

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

Injury No.: 03-096181

Employee: Martin Lampe  
Employer: H & H Sheet Metal & Contracting  
Insurer: Truck Insurance Exchange  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: September 22, 2003  
Place and County of Accident: St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. 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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 18, 2007. The award and decision of Administrative Law Judge John Howard Percy, issued May 18, 2007, 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 25<sup>th</sup> day of September 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

**AWARD**

Employee: Martin Lampe

Injury No. 03-096181

Dependents: N/A  
Employer: H & H Sheet Metal & Contracting  
Additional Party: Second Injury Fund  
Insurer: Truck Insurance Exchange  
Hearing Date: January 26, 30 and February 14, 2007

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

Checked by: JHP

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: September 22, 2003
5. State location where accident occurred or occupational disease was contracted St. Louis 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 occurred or occupational disease contracted:  
Employee fell from ladder
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: left ankle, right knee, thoracic spine and lumbar spine
14. Nature and extent of any permanent disability: Permanent Total Disability against Employer/Insurer
15. Compensation paid to-date for temporary disability: \$35,501.42
16. Value necessary medical aid paid to date by employer/insurer? \$148,673.21

Employee: Martin Lampe Injury No. 03-096181

17. Value necessary medical aid not furnished by employer/insurer? \$2,958.00
18. Employee's average weekly wages: \$750.02
19. Weekly compensation rate: \$500.02 PTD/TTD \$347.05 PPD
20. Method wages computation: Stipulation

### COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: \$2,958.00

Permanent total disability benefits in the amount of \$500.02 per week from

Employer/Insurer beginning January 3, 2006 for Claimant's lifetime

Undetermined

22. Second Injury Fund liability: No

TOTAL:

Undetermined

23. Future requirements awarded: See Award

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

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

Dean L. Christianson

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: Martin Lampe

Injury No. 03-096181

Dependents: N/A

Before the  
**Division of Workers'  
Compensation**

Employer: H & H Sheet Metal & Contracting

Department of Labor and Industrial

Additional Party: Second Injury Fund

Relations of Missouri

Jefferson City, Missouri

Insurer: Truck Insurance Exchange

Checked by: JHP

A hearing in this proceeding was held on January 26, 30 and February 14, 2007. Both parties submitted proposed awards on March 14, 2007. The record comprises 630 pages of medical records, 44 pages of medical and vocational reports, 44 pages of other documents, and 133 pages of medical and vocational depositions.

### STIPULATIONS

The parties stipulated that on or about September 22, 2003:

1. the employer and employee were operating under and subject to the provisions of the Missouri Workers' Compensation Law;
2. the employer's liability was insured by Truck Insurance Company;
3. the employee's average weekly wage was \$750.02<sup>[11]</sup>;
4. the rate of compensation for temporary total disability and permanent total disability was \$500.02 and the rate of compensation for permanent partial disability was \$347.05; and
5. the employee sustained an injury by accident arising out of and in the course of employee's employment occurring in St. Louis County, Missouri.

The parties further stipulated that:

1. the employer had notice of the injury and a claim for compensation was filed within the time prescribed by law;
2. compensation has been paid in the amount of \$35,501.42 representing 71 weeks of benefits covering various periods between September 23, 2003 and January 3, 2006;
3. employer/insurer have paid \$148,673.21 in medical expenses; and
4. The employee reached maximum medical improvement and a state of permanency with respect to the work-related injuries on January 3, 2006.

## ISSUES

The issues to be resolved in this proceeding are:

1. whether employee is entitled pursuant to Section 287.140 Mo. Rev. Stat. (2000) to be reimbursed for any medical expenses, which he may have incurred in obtaining treatment for the work-related injuries;
2. whether employee should be provided with any future medical treatment for the injuries;
3. whether and to what extent employee sustained any permanent disability which would entitle him to an award of compensation;
4. whether and to what extent employee has sustained any additional permanent partial or total disability for which the Second Injury Fund would be liable as a result of the combination of any preexisting disabilities with the primary injury.

### REIMBURSEMENT FOR MEDICAL EXPENSES

Employee is seeking reimbursement for medical and prescription bills incurred as a result of treatment provided for his low back, right knee, and left ankle between May 30, 2006 and January 7, 2007. The bills are included in Claimant's Exhibits R, V, and W and total \$3,018.00.

Section 287.140.1 Mo. Rev. Stat. (2000) provides in part:

In addition to all other compensation, 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 [the employee] from the effects of the injury. If the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense.

While the employer has the right to select the provider of medical and other services, this right may be waived by the employer if the employer after notice of the injury, refuses or neglects to provide the necessary medical care. Shores v. General Motors Corp., 842 S.W.2d 929 (Mo. App. 1992); Sheehan v. Springfield Seed & Floral, 733 S.W.2d 795 (Mo. App. 1987); Wiedower v. ACF Industries, Inc., 657 S.W.2d 71 (Mo. App. 1983); Hendricks v. Motor Freight Corp., 570 S.W.2d 702 (Mo. App. 1978). While an employer initially has the right to select the medical care provider, the employer may waive that right, by failing, neglecting or refusing to provide medical treatment after receiving notice of an injury. Under such circumstances the employee may make his or her own selection, procure the necessary treatment and have the reasonable costs thereof assessed against the employer. Wiedower at 74; Hendricks at 709. The employer may also consent affirmatively to the selection of a health care provider by the employee or consent inferentially by failing to object to the employee's selection after having knowledge of that selection. Hendricks at 709-710.

If the employer/insurer discontinue treatment even though the employee needs further treatment to cure and relieve the effects of his or her injury, then the employer/insurer will be liable for the entire cost of such additional treatment to the extent the treatment is proved by the employee to be reasonably necessary to cure employee of the effects of the work-related injury. Emert v. Ford Motor Company, 863 S.W.2d 629 (Mo. App. 1993); Wood v. Dierbergs Market, 843 S.W.2d 396 (Mo. App. 1992); see Herring v. Yellow Freight System, Inc., 914 S.W.2d 816, 822 (Mo. App. 1995).

If, after the treating physician selected by the employer has provided medical treatment and released the employee to return to work, the employee seeks additional treatment without notifying the employer that further treatment is needed, then the employee and not the employer is liable for the cost of such treatment. Blackwell v. Puritan-Bennett Corp., 901 S.W.2d 81, 85 (Mo. App. 1995).

The employee must also prove that the medical care provided by the physician selected by the employee was reasonably necessary to cure and relieve the employee of the effects of the injury. Chambliss v. Lutheran Medical Center, 822 S.W.2d 926 (Mo. App. 1991); Jones v. Jefferson City School District, 801 S.W.2d 484 (Mo. App. 1990); Roberts v. Consumers Market, 725 S.W.2d 652 (Mo. App. 1987); Brueggemann v. Permaneer Door Corp., 527 S.W.2d 718 (Mo. App. 1975).

Employee must establish the causal relationship between the bills for medical services and the treatment provided. Martin v. Mid-America Farm Lines, Inc., 769 S.W.2d 105 (Mo. 1989). It is not necessary to have testimony on the medical-causal relationship of each individual expense where the causal relationship can reasonably be inferred. Lenzini v. Columbia Foods, 829 S.W.2d 482, 484 (Mo. App. 1992). Employee may establish the causal relationship through the testimony of a physician or through the medical records in evidence which relate to the services provided. Idem.; Wood v. Dierbergs Market, 843 S.W.2d 396, 399 (Mo. App. 1992); Meyer v. Superior Insulating Tape, 882 S.W.2d 735, 738 (Mo. App. 1994).

