him with CRPS favorably responsive to spinal cord stimulation, residual paraspinous muscle spasm, and underlying anxiety depression likely. Dr. Cleaver placed the employee at maximum medical improvement in regard to further intervention for his CRPS, but opined that the employee will require ongoing medical

management utilizing medications, potential intermittent injections for muscle spasms, and limitations of his physical activity secondary to utilizing the therapy and its inability to be utilized 24 hours a day (Employee Exhibit O, Pages 1-2). Later that day, Dr. Guidos examined the employee for an independent medical examination. Dr. Guidos noted that the employee had restrictions and would need future medical treatment and opined that the employee had an impairment rating of 25% at the level of the shoulder (Employee Exhibit O, Pages 3-5). At her deposition on June 12, 2009, Dr. Guidos testified that her specialty was physical medicine and rehabilitation but she was not board certified (Employer-Insurer Exhibit 1, Deposition Pages 8 & 19). Further, she noted that her opinion was not changed despite the employee's follow-up treatment from Dr. Jarvis and Dr. Cleaver (Employer-Insurer Exhibit 1, Deposition Page 17).

On May 4, 2009, the employee returned to Dr. Cleaver with continuing complaints of worsening neck, shoulder, and bilateral upper extremity pain. The employee reported increased sweating and redness in his hands. Dr. Cleaver noted that the CRPS was no longer adequately responding to neuromodulation and current medical regimen. As a result, Dr. Cleaver reprogrammed the spinal cord stimulator, gave the employee the power to control the rate of the stimulator, and added Oxycodone to his medication (Employee Exhibit N, Pages 6-7).

The employee was also examined by Dr. Mark Lichtenfeld on two occasions for the purposes of an independent medical examination. As a direct result of the work injury of September 12, 2005, Dr. Lichtenfeld opined on August 17, 2007 that the employee suffered the following permanent partial disability: 45% of the left thumb MP joint, 85% of the left index finger MP joint, 45% of the left long finger MP joint, 40% of the left ring finger MP joint, 35% of the left small finger MP joint, a 25% loading factor for injuries to the left fingers due to the combination of the finger injuries being greater than the simple sum, 40% of the left wrist, 30% of the left elbow, and 40% of the body as a whole due to RSD (CRPS). With regard to his pre-existing disabilities, Dr. Lichtenfeld opined that the employee suffered the following permanent partial disability: 30% of the right wrist; 35% of the right knee, and 12.5% of the body as a whole due to the low back. Further, Dr. Lichtenfeld opined that the disabilities combine to form an overall disability greater than the simple sum and that the disabilities create a significant obstacle and/or hindrance to obtaining employment and/or re-employment. Dr. Lichtenfeld also noted that the employee would benefit from additional medical treatment in the form of regular treatment with a pain management specialist, radiofrequency treatment, narcotic pain medication, and/or a peripheral nerve stimulator. Finally, Dr. Lichtenfeld placed the following restrictions on the employee: avoid any type of trauma to his left upper extremity; avoid power and repetitive gripping as well as using any type of gas, electric, or air powered tools with his left upper extremity; avoid using impact and torquing tools with his left upper extremity; avoid lifting more than 5 pounds on a one time basis, avoid all repetitive lifting with his left upper extremity; exert extra caution to avoid injuring his right upper extremity; avoid working around dangerous equipment if possible, and avoid exposure to extreme temperatures (Employee Exhibit A, Deposition Exhibit 2).

Following his next examination on September 19, 2008, Dr. Lichtenfeld reiterated his prior opinions and added a few additional ones. First, Dr. Lichtenfeld opined that the employee also suffered a permanent partial disability of 17.5% of the body as a whole due to chronic