In the absence of such proof, medical bills may be excluded. Cahall v. Riddle Trucking, Inc., 956 S.W.2d 315, 322 (Mo. App. 1997); Meyer v. Superior Insulating Tape, 882 S.W.2d 735, 738 (Mo. App. 1994). Bills showing only a balance due may be excluded for lack of adequate foundation. Hamby v. Ray Webbe Corp., 877 S.W.2d 190 (Mo. App. 1994).

### **Findings of Fact**

Based on my observations of claimant's demeanor during his testimony, I find that he is a credible witness and that his testimony is generally credible. Based on the credible testimony of claimant and on the medical records, I make the following findings of fact.

#### **Description of Accident**

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Martin Lampe, employee herein, was hired as an apprentice sheet metal worker for H & H Sheet Metal in July of 2003. H & H Sheet Metal performs architectural sheet metal work.

On September 22, 2003 while descending a ladder from a rooftop, claimant fell approximately thirty feet to the ground when the ladder fell away from the building.

#### **Authorized Medical Treatment**

Claimant was taken by ambulance to St. Anthony's Medical Center where he was admitted for a period of five days. X-rays of the right tibia and fibula showed a comminuted fracture in the tibial plateau and proximal tibial shaft and a mildly displaced fracture involving the medial malleolus of the right ankle. A CT scan of the right knee also showed a nondisplaced fracture involving the fibular head extending into the proximal tibial fibular joint. X-rays of the left ankle showed a mildly displaced fracture involving the lateral malleolus. His left ankle was placed in a cast. <sup>[2]</sup> X-rays of the dorsal spine showed a compression of deformity of T12 with 30% to 40% loss of height anteriorly. A CT Scan of the lumbar spine showed the compression fracture of the superior endplate of T12. Additional findings in the lumbar spine included a vacuum phenomenon at L3-4 associated with a broad based disc protrusion, seven millimeters anterolisthesis of L4 on L5 associated with mild spinal stenosis, and discogenic degenerative disease at L2-3, L3-4, and L4-5. <sup>[3]</sup> (Claimant's Exhibits D, Pages 9, 15, 18-19, & 22-23 and E, Pages 3-16) On September 24, 2003 employee underwent an open reduction and internal fixation of the comminuted right tibial plateau fracture by Dr. David B. Fagan. Claimant was nonweightbearing on discharge and was taking Percocet for pain control. He was to see Dr. Fagan in three weeks. (Claimant's Exhibit D, Page 24 & 26)

On October 2, 2003 Dr. John D. Graham evaluated employee for pain management. Employee was in a wheelchair. Claimant advised Dr. Graham of his past history of drug and alcohol abuse, stating that he would like to remain clean and sober if at all possible. Dr. Graham prescribed OxyContin for 12 hour pain relief. On October 14 employee reported that the OxyContin was controlling his pain very well. He complained of some low back discomfort in the early morning hours. Dr. Graham thought it was from the compression fracture. He prescribed Lidoderm patches for the low back. (Claimant's Exhibit F, Pages 9-10 & 13-14)

Dr. Fagan reexamined claimant on October 14. Employee was in a wheelchair. X-rays showed healing of the tibial plateau fracture and left ankle fracture. He recommended that employee work on range of motion exercises, but remain nonweightbearing. X-rays of the back showed a compression fracture of approximately 50% of T12 and a fracture of L5 with spondylolisthesis at L4 and L5. (Claimant's Exhibit F, Page 12)

On November 6, 2003 employee told Dr. Graham that his pain was well controlled, except for some back pain and occasional pain in his right knee. Dr. Graham decreased the dosage of OxyContin and prescribed Celebrex. (Claimant's Exhibit F, Page 20)

Dr. Fagan reexamined claimant on November 6. X-rays of the right tibial plateau and left ankle looked good. He removed both casts and prescribed home physical therapy and weightbearing of no greater than 50 pounds. (Claimant's Exhibit F, Page 21)

Dr. Thomas K. Lee examined claimant's back on November 10. Mr. Lampe complained of pain in his lower back, particularly at L5. Dr. Lee reviewed x-rays which he thought showed acceptable healing. He noted that Dr. Graham was treating him for pain. (Claimant's Exhibit F, Page 26)

On December 4, 2003 Dr. Graham noted that claimant was walking with a cane and not using a wheelchair. Claimant told him that he was doing very well. He was no longer taking OxyContin and only occasionally taking Celebrex and using the Lidoderm patch. Dr. Graham prescribed additional Celebrex for employee to take as needed and discharged employee from his care. (Claimant's Exhibit F, Page 27)

Dr. Fagan also reexamined claimant on December 4, 2003. Dr. Fagan noted that employee had excellent range of motion of his ankle and knee. X-rays showed that his fractures were healing in good position. Dr. Fagan prescribed outpatient physical therapy. (Claimant's Exhibit F, Page 28)

Claimant was evaluated at ProRehab for physical therapy for his lower extremities on December 9, 2003. Employee rated his pain level as 6 on a scale of 1 to 10. He complained of stabbing pain in the outside of his left ankle and pressure-type pain and stiffness in his right knee. He reported that his lower lumbar pain was worse with sitting and riding and better with lying completely flat in bed. He indicated that back pain restricted his travel over two hours and prevented him from sitting more than 1 hour and often more than ½ hour. Claimant was started on a program of ankle and knee exercises. (Claimant's Exhibit L, Pages 7-9 & 12-15)

On December 10 Mr. Lampe complained to Dr. Lee of tenderness in the T12 region only. X-rays showed healing of the T12 compression fracture. Forward flexion was to 60 degrees without pain. Dr. Lee prescribed physical therapy consisting of gradual progressive range of motion exercises. (Claimant's Exhibits F, Page 30 and L, Page 22)

Claimant attended 10 of 14 scheduled physical therapy sessions through January 2, 2004. He missed 4 sessions due to personal problems including a recurrence of alcoholism. He worked at a high intensity level and demonstrated no adverse reactions to the in-house exercise programs. As of January 2 the therapist thought that employee was making progress. (Claimant's Exhibit L, Pages 37-38)

On January 16 Dr. Lee noted that claimant's forward flexion was to 95 degrees. Mr. Lampe had some tenderness at T10 and L5. Dr. Lee advised him to lift no more than 20 pounds. Dr. Lee recommended work hardening of four hours per day, five days per week. (Claimant's Exhibit F, Page 32)

Dr. Fagan reexamined claimant on January 16, 2004. He noted swelling about the left ankle and good range of motion of the right knee and both ankles. X-rays of the knee and ankle looked good. Dr. Fagan felt that employee could weight bear as tolerated. He agreed with Dr. Lee's recommendation for two additional weeks of work conditioning. (Claimant's Exhibit F, Page 33)

Mr. Lampe underwent a functional evaluation at Farmington Sports and Rehabilitation Center in Farmington, Missouri on January 21, 2004. The therapist noted that he had limited tolerances to prolonged weight bearing positions and increased discomfort in his knees and ankles with prolonged sitting. She noted that he stood with reduced weight bearing through the right lower extremity and had antalgia with walking. He demonstrated signs of discomfort and slowing of movement during transition to and from crouched and squatted postures. He was able to lift 88 pounds from floor to waist and 58 pounds from waist to overhead. She opined that he was functioning in the heavy physical demand level. His primary limiting factors were pain and limitations in range of motion and flexibility in his knees and ankles, limited tolerance to weight bearing postures, including standing, walking, and climbing, and limited material handling tolerances. All symptom magnification testing was negative. (Claimant's Exhibit H, Pages 35 & 37-39)