cervical and thoracic spine spasms. Next, Dr. Lichtenfeld noted that the employee would require battery replacements and ongoing treatment for his dorsal column stimulator for the remainder of his life. With regard to his restrictions, Dr. Lichtenfeld opined that the prior restrictions should apply to both upper extremities, that the employee should avoid working with his arms outstretched and overhead, and that the employee should avoid reaching overhead and should perform no lifting above the shoulder height. Finally, Dr. Lichtenfeld opined that the employee is totally and permanently disabled as he is unable to compete on the open labor market. Dr. Lichtenfeld based his opinion after considering the employee's educational background and vocational history, the employee's pre-existing medical conditions, the employee's injuries caused by his work injury of September 12, 2005, and the employee's need for taking narcotic pain medication for his chronic pain which affects his mental status and ability to function in nearly every type of work environment (Employee Exhibit A, Deposition Exhibit 3). At his deposition, Dr. Lichtenfeld opined that employee's work related accident of September 12, 2005 was the prevailing factor and substantial cause in the development of the employee's diagnoses (Employee Exhibit A, Deposition Page 20). Additionally, Dr. Lichtenfeld testified on cross-examination that the employee was able to return to full duty with no permanent restrictions after each of his pre-existing injuries to his right wrist, back, and right knee (Employee Exhibit A, Deposition Pages 41-45).

The employee was examined by both Dr. Wayne Stillings and Dr Michael Jarvis for the purpose of an independent psychiatric examination. On October 28, 2008, Dr. Wayne Stillings examined the employee and opined that the September 12, 2005 work injury was the prevailing factor in causing the employee's 15% permanent partial psychiatric disability of the body as a whole due to the mood disorder; 10% permanent partial psychiatric disability of the body as a whole due to the pain disorder; and 5% permanent partial psychiatric disability of the body as a whole due to the anxiety disorder. With regard to pre-existing psychiatric disabilities, Dr. Stillings opined that the employee had a dysfunctional family of origin disorder, a parent-child relational problem disorder, and a personality disorder. Consequently, Dr. Stillings noted that the employee is permanently and totally disabled when considering all of his physical and psychiatric disabilities and that the employee is in need of further psychiatric care and maintenance due to his work injury (Employee Exhibit B, Deposition Exhibit 2). At his deposition on April 27, 2009, Dr. Stillings testified that the employee had no prior psychiatric treatment and was not taking any psychiatric medication prior to the work related injury of September 12, 2005 (Employee Exhibit B, Deposition Page 16).

On May 29, 2009, Dr. Michael Jarvis examined the employee and did not opine as to permanent disability that the employee had, but did mention that he felt the employee's condition would clear once his workers' compensation case is brought to a close. Further, Dr. Jarvis opined that the employee was not disabled from work from a psychiatric point of view (Employer-Insurer Exhibit 2, Deposition Exhibit 2). At his deposition, Dr. Jarvis admitted that he was not offering a vocational rehabilitation opinion as to the employee's ability to work, but just a medical opinion that the employee gets agitated when he has pain (Employee Exhibit 2, Deposition Page 43). After noting that the employee's stressors have continued, Dr. Jarvis testified that the DSM-IV indicates that the adjustment disorder may persist if the stressors or its consequences persist (Employee Exhibit 2, Deposition Page 50).

The employee was also examined by both Mr. Timothy Lalk and Ms. June Blaine for the purpose of a vocational rehabilitation examination. On November 7, 2008, Mr. Timothy Lalk, a vocational rehabilitation specialist, evaluated the employee and noted that he could not recommend any vocational rehabilitation services for the employee. Based on the restrictions recommended by Dr. Vaught and Dr. Guidos, Mr. Lalk opined that the employee would not be able to perform his former employment, but would be able to perform unskilled entry-level positions like unarmed security guard/information clerk, desk clerk at motel or rental store, cashier in a self-service or convenience store, and a variety of customer service representative positions. Based on the employee's symptoms and the opinions of Dr. Lichtenfeld and Dr. Stillings, Mr. Lalk opined that the employee would not be employable in the open labor market (Employee Exhibit C, Deposition Exhibit 2). At his deposition, Mr. Lalk testified that the employee was working full-time with no permanent work restrictions prior to the work related injury of September 12, 2005 (Employee Exhibit C, Deposition Exhibit 2).

On September 23, 2009, Ms. June Blaine, a vocational rehabilitation specialist, evaluated the employee and opined that the employee was employable in the open labor market given his background, education, and work experience while taking under consideration his functional capacities. Based on the opinions of Dr. Vaught, Dr. Guidos, and Dr. Jarvis, Ms. Blaine opined that the employee would be employable in sedentary to light level work demand including a cashier, security, motel/hotel clerk, expediter, rental clerk, order clerk, production clerk, and scheduler clerk. Based on the opinions of Dr. Lichtenfeld and Dr. Stillings, Ms. Blaine noted that the employee would be considered permanently and totally disabled, but chose not to follow those opinions (Employee Exhibit 3, Deposition Exhibit B). At her deposition, Ms. Blaine testified that she assumed that the dorsal column stimulator was quite functional and would control his pain at work (Employee Exhibit 3, Deposition Pages 21-22). On cross-examination, Ms. Blaine testified that the use of narcotic pain medication, anger, attendance problems, depression, gripping difficulty, balance problems, nausea, and sleepiness can negatively affect employability.