Dr. Fagan reexamined Mr. Lampe on February 6, 2004. Mr. Lampe indicated that his main problem was with balance and some pain in his back. He indicated that his knee was not much of a problem. He had full range of motion in the right knee and a little swelling in his leg and ankle. Dr. Fagan advised employee that he could return to work after the additional therapy recommended by Dr. Lee. (Claimant's Exhibit F, Page 34)

Dr. Lee reexamined claimant on February 6. He indicated that claimant had pain in the L4-5 region. X-rays showed a well consolidated fracture at T12, a minimal amount of early degenerative scoliosis at L3-4, and spondylolisthesis of L4 on L5. Dr. Lee restricted him from working on uneven surfaces or pitched roofs and restricted him from prolonged bending or crawling. (Claimant's Exhibit F, Pages 35-36)

Claimant participated in 17 sessions of work hardening through February 19, 2004. The therapist noted at the conclusion of the program that Mr. Lampe had continued to make good progress and that he appeared to be able to perform all essential job demands as a sheet metal worker. The therapist again stated that there was an absence of symptom magnification. (Claimant's Exhibit H, Pages 43-44)

Dr. Lee reexamined claimant on February 23, 2004. Mr. Lampe reported pain with his work hardening and swelling in the left ankle. On examination Dr. Lee noted mild to moderate decreased inversion of both ankles and tenderness at T12 and L5. As claimant's request Dr. Lee released him to full duty and prescribed Celebrex. (Claimant's Exhibit F, Page 37)

Claimant returned to Dr. Lee on March 22, 2004. Claimant indicated that he was working cleaning film off 10 feet pieces of sheet metal. On examination he was tender from L2 to L4. He reported that Celebrex was not adequate. He nevertheless wanted to keep working. Dr. Lee recommended continued home exercises. (Claimant's Exhibit F, Page 39)

Dr. Fagan also reexamined claimant on March 22. On examination employee had well-developed quadriceps and calf musculatures bilaterally. He had swelling in his right knee and left ankle. His range of motion of his knee and ankle looked good. Dr. Fagan thought that claimant would continue to improve. (Claimant's Exhibit F, Page 40-41)

Dr. Ronald Hertel, an orthopedic surgeon, examined Mr. Lampe on April 13, 2004 at the request of employee's attorney. Based on his examination and review of the medical records, he opined that while claimant's anterior subluxation of L4 on L5 preexisted the work accident of September 22, 2003, the work accident aggravated that condition. He opined that it also caused compression fractures to the vertebral bodies of T12 and L1.<sup>[4]</sup> He recommended that claimant undergo a lumbar myelogram. He opined that the work accident substantially contributed to the need for a myelogram and consideration for surgery. (Claimant's Exhibit A, depo ex 2, pp 5-6)

Dr. Lee reexamined claimant on May 17, 2004. Claimant was still working though he was still experiencing pain. Dr. Lee felt that he was a maximum medical improvement and released with him to full duty. (Claimant's Exhibit F, Page 43)

Dr. Fagan also reexamined claimant on May 17. Mr. Lampe reported that he occasionally felt that his knee was going to give way. X-rays of the knee and ankle showed that his fractures had healed in good position. Dr. Fagan told him that he would continue to improve and that he could take anti-inflammatories. (Claimant's Exhibit F, Pages 44-45)

In response to claimant's request for a surgical referral made to the employer, Dr. Lee on July 13, 2004 recommended an MRI of the lumbar spine. He noted that claimant had a preexisting fracture deformity at L5 and an acute fracture at T12. (Claimant's Exhibit F, Pages 46-47)

An MRI of Mr. Lampe's lumbar spine performed on July 28, 2004 showed grade I anterolisthesis of L4 on L5 with severe central canal stenosis and bilateral neural foraminal stenosis and degenerative disc disease at all lumbar levels with annular disc bulges at the remaining lumbar levels. (Claimant's Exhibit F, Page 49)

Dr. Lee reexamined claimant on October 27, 2004. Mr. Lampe told him that he was working full duty, but was getting tired of hurting every day. He complained of pain in the back and legs. Dr. Lee opined that Mr. Lampe's current ongoing complaints were due to an aggravation of his preexisting lumbar spine condition. He recommended an epidural steroid injection. (Claimant's Exhibit F, Pages 50-51)

Dr. David G. Kennedy, a neurosurgeon, examined employee on January 26, 2005. Mr. Lampe told Dr. Kennedy about the September 24, 2003 fall and his increasing low back complaints, especially after returning to work. His principal complaints were persistent pain in the lower lumbar area with radiating pain into both legs, the left greater than the right. On examination claimant's straight leg raising test was positive bilaterally at 45 degrees. Dr. Kennedy reviewed the MRI of the lumbar spine performed on May 1, 2001, the CT scan of the lumbar spine performed on September 23, 2003, and the MRI of the lumbar spine performed on July 28, 2004.<sup>[5]</sup> Dr. Kennedy diagnosed claimant with a listhesis at L4-5 with significant spinal stenosis at that level and recommended that employee undergo a decompression and fusion at this level. He advised claimant not to lift more than 20 pounds nor to do more than occasional bending, twisting, or stooping prior to further treatment. (Claimant's Exhibit M, Pages 6-8)

Dr. Hertel also reviewed the July 28, 2004 MRI. He indicated that it showed that there was significant pressure on the dura at the L4-5 level and significant encroachment on the L4-5 nerve roots and the dura. He opined that claimant was a candidate for decompression and spinal fusion at the L4-5 level. (Claimant's Exhibit A, depo ex 4)

Claimant underwent a lumbar myelogram and CT scan post-myelogram on April 7, 2005. They showed Grade I spondylolisthesis at L4-L5 with moderate to severe spinal canal stenosis at that level. There was nonfilling of both L5 nerve root sheaths. There was a mild broad focal lateralization to the right of the L4-L5 disc which encroached with mild compromise into the right L4 foramen. There was no significant abnormality at L5-S1. There were diffuse degenerative disc

changes at L2-L3 and L3-L4. Old compression deformities were noted at T12 and L5. (Claimant's Exhibit M, Pages 9-10) Lumbar spine x-rays taken on April 18, 2005 showed minimal anterolisthesis of L4 on L5, compression deformities at T12 and L5, spondylitic changes and changes of degenerative disk disease in the mid-lumbar spine, and facet disease in the lower lumbar spine. (Claimant's Exhibit M, Page 13)

On April 25, 2005 Drs. David Robson and David Kennedy performed a bilateral lumbar laminectomy, facetectomy and foraminotomy at L4-L5 and fusion with insertion of cage and pedicle screw fixation. Dr. Kennedy noted that the L4-5 facets were severely enlarged. (Claimant's Exhibit M, Pages 20-23)

Dr. Kennedy reexamined Mr. Lampe on May 25. Employee told him that he was not taking any pain medication and having only minimal leg pain. He was advised to walk as tolerated. On July 19 Mr. Lampe told him that he had some aching pain in his lower lumbar area and decreased range of motion. Dr. Kennedy thought that it was due to persistent muscle and ligament aggravation. He initiated physical therapy. He also complained of pain and crackling in his left knee. Dr. Kennedy advised him to see Dr. Fagan. (Claimant's Exhibit M, Pages 27 & 29)

On July 28, 2005 claimant was evaluated for physical therapy for his low back at Farmington Sports and Rehabilitation Center. The therapist noted that employee had pain in his low back, decreased trunk range of motion, decreased flexibility, decreased awareness of pain causing activities and decreased core strength/lumbar stabilization. (Claimant's Exhibit H, Pages 50-51) Claimant attended attending 15 sessions of physical therapy through August 29, 2005. The therapist noted that claimant reported much less low back pain, but more right knee and left ankle pain. He met nearly all of his physical therapy goals. She recommended work hardening prior to employee returning to work. (Claimant's Exhibit H, Page 57)

On August 30 Mr. Lampe told Dr. Kennedy that his range of motion had improved. Dr. Kennedy wanted to start him on a work conditioning program. (Claimant's Exhibit M, Page 32)

Dr. Fagan reexamined claimant's right knee and left ankle on August 30, 2005. Claimant reported that his knee started acting up during physical therapy. He complained of a lot of popping and pain in the knee and pain and swelling in the left ankle. On examination there was a lot of swelling in his ankle and a lot of crepitus in the right knee. X-rays of the left ankle revealed an old fracture of the distal fibula which had healed in good position and degenerative spurs at the inferior pole of the fibula. X-rays of the knee showed some arthritic changes. Dr. Fagan recommended glucosamine chondroitin sulfate and anti-inflammatories. (Claimant's Exhibit F, Pages 52-53)

Claimant underwent a work hardening evaluation at Farmington Sports and Rehabilitation Center on September 6, 2005. His symptom magnification testing was negative. He presented with limited lumbar flexibility and intermittent symptoms in the lower extremity since his back surgery. He reported that prolonged sitting and bending caused back and leg discomfort. (Claimant's Exhibit H, Pages 59 & 76-77) Claimant attended 13 sessions of work hardening through September 27, 2005. The therapist concluded that Mr. Lampe demonstrated improved tolerance to material handling, but continued to exhibit limited positional tolerances to bending, sitting and sustained overhead postures. He continued to have lower extremity flexibility. He made slight improvement in lumbar flexibility, but deficits remained. (Claimant's Exhibit H, Pages 88-90)

Dr. Kennedy reexamined claimant on September 28, 2005. Mr. Lampe indicated that he was still having quite a bit of aching back pain particularly with prolonged standing or sitting. Dr. Kennedy indicated that employee had done well from the standpoint of strengthening, but that certain activities aggravated his pain. (Claimant's Exhibit M, Page 35)

Dr. Fagan also reexamined claimant on September 28. Claimant reported that while his ankle had gotten much better, his knee was about the same. He walked with a slight limp. Dr. Fagan again recommended a cortisone injection. On October 27, 2005 claimant reported that he experienced some relief for two or three days after which his pain returned. He complained of a grinding sensation. Dr. Fagan suspected some articular cartilage damage and recommended arthroscopic surgery. (Claimant's Exhibit F, Pages 55-57)

Dr. Kennedy also reexamined Mr. Lampe on October 27. employee indicated that he was better, but that he still had some aching pain. His forward flexion was reduced about 50%. Straight leg raising was negative. X-rays showed incorporation of fusion material. Dr. Kennedy felt that employee was a maximum medical improvement. He advised him not to lift more than 40 pounds and to not do more than occasional bending, twisting, or stooping. (Claimant's Exhibit M, Pages 38-40)

Claimant underwent arthroscopic surgery on the right knee on November 2, 2005. Dr. Fagan found extensive articular

cartilage damage of the femoral trochlea, tears of the posterior horns of the lateral and medial menisci, mild articular cartilage damage to the medial femoral condyle, and a large flap of articular cartilage in the lateral compartment. He performed medial and lateral meniscectomies and chondroplasty of the femoral trochlea, lateral tibial plateau and medial femoral condyle. (Claimant's Exhibits F, Page 59-60 and Substitute S, Pages 1-2) Dr. Fagan reexamined claimant on November 9 and December 6, 2005, and January 3, 2006. Dr. Fagan told claimant that he found a rather significant amount of arthritis in right his knee. He thought that the knee would function fairly well, though it would never be completely normal. On January 3, 2006 claimant was walking without an assistive device. He could fully extend his knee and bend it back approximately 130 degrees. Dr. Fagan opined that claimant's knee was doing fairly well and that it would continued to improve. He told Mr. Lampe that he would see him on an as needed basis. Dr. Fagan did not give claimant any permanent work restrictions. (Claimant's Exhibit F, Pages 61-65)

### Unauthorized Medical Treatment

On May 30, 2006 Martin Lampe sought treatment from a Dr. Dickerson at Parkland Health Center for low back, right knee, and left ankle pain. He was diagnosed with chronic pain and low back pain and prescribed MS Contin. Claimant returned on July 25. He was again diagnosed with low back pain and prescribed MS Contin. (Claimant's Exhibit X)

Claimant sought treatment from Dr. Chad Shelton at Pain Management Services in St. Louis on September 11, 2006. He complained of left ankle pain, back pain, right knee pain, and neck pain.<sup>16</sup> He indicated that his back pain radiated into his buttocks and that he had numbness in his left leg. He indicated that lying down made his pain worse and that he obtained relief from pain only from medicines and heat/ice. He complained of a cough and wheezing. He indicated that pain prevented him from sitting for more than 15 minutes, from standing for more than half an hour, from traveling except to receive treatment, from sleeping more than 4 hours, and from walking more than 100 yards. He added that he always used a cane or walking stick because of his pain. (Claimant's Exhibit R, Pages 2-4 and 7-8)

Dr. Shelton's assessment was lumbar post-laminectomy syndrome, lumbar facet arthropathy, and degenerative knee pain. He performed a caudal epidural steroid injection under fluoroscopy and changed his medication to OxyContin and Lyrica. He suggested the possibility of lumbar medial branch blocks. (Claimant's Exhibit R, Pages 11-13 & 19)

Claimant returned to Dr. Shelton on September 25. Mr. Lampe indicated that he experienced no pain relief from the injection and did not want to undergo any further injections. He also stated that he experienced some improvement with OxyContin. On examination Dr. Shelton noted tenderness in the bilateral lumbar paraspinous muscles with increased pain with flexion and extension. Straight leg raise was negative. Dr. Shelton increased the dosage of OxyContin and continued the Lyrica. (Claimant's Exhibit R, Pages 21-22 & 24)

Dr. Shelton reexamined claimant on October 9, 2006. Though Mr. Lampe continued to rate his pain as severe, he acknowledged that the OxyContin had further reduced his pain. On examination Dr. Shelton noted diffuse paraspinous tenderness with increased pain with flexion. Dr. Shelton increased the dosage of OxyContin. (Claimant's Exhibit R, Pages 26-27 & 29)

Claimant returned to Dr. Shelton on November 6, 2006. Mr. Lampe indicated that he had obtained 50% pain relief from the medications, though his overall pain level was still "severe/moderate." On examination Dr. Shelton noted tenderness in the bilateral lumbar paraspinous muscles as well as the sacroiliac joint and increased pain with extension. Dr. Shelton continued the OxyContin and Lyrica, added Norco for breakthrough pain with activities, and gave him samples of Lidoderm patches for his right sacroiliac joint area. Dr. Shelton also recommended medial branch blocks for his lumbar facet arthropathy. (Claimant's Exhibit R, Pages 30-31 & 33-34)

Dr. Shelton reexamined claimant on December 4, 2006. Though Mr. Lampe continued to have low back pain and some occasional leg pain, he felt that he was doing extremely well with his current medical regime. On examination Dr. Shelton noted some paraspinous muscle tenderness and increased pain with extension. Dr. Shelton continued the OxyContin, Lyrica, and Norco. He again discussed possible lumbar medial branch blocks. (Claimant's Exhibit A, Pages 35-36 & 39-40)