At the time of the hearing, the employee testified that he continues to treat with Dr. Cleaver, who is providing him with medications, as well as monitoring of his stimulator. His medications include those for depression, anxiety, pain, muscle relaxation and anti-inflammation. The employee testified that he takes all of these medications everyday, even when he is using his stimulator. The stimulator causes the employee to have muscle spasms between his shoulder blades and into his neck, so he frequently has to stop using the stimulator and increase his medication. On those days when he is not able to use his stimulator, the employee simply takes more medication. The stimulator also negatively affects his ability to drive, take showers, sleep, do laundry, do yard work, and do everyday activities. The employee has not worked since he was terminated by the employer on May 20, 2008, which was the day after he reached maximum medical improvement according to Dr. Cleaver and Dr. Guidos. Since that time, the employee has looked for work but has been unsuccessful. Further, he has been told by potential employers that he is a liability. With regard to disfigurement, the employee had a 3 ½ inch Z scar at the left index finger and hand, a 3 inch scar in the palm, a 2 ½ inch scar on the lower forearm, a 5 ½ inch scar on the upper forearm, and a darkened spot approximately the size of a quarter on his left

wrist from his injections. Throughout the hearing, the employee swayed back and forth and his hands changed colors from white to purple.

APPLICABLE LAW:

- Under Section 287.140.1., “the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance, and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury”. Further, the employer is given the right to select the authorized treating physician. Subsection 1 also provides that the employee has the right to select his own physician at his own expense. The employer, however, may waive its right to select the treating physician by failing or neglecting to provide necessary medical aid. *Emert v Ford Motor Company*, 863 S.W. 2d 629 (Mo.App. 1993); *Shores v General Motors Corporation*, 842 S.W. 2d 929 (Mo.App.1992) and *Hendricks v Motor Freight*, 520 S.W. 2d 702, 710 (Mo.App.1978).
- The standard of proof for entitlement to an allowance for future medical aid cannot be met simply by offering testimony that it is “possible” that the claimant will need future medical treatment. *Modlin v Sunmark, Inc.*, 699 S.W. 2d 5, 7 (Mo.App.1995). The cases establish, however, that it is not necessary for the claimant to present “conclusive evidence” of the need for future medical treatment. *Sifferman v Sears Roebuck and Company*, 906 S.W. 2d 823, 838 (Mo. App.1995). To the contrary, numerous cases have made it clear that in order to meet their burden, claimants are required to show by a “reasonable probability” that they will need future medical treatment. *Dean v St. Lukes Hospital*, 936 S.W. 2d 601 (Mo.App.1997). In addition, employees must establish through competent medical evidence that the medical care requested, “flows from the accident” before the employer is responsible. *Landers v Chrysler Corporation*, 963 S.W. 2d 275, (Mo.App.1997).
- The test for finding the Second Injury Fund liable for permanent partial disability benefits is set forth in Section 287.220.1 RSMo as follows:

“All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a pre-existing permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining re-employment if the employee becomes unemployed, and the pre-existing permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and

if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no pre-existing disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for."

- The test for finding the Second Injury Fund liable for permanent total disability is set forth in Section 287.220.1 RSMo., as follows:

If the previous disability or disabilities, whether from compensable injuries or otherwise, and the last injury together result in permanent total disability, the minimum standards under this subsection for a body as a whole injury or a major extremity shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employee at the time of the last injury is liable is less than compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under Section 287.200 out of a special fund known as the "Second Injury Fund" hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in Section 287.414.
- Section 287.020.7 RSMo. provides as follows:

The term "total disability" as used in this chapter shall mean the inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident.
- The phrase "the inability to return to any employment" has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration, in the manner that such duties are customarily performed by the average person engaged in such employment. *Kowalski v M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922(Mo.App.1992). The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. *Reiner v Treasurer of the State of Missouri*, 837 S.W.2d 363, 367(Mo.App.1992). Total disability means the "inability to return to any reasonable or normal employment". *Brown v Treasurer of the State of Missouri*, 795 S.W.2d 479, 483(Mo.App.1990). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Id.* The key is whether any employer in the usual course of business would be reasonably expected to hire the employee in that

person's physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Reiner* at 365. See also *Thornton v Haas Bakery*, 858 S.W.2d 831,834(Mo.App.1993).