Claimant returned to Dr. Shelton on January 3, 2007. Mr. Lampe described his overall pain as moderate. He continued to report that the medications had reduced his pain by 50%. On examination Dr. Shelton noted some mild lumbar paraspinous muscle tenderness with increase pain with extension. He also noted some tenderness over his right-sided sacroiliac joint. Dr. Shelton continued the OxyContin, Lyrica, and Norco. He again discussed possible lumbar medial branch blocks. (Claimant's Exhibit R, Pages 41-42)

### Medical Opinions

Based on his examination of employee on October 27, 2005, Dr. Kennedy concluded that employee had reached maximum medical improvement. He discharged employee from his care at that time. Dr. Kennedy did not discuss ongoing care of a symptomatic nature. (Claimant's Exhibit M, Page 38)

In his report dated February 1, 2006, Dr. Fagan opined that employee's right knee and left ankle had reached maximum medical improvement. He discharged employee from his care at that time. Dr. Fagan did not discuss ongoing care of a symptomatic nature. (Claimant's Exhibit F, Pages 66-67)

Dr. Mark A. Lichtenfeld examined claimant on May 12, 2006 at the request of his attorney. After reviewing all of the treatment records and examining Mr. Lampe, Dr. Lichtenfeld opined that claimant was in need of additional treatment as a result of the work-related injury of September 22, 2003, including anti-inflammatory medications, muscles relaxers, and pain medications. He also recommended a myelogram and post-myelogram CT scan for evaluation of his nerve roots. (Claimant's Exhibit B, depo ex 2, p. 12)

Based upon his examination of employee on May 30, 2006, Dr. Dickerson at the Parkland Health Clinic prescribed additional treatment for employee. (Claimant's Exhibit X)

Based upon his examination of employee on September 11, 2006 and his review of claimant's prior medical treatment, Dr. Shelton felt that employee was in need of further medical treatment for his back complaints and prescribed additional treatment. This treatment has included injections and medications. (Claimant's Exhibit R, Pages 9-12)

### **Additional Findings**

Because of increased pain in his low back and continuing complaints regarding his right knee and left ankle claimant sought the additional medical treatment from his family physician who referred him to Dr. Shelton. The treatments provided by Dr. Shelton have helped to reduce employee's pain level. (Claimant's Testimony)

Claimant's Exhibit R includes charges for the caudal epidural steroid injection administered on by Dr. Shelton on September 11, 2006 and for office visits on September 25, October 9, November 6, December 4, 2006 and January 3, 2007 and totals \$1,809.00. Claimant's Exhibit V includes charges of \$1,024.00 from St. Anthony's Medical Center for the epidural steroid injection and \$25.00 co-payment for the visit to Parkland Health Clinic on May 30, 2006 and prescription co-payments totaling \$60.00.<sup>[7]</sup> Claimant's Exhibit W includes prescriptions co-payments totaling \$40.00. The medical services for the foregoing charges are documented in the records of Dr. Shelton and Parkland Health Clinic.

Employer/insurer introduced no evidence that any of the foregoing treatment was not necessary to cure and relieve employee from the effects of the work-related low back injury.

Based on the medical records in evidence, I find that the foregoing treatment was reasonable and necessary to cure and relieve employee from the effects of the work-related low back injury. Lenzini v. Columbia Foods, 829 S.W.2d 482, 484 (Mo. App. 1992).

Proof of the fairness and reasonableness of the bills may be made by the testimony of the claimant alone. Identification of treatment covered by a bill and the relationship of the treatment to the employee's injury is sufficient. Proof of payment is not required. It is then up to the employer to show that the bills are not fair and reasonable. Martin v. Mid-America Farm Lines, Inc., 769 S.W.2d 105 (Mo. 1989); Metcalf v. Castle Studios, 946 S.W.2d 282, 287-88 (Mo. App. 1997); Shores v. General Motors Corp., 842 S.W.2d 929 (Mo. App. 1992).

Claimant testified that he received the treatment shown on the bills. Each item on the bills corresponds to an entry in the provider's medical records indicating that treatment was for claimant's back condition. Employer/insurer introduced no evidence that the charges were not fair or reasonable. I have examined the specific charges and they appear to be fair and reasonable.

I further find that the charges totaling \$2,958.00 for such treatment were fair and reasonable. Accordingly, I find employer/insurer are liable for the foregoing medical expenses totaling \$2,958.00.

### **FUTURE MEDICAL CARE**

There is no dispute that claimant injured his low back, right knee, and left ankle as a result of the work-related accident. Employee is requesting an award of future medical care for the work-related injuries to his low back, right knee,

and left ankle.

Section 287.140 Mo. Rev. Stat. (2000) requires that the employer/insurer 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.” Future medical care can be awarded even though claimant has reached maximum medical improvement. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 278 (Mo. App. 1996). It can be awarded even where permanent partial disability is determined. The employee must prove beyond speculation and by competent and substantial evidence that his or her work-related injury is in need of treatment. Williams v. A.B. Chance Co., 676 S.W.2d 1 (Mo. App. 1984). Conclusive evidence is not required. However, evidence which shows only a mere possibility of the need for future treatment will not support an award. It is sufficient if claimant shows by reasonable probability that he or she will need future medical treatment. Dean v. St. Luke’s Hospital, 936 S.W.2d 601, 603 (Mo. App. 1997); Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 277 (Mo. App. 1996); Sifferman v. Sears, Roebuck and Co., 906 S.W.2d 823, 828 (Mo. App. 1995). “Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt.” Tate v. Southwestern Bell Telephone Co., 715 S.W.2d 326, 329 (Mo. App. 1986); Sifferman at 828.

Where the sole medical expert believes that it is “very likely” that the claimant will need future medical treatment, but is unable to say whether it is more likely than not that the claimant will need such treatment, that opinion, when combined with credible testimony from the claimant and the medical records in evidence, can be sufficient to support an award which leaves the future treatment issue open. This is particularly true where the medical expert states that the need for treatment will depend largely on the claimant’s pain level in the future and how well the claimant tolerates that pain. Dean, supra at 604-06.

The amount of the award for future medical expenses may be indefinite. Section 287.140.1 does not require that the medical evidence identify particular procedures or treatments to be performed or administered. Dean, supra at 604; Talley v. Runny Meade Estates, Ltd., 831 S.W.2d 692, 695 (Mo. App. 1992); Bradshaw v. Brown Shoe Co., 660 S.W.2d 390, 393-394 (Mo. App. 1983). The award may extend for the duration of an employee’s life. P.M. v. Metromedia Steakhouses Co., Inc., 931 S.W.2d 846, 849 (Mo. App. 1996). The award may require the employer to provide future medical treatment which the claimant may require to relieve the effects of an injury or occupational disease. Polavarapu v. General Motors Corporation, 897 S.W.2d 63 (Mo. App. 1995). It is not necessary that such treatment has been prescribed or recommended as of the date of the hearing. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 277 (Mo. App. 1996). Where future medical care and treatment is awarded, such care and treatment “must flow from the accident before the employer is to be held responsible.” Modlin v. Sun Mark, Inc., 699 S.W.2d 5, 7 (Mo. App. 1985); Talley v. Runny Meade Estates, Ltd. At 694. The employer/insurer may be ordered to provide medical and hospital treatment to cure and relieve the employee from the effects of the injury even though some of such treatment may also give relief from pain caused by a preexisting condition. Hall v. Spot Martin, 304 S.W.2d 844, 854-55 (Mo. 1957). However, where preexisting conditions also require future medical care, the medical experts must testify to a reasonable medical certainty as to what treatment is required for the injuries attributable to the last accident. O’Donnell v. Guarantee Elec. Co., 690 S.W.2d 190, 191 (Mo. App. 1985).

#### Claimant’s Testimony

Claimant testified that he experiences constant pain in his back. He said that it worsens with motions such as bending, stooping and twisting. If he attempts to be more active, then he finds that he has to recline to obtain relief. Medication helps make his symptoms “bearable.” He tries to perform household activities such as laundry and sweeping, though he has difficulty in doing so because of the bending and lifting involved. And if he does perform these activities, he generally finds that he needs a couple of days to get his symptoms to return to normal. He is able to ride in a car, though he needs to stop frequently to stretch and relieve his symptoms. He has found that he is generally in poor shape after a trip to St. Louis from his home, requiring him to recline for a day or two to recover. If he stands for more than fifteen minutes he begins getting numbness in his left thigh. He feels he can sit comfortably for fifteen minutes at a time. And he is able to walk up to fifty yards before developing worsening complaints. His back limits his sleep.

Claimant also described ongoing symptoms in his right knee. He stated that his leg “pounds” at night. It is painful when he is walking and he has to watch how he walks and think about his steps. His right leg has given out on him and he generally uses a cane if he is planning on walking longer distances. He has particular difficulty if he steps on uneven surfaces, such as an acorn or a rock.

Claimant’s left ankle continues to cause pain and he also needs to watch how he walks with it. When he is performing twisting maneuvers, the ankle feels like it is still broken. His ankle is constantly swollen. His symptoms improve when lies on his back with his leg elevated.

## Medical Opinions

As previously noted<sup>[8]</sup> Dr. Hertel opined that the September 22, 2003 work accident aggravated claimant's preexisting anterior subluxation of L4 on L5 and caused compression fractures to the vertebral bodies of T12 and L1. He opined that the work accident substantially contributed to the need for a myelogram and consideration for surgery. (Claimant's Exhibit A, depo ex 2, pp 5-6)

Dr. Kennedy opined that the accident of September 22, 2003 "substantially contributed" employee's lumbar symptoms and the need for operative intervention. (Claimant's Exhibit M, Pages 7-8) Dr. Kennedy opined in his report of October 27, 2005 that claimant had reached a state of maximum medical improvement. He did not discuss the prospect of palliative care. (Claimant's Exhibit M, Page 38)

Dr. Fagan opined in his report dated February 1, 2006, that employee's right knee and left ankle had reached maximum medical improvement. He discharged employee from his care at that time. Dr. Fagan did not discuss ongoing care of a symptomatic nature. (Claimant's Exhibit F, Page 66-67)

During his physical examination of claimant on May 2, 2006, Dr. Lichtenfeld found that claimant had lost strength in the extensor hallucis longus, a finding which was indicative of an impingement of the left S1 nerve root. (Claimant's Exhibit B, Page 17) He also found that claimant had lost motion and strength in other areas of his lower extremities, though he indicated that it was difficult to ascertain the origin of the problem as claimant had problems with his lumbar spine and his right knee and left ankle. (Claimant's Exhibit B, Pages 18-19) Dr. Lichtenfeld found that claimant had decreased sensation in the left calf and foot, which he attributed to problems in the L5 distribution mainly, though possibly also in the L4 and S1 distribution. (Claimant's Exhibit B, Page 20) He found a positive provocative test of the left lower extremity, producing a shooting pain into the left hip, indicative of nerve root impingement. (Claimant's Exhibit B, Page 21)

Dr. Lichtenfeld opined that claimant sustained the following diagnoses as a result of the accident of September 22, 2003: displaced comminuted fracture of the right tibial plateau and proximal tibial shaft associated with a six millimeter depression deformity of the lateral tibial plateau, mildly displaced fracture of the right medial malleolus, mildly displaced left lateral malleolar fracture, nondisplaced fracture of the right fibular head extending into the proximal tibiofibular joint, status-post open reduction and internal fixation of the right tibial plateau fracture, chronic lumbosacral spine strain, incitation and acceleration of preexisting lumbar spine degenerative changes, T12 compression fracture, right knee hemarthrosis, symptomatic spinal stenosis, right L4 nerve root encroachment, status-post harvesting of right iliac crest bone graft, status-post bilateral lumbar laminectomy, facetectomy and foraminotomy at L4-5, status-post posterior spinal fusion with left iliac crest bone graft, status-post insertion of left L4-5 cage, status-post hardware fixation and fusion at L4-5, status-post L4-5 discectomy, post-traumatic degenerative changes in the left ankle, tear of the posterior horn of the right medial and lateral menisci, status-post arthroscopy of the right knee with chondroplasty of the patella, femoral trochlea, lateral tibial plateau and medial femoral condyle, and status-post partial medial and lateral meniscectomy. (Claimant's Exhibit B, Pages 29-34)

Dr. Lichtenfeld opined that claimant would need further medical care due to his injuries of September 22, 2003, in the form of anti-inflammatory medications, muscle relaxers and pain medication. (Claimant's Exhibit B, Pages 35-36) He also recommended a physical exercise program and further testing concerning the condition of the lumbar spine.

As previously noted<sup>[9]</sup> claimant was referred to Dr. Chad Shelton by Dr. Dickerson, his personal physician.

Dr. Chad Shelton performed a caudal epidural steroid injection and prescribed OxyContin, Lyrica and Norco. He noted that claimant had obtained a 50% reduction of his pain. Dr. Shelton recommended lumbar medial branch blocks as well. (Claimant's Exhibit R, Pages 19 & 41-42)

## Additional Findings

Based on the medical opinions of Drs. Hertel, Kennedy and Lichtenfeld, I find that the accident of September 23, 2003 caused a chronic lumbosacral strain, compression fractures to the vertebral bodies of T12 and L1 and aggravated claimant's preexisting anterior subluxation of L4 on L5 to the extent that it caused compression of the L5 nerve roots and necessitated that decompression and fusion performed by Drs. Kennedy and Robson. Based on the medical opinions of Drs. Fagan and Lichtenfeld, I also find that the accident of September 23, 2003 also caused a displaced comminuted fracture of the right tibial plateau and proximal tibial shaft associated with a six millimeter depression deformity of the lateral tibial plateau, which were surgically repaired by Dr. Fagan, a mildly displaced fracture of the right medial malleolus, a mildly displaced fracture of the left lateral malleolus, and a nondisplaced fracture of the right fibular head extending into the proximal tibiofibular joint. Based on the medical opinions of Drs. Fagan and Lichtenfeld, I further find that claimant

developed as a consequence of the September 23, 2003 accident tears of the posterior horns of the right medial and lateral menisci and cartilage damage to the medial femoral condyle and a large flap of articular cartilage in the lateral compartment, which were surgically repaired by Dr. Fagan, and post-traumatic degenerative changes in the left ankle.

Based on the credible testimony of claimant, I find that his ongoing complaints of pain to be generally credible.

Based on the credible opinion of Dr. Lichtenfeld, supported by the records of Dr. Shelton, I find that claimant will require ongoing medical care in the form of medications and possibly injections or other procedures to cure or relieve the effects of his back and leg injuries. Employer/insurer are hereby ordered to provide and pay continued pain management by Dr. Shelton and for such further medical care as may be necessary to cure or relieve the effects of claimant's injuries.