RULINGS OF LAW:

Issue 1. Future Medical Aid

The medical evidence unequivocally supports a finding that the employee needs additional medical treatment to cure and relieve him from the effects of his September 12, 2005 work related injury. Several doctors have noted that the employee will require future medical treatment. First, Dr. Lichtenfeld opined that as a result of his workplace injury of September 12, 2005 the employee should continue to see Dr. Cleaver on a regular basis to manage his pain medications, see Dr. Vaught as needed for modifications of his dorsal column stimulator electrodes should they malfunction, receive replacements of a battery periodically for his battery pack, and receive ongoing treatment for his condition for the remainder of his life (Employee Exhibit A, Deposition Exhibits 2 & 3). Next, Dr. Stillings testified that the employee will need ongoing psychiatric care "primarily consisting of psychotropic medication for the aforementioned diagnoses to prevent a deterioration of his clinical psychiatric condition on a maintenance basis" (Employee Exhibit B, Deposition Exhibit 2). Then, Dr. Guidos opined that the employee will need replacement batteries for his stimulator, possible additional surgeries due to stimulator failure, and continued medication which should be reduced (Employer-Insurer Exhibit 1, Deposition Exhibit 2). At the time of her deposition, Dr. Guidos noted that the employee had been unable to wean himself off of his medications (Employer-Insurer Exhibit 1, Deposition Page 30). Next, Dr. Jarvis stated that the employee needs to continue with the psychiatric medication he is receiving but did not attribute this need to the effects of the work injury. Finally, Dr. Cleaver continues to treat the employee and noted in his latest report, dated May 4, 2009, that the employee has not had "an adequate response to neuromodulation currently and current medical regimen." Consequently, Dr. Cleaver increased the employee's medication by adding the narcotic pain reliever Oxycodone (Employee Exhibit N, Pages 6-7).

All of the doctors agree that the employee is in need of ongoing medical care. Not only is the care needed to maintain the stimulator, but it is also necessary to deal with the physical and psychiatric complaints that must be treated with medication. With regard to his psychiatric complaints, the employee had no prior medication or treatment for any mental condition prior to his work related accident of September 12, 2005. Following the accident, the employee clearly needs treatment and/or medication. Based on the evidence, I find the opinions of Dr. Stillings more credible than those of Dr. Jarvis. With regard to the employee's physical complaints, the evidence clearly establishes that the employee will require future medical treatment in the form of medication, pain management, modification and maintenance of the dorsal column stimulator, and battery replacements.

Based on the evidence, the employer-insurer is therefore directed to furnish additional medical treatment related to the employee's September 12, 2005 work related psychiatric and physical condition pursuant to Section 287.140 RSMo.

Issue 2. Nature and Extent of Disability & Issue 3. Liability of the Employer

The employee has alleged that he is permanently and totally disabled as a result of his September 12, 2005 accident, and/or that he is permanently and totally disabled due to the effects of the September 12, 2005 accident in combination with his pre-existing injuries. At the time of the hearing, the employee was still treating with Dr. Cleaver and currently taking narcotic and psychiatric medication. Further, the employee utilized a dorsal column stimulator that causes him to have muscle spasms between his shoulder blades and into his neck. As a result, the employee frequently has to stop using the stimulator and increase his medication. On those days when he is not able to use his stimulator, the employee simply takes more medication. The stimulator also negatively affects his ability to drive, take showers, sleep, do laundry, do yard work, and do everyday activities. In addition to not working since he was terminated by the employer on May 20, 2008, the employee noted that he has been told by potential employers that he is a liability. His treating doctors have placed significant restrictions on him that include: maximum lifting of 15 pounds, no overhead work, and no highly repetitive bending, stooping or twisting. Dr. Lichtenfeld also placed the following restrictions on the employee: avoid any type of trauma to his left upper extremity; avoid power and repetitive gripping as well as using any type of gas, electric, or air powered tools with either upper extremity; avoid using impact and torquing tools with either upper extremity; avoid lifting more than 5 pounds on a one time basis, avoid all repetitive lifting with both upper extremities; exert extra caution to avoid injuring his right upper extremity; avoid working around dangerous equipment if possible, avoid exposure to extreme temperatures, avoid working with his arms outstretched and overhead, and avoid reaching overhead and should perform no lifting above the shoulder height (Employee Exhibit A, Deposition Exhibits 2 & 3).