### **ALLEGED PERMANENT TOTAL DISABILITY**

Employee claims that he is permanently and totally disabled as a result of the work-related injuries of September 22, 2003, or, alternatively, as a result of the combination of the work-related injuries with employee's alleged preexisting disabilities in his neck and low back, left hand, lungs and due to alcoholism. The claim of total disability against the employer must be considered first. Where the disability caused solely by the primary injury is total disability, there can be no liability for the Second Injury Fund. Hughey v. Chrysler Corp., 34 S.W.3d 845, 847 (Mo. App. 2000); Vaught v. Vaughts, Inc., 938 S.W.2d 931, 939 (Mo. App. 1997); Roller v. Treasurer of State of Mo., 935 S.W.2d 739, 740 (Mo. App. 1996).

Section 287.020.7 Mo. Rev. Stat. (2000) defines total disability as the "inability to return to any employment and not merely...[the] inability to return to the employment in which the employee was engaged at the time of the accident." The words "inability to return to any employment" mean "that the employee is unable 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. 1982). The words "any employment" mean "any reasonable or normal employment or occupation; it is not necessary that the employee be completely inactive or inert in order to meet this statutory definition." Id. at 922; Brown v. Treasurer of Missouri, 795 S.W.2d 479, 483 (Mo. App. 1990); Crum v. Sachs Elec., 769 S.W.2d 131, 133 (Mo. App. 1989). "[W]orking very limited hours at rudimentary tasks [is not] reasonable or normal employment." Grgic v. P & G Const., 904 S.W.2d 464, 466 (Mo. App. 1995). The primary determination with respect to the issue of total disability is whether, in the ordinary course of business, any employer would reasonably be expected to employ the claimant in his or her present physical condition and reasonably expect him or her to perform the work for which he or she is hired. Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 367 (Mo. App. 1992); Talley v. Runny Mead Estates, Ltd., 831 S.W.2d 692, 694 (Mo. App. 1992); Brown v. Treasurer of Missouri, at 483; Fischer v. Archdiocese of St. Louis, 793 S.W.2d 195, 199 (Mo. App. 1990); Sellers v. Trans World Airlines, Inc., 776 S.W.2d 502, 504 (Mo. App. 1989). The test for permanent and total disability is whether given the employee's condition, he or she would be able to compete in the open labor market; the test measures the employee's prospects for obtaining employment. Reiner at 367; Brown at 483; Fischer at 199. A claimant who is "only able to work very limited hours at rudimentary tasks is a totally disabled worker." Grgic v. P & G Const., 904 S.W.2d 464, 466 (Mo. App. 1995).

The employee must prove the nature and extent of any disability by a reasonable degree of certainty. Downing v. Willamette Industries, Inc., 895 S.W.2d 650, 655 (Mo. App. 1995); Griggs v. A. B. Chance Company, 503 S.W.2d 697, 703 (Mo. App. 1974). Such proof is made only by competent and substantial evidence. It may not rest on speculation. Idem. Expert testimony may be required where there are complicated medical issues. Goleman v. MCI Transporters, 844 S.W.2d 463, 466 (Mo. App. 1993); Griggs at 704; Downs v. A.C.F. Industries, Incorporated, 460 S.W.2d 293, 295-96 (Mo. App. 1970). The fact finder may accept only part of the testimony of a medical expert and reject the remainder of it. Cole v. Best Motor Lines, 303 S.W.2d 170, 174 (Mo. App. 1957). Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. Hawkins v. Emerson Electric Co., 676 S.W.2d 872, 877 (Mo. App. 1984). Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. Webber v. Chrysler Corp., 826 S.W.2d 51, 54 (Mo. App. 1992); Hutchinson v. Tri-State Motor Transit Co., 721 S.W.2d 158, 163 (Mo. App. 1986).

However, where the facts are within the understanding of lay persons, the employee's testimony or that of other lay witnesses may constitute substantial and competent evidence. This is especially true where such testimony is supported by some medical evidence. Pruteanu v. Electro Core Inc., 847 S.W.2d 203 (Mo. App. 1993); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 367 (Mo. App. 1992); Fisher v. Archdiocese of St. Louis, 793 S.W.2d 195, 199 (Mo. App. 1990); Ford v. Bi-State Development Agency, 677 S.W.2d 899, 904 (Mo. App. 1984); Fogelsong v. Banquet Foods Corp., 526 S.W.2d 886, 892 (Mo. App. 1975). The trier of facts may even base its findings solely on the testimony of the employee. Fogelsong

at 892. The trier of facts may also disbelieve the testimony of a witness even if no contradictory or impeaching testimony is given. Hutchinson v. Tri-State Motor Transit Co., *supra* at 161-2; Barrett v. Bentzinger Brothers, Inc., 595 S.W.2d 441, 443 (Mo. App. 1980). The uncontradicted testimony of the employee may even be disbelieved. Weeks v. Maple Lawn Nursing Home, 848 S.W.2d 515, 516 (Mo. App. 1993); Montgomery v. Dept. of Corr. & Human Res., 849 S.W.2d 267, 269 (Mo. App. 1993).

The determination of the degree of disability sustained by an injured employee is not strictly a medical question. While the nature of the injury and its severity and permanence are medical questions, the impact that the injury has upon the employee's ability to work involves factors which are both medical and nonmedical. Accordingly, the Courts have repeatedly held that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission. Sellers v. Trans World Airlines, Inc., 776 S.W.2d 502 (Mo. App. 1989); Quinlan v. Incarnate Word Hospital, 714 S.W.2d 237, 238 (Mo. App. 1986); Banner Iron Works v. Mordis, 663 S.W.2d 770, 773 (Mo. App. 1983); Barrett v. Bentzinger Brothers, Inc., 595 S.W.2d 441, 443 (Mo. App. 1980); McAdams v. Seven-Up Bottling Works, 429 S.W.2d 284, 289 (Mo. App. 1968). The fact finding body is not bound by or restricted to the specific percentages of disability suggested or stated by the medical experts. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences from such testimony. Fogelsong v. Banquet Foods Corporation, 526 S.W.2d 886, 892 (Mo. App. 1975). The finding of disability may exceed the percentage testified to by the medical experts. Quinlan v. Incarnate Word Hospital, at 238; Barrett v. Bentzinger Brothers, Inc., at 443; McAdams v. Seven-Up Bottling Works, at 289. The uncontradicted testimony of a medical expert concerning the extent of disability may even be disbelieved. Gilley v. Raskas Dairy, 903 S.W.2d 656, 658 (Mo. App. 1995); Jones v. Jefferson City School Dist, 801 S.W.2d 486 (Mo. App. 1990). The fact finding body may reject the uncontradicted opinion of a vocational expert. Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995).

### **CLAIM AGAINST EMPLOYER**

An employer is liable for permanent total disability compensation under Section 287.200 Mo. Rev. Stat. (2000) only where there is evidence in the record that the primary accident alone caused employee to be permanently and totally disabled. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 276 (Mo. App. 1996); Feldman v. Sterling Properties, 910 S.W.2d 808, 810 (Mo. App. 1995); Moorehead v. Lismark Distributing Co., 884 S.W.2d 416, 419 (Mo. App. 1994); Kern v. General Installation, 740 S.W.2d 691, 692 (Mo. App. 1987); *accord*, Terrell v. Board of Education, City of St. Louis, 871 S.W.2d 20, 23 (Mo. App. 1993); Roby v. Tarlton Corp., 728 S.W.2d 586, 589 (Mo. App. 1987).