After considering the employee's limitations and current treatment with the stimulator and medication, I find that the opinions of Dr. Lichtenfeld, Dr. Stillings, and Timothy Lalk are more credible than the opinions of Dr. Guidos, Dr. Jarvis, and June Blaine. Further, I find the employee to be credible regarding his testimony about his limitations, symptoms, treatment, and current abilities. The opinions of Dr. Guidos, Dr. Jarvis, and June Blaine have clearly failed to properly account for how the employee's CRPS, psychiatric condition, use of the stimulator, and use of narcotic medication have interfered with his ability to work, drive, take showers, sleep, do laundry, do yard work, and do everyday activities. Even if the employee was lucky enough to obtain employment, he would not be able to maintain it due to his limitations. Based on the evidence, I find that no employer in the usual course of business would reasonably be expected to employ the employee in his present physical and psychiatric condition, nor reasonably expect the employee to perform the work for which he had been hired. Consequently, I find that the employee is no longer able to compete in the open labor market and therefore is permanently and totally disabled.

The remaining question is whether the employee is permanently and totally disabled as a result of the last injury alone or as a result of a combination of his pre-existing injuries and the last injury. If the employee is permanently totally disabled as a result of the last injury alone, then the employer and insurer are liable for the total disability. The Second Injury Fund is only liable for permanent total disability benefits if the total disability was caused by a combination of the pre-existing conditions with the last injury of September 12, 2005. Based on the evidence including the medical opinions of Dr. Lichtenfeld and Dr. Stillings and the vocational opinion of Mr. Lalk, I find that the employee is permanently and totally disabled as a result of the September 12, 2005 accident alone. While the employee had some degree of pre-existing disability, the effects of the September 12, 2005 accident are simply too substantial for the employee to overcome in attempting to compete in the open labor market. His physical problems from the September 12, 2005 accident alone would cause him to be unemployable, and the combination of those problems with the psychiatric problems from the September 12, 2005 accident leaves no doubt that the employee is permanently and totally disabled as a result of the last accident alone.

The employer-insurer has paid the employee temporary total disability benefits through May 19, 2008 at a rate of \$696.97 per week. Based my above findings regarding permanent total disability, the employer-insurer is therefore directed to pay to the employee the sum of \$696.97 per week commencing on May 20, 2008, and said weekly benefits shall be payable during the continuance of such permanent total disability for the lifetime of the employee pursuant to Section 287.200.1, unless such payments are suspended during a time in which the employee is restored to his regular work or its equivalent as provided in Section 287.200.2.

In addition to his permanent total disability, the employee was seriously and permanently disfigured by the September 12, 2005 work related accident based on a 3½ inch Z scar at the left index finger and hand, a 3 inch scar in the palm, a 2½ inch scar on the lower forearm, a 5½ inch scar on the upper forearm, and a darkened spot approximately the size of a quarter on his left wrist from his injections. As a result of the scarring and darkened spot, I find that the employee is entitled to 16 weeks for disfigurement. The employer-insurer is therefore directed to pay to the employee the sum of \$365.08 per week for 16 weeks for a total of \$5,841.28 for disfigurement.

Issue 4. Liability of the Fund

Under Section 287.220.1 RSMo., the Second Injury Fund has no liability and the employer-insurer is solely responsible for full permanent total disability benefits if the last injury, considered alone and of itself, results in permanent total disability. Based on my above findings that the employee's work injuries resulting from the accident of September 12, 2005 are the cause of this employee's permanent and total disability, I find that the Second Injury Fund has no liability in this matter.

ATTORNEY'S FEE:

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

INTEREST:

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

Made by:

Carl Strange
Administrative Law Judge
Division of Workers' Compensation

Date: _____

A true copy: Attest:

Ms. Naomi Pearson