Employer is liable for any aggravation of a preexisting asymptomatic condition caused by the primary injury even though the accident would not have produced the injury in a person not having the condition. Gennari v. Norwood Hills Corporation, 322 S.W.2d 718, 722-23 (Mo. 1959); Miller v. Wefelmeyer, 890 S.W.2d 372, 376 (Mo. App. 1994); Weinbauer v. Gray Eagle Distributors, 661 S.W.2d 652, 654 (Mo. App. 1983); Johnson v. General Motors Assembly Division, 605 S.W.2d 511, 513 (Mo. App. 1980); Fogelsong v. Banquet Foods Corporation, 526 S.W.2d 886, 891 (Mo. App. 1975); Mashburn v. Chevrolet Kansas City Div., G.M. Corp., 397 S.W.2d 23 (Mo. App. 1965); Garrison v. Campbell "66" Express, 297 S.W.2d 22 (Mo. App. 1956); *accord*, Lawton v. Trans World Airlines, Inc., 885 S.W.2d 768, 771 (Mo. App. 1994); Terrell v. Board of Education, City of St. Louis, 871 S.W.2d 20 (Mo. App. 1993). In Weinbauer claimant had preexisting cervical osteoarthritis. In Johnson claimant had preexisting spondylolisthesis.

An employer is not liable for any post-accident worsening of an employee's preexisting disabilities which is not caused or aggravated by the last work-related injury. Kern v. General Installation, 740 S.W.2d 691, 692 (Mo. App. 1987).

### **Findings of Fact**

Based on the credible testimony of employee, I make the following findings of fact.

#### **Educational and Employment History**

Claimant graduated from high school in 1974. His only additional training was auto mechanic work in 1974 and several weeks of training as an apprentice through the Sheet Metal Workers' Union.

Employee served in the Army for a period of four years, receiving training in artillery. He was honorably discharged. He subsequently worked as a mover for twelve to fifteen years. He then worked as a carpenter for seven or eight years. He worked for Employer as a sheet metal worker for a period of approximately seven weeks beginning in July of 2003. Claimant's last employment was with Lyons Sheet Metal where he worked as a sheet metal worker for one month in 2004.

Claimant does not know how to operate a computer.

Claimant was 49 years old on January 3, 2006 when he reached maximum medical improvement with respect to his injuries of September 22, 2003.

#### Claimant's Testimony

Claimant testified that he lost his last job because of the extent of his ongoing problems with his back and legs. He stated that he is limited in his activities because of symptoms from his work accident. He complained of constant pain in his back which is worse with activities such as bending, stooping and twisting. His symptoms are improved with laying flat on his back. He stated that if he tries to be more active then it will usually take him a couple of days before his symptoms return back to their baseline. He testified that he takes medication to make his situation "bearable."

Mr. Lampe also testified to ongoing problems with his right leg and knee. He complained that it "pounds" at night and hurts to walk. He has to "think" about steps as he walks on them. His right leg sometimes gives out and on many occasions he uses a cane for support. If he steps on something uneven, such as an acorn or a small rock, he often experiences an increase in symptoms. Claimant testified to ongoing problems with his left ankle and leg. His ankle is painful and he has to watch how he walks. When he twists, there is movement in his ankle that feels to him as if it is broken. He complained that his ankle is usually swollen, which is worse with activity.

Claimant does not perform much activity during the day. Sometimes he will baby-sit for his sister's children and sometimes he will try light housework such as vacuuming or laundry. He has difficulty with bending over to do laundry. When he is active around his home he usually finds that it takes him a couple of days to get back to normal. He testified that he experiences increased back symptoms when riding in a car and that he stopped a couple of times on the drive to St. Louis so that he could stretch. Following past trips to the St. Louis area, he noted that he had increased symptoms which caused him to lay around the house to recuperate. Employee testified that he can stand comfortably for fifteen minutes or so and that after fifteen minutes of standing he experiences numbness in his left leg. He feels that he can sit comfortably for fifteen minutes and walk for approximately fifty yards. Beyond this, his symptoms increase to the point that he needs to recline.

#### Medical Opinions

Dr. Lichtenfeld opined that claimant had 47.5% permanent partial disability of the right knee, 35% permanent partial disability of the left ankle, 40% permanent partial disability of the body as a whole, referable to the lumbar spine, and 12.5% of the body as a whole referable to the thoracic spine. <sup>[10]</sup> (Claimant's Exhibit B, Pages 34-35)

Dr. Lichtenfeld opined that the foregoing disabilities combine to form an overall disability that is greater than the simple sum of the disabilities combined. <sup>[11]</sup> (Claimant's Exhibit B, Page 35)

Regarding the injuries from the September 22, 2003 accident Dr. Lichtenfeld recommended that claimant avoid working at heights, avoid working on uneven and slick surfaces including gravel, ice, snow, mud, wet grass, inclines, ladders and roofs, avoid kneeling, squatting, bending, twisting and stooping, avoid lifting more than 25 to 35 pounds on a one-time basis, lift only between the waist and shoulder levels, avoid operating power tools with his lower extremities, avoid prolonged standing and sitting without being able to change positions at least three to four times per hour and as needed. (Claimant's Exhibit B, Pages 36-37)

Dr. Kennedy opined in a report that claimant should have the following restrictions due to his accident of September 22, 2003: no heavy labor, no lifting more than 40 pounds, and occasional bending, twisting or stooping. (Claimant's Exhibit M, Page 38)

Dr. Kennedy also opined that the September 22, 2003 accident caused 25% permanent partial disability of the body referable to the lumbar spine. (Employer/Insurer's Exhibit 1) Dr. Kennedy offered no opinion concerning restrictions or disability from the knee and ankle injuries.

Dr. Fagan opined in a report that claimant sustained 5% permanent partial disability of the left ankle due to his fracture and 15% permanent partial disability of the right knee due to his two surgeries. He did not recommend any work restrictions for claimant. (Claimant's Exhibit F) Dr. Fagan offered no opinion concerning restrictions or disability due to the back injury.

#### Vocational Opinions

Mr. Timothy G. Lalk, a vocational rehabilitation counselor, testified by deposition on behalf of claimant on December 7, 2006. Mr. Lalk interviewed claimant on August 3, 2006. He also reviewed extensive medical records and a copy of claimant's deposition.

Mr. Lalk performed vocational testing and determined that with some additional academic preparation claimant would be mentally capable of pursuing post-secondary training. (Claimant's Exhibit C, depo ex 2, p. 13)

Mr. Lalk concluded that claimant is not able to compete for employment in the open labor market due to his symptoms and level of activity. (Claimant's Exhibit C, Page 17 & depo ex. 2, p. 17) Before reaching that conclusion, Mr. Lalk discussed several different paradigms in analyzing claimant's situation. He stated that if he accepted only the restrictions of Dr. Kennedy and Dr. Fagan, then claimant would not be able to return to his previous jobs as a carpenter or sheet metal worker and claimant would not have the experience or training required to perform less physically demanding construction tasks. However, Mr. Lampe would be able to work as a forklift operator or at unskilled employment, including operating a machine, doing product assembly, or packaging small products. (Claimant's Exhibit C, Pages 13-16) He next stated that if he accepted only the restrictions of Dr. Lichtenfeld, then claimant would be able to work, but only in jobs which are close to the sedentary level, such as a convenience store cashier, unarmed security guard or information clerk, desk clerk at a motel or rental store, or a variety of customer service representative positions. (Exhibit C, Pages 16-17)

Lastly, Mr. Lalk indicated that Mr. Lampe told him that despite his efforts to change positions and take pills, he was unable to control his symptoms in his low back without lying down. Mr. Lalk opined that if he accepted claimant's description of his pain complaints and what he must do to control his symptoms (i.e. lie down for extended periods of time during the workday), together with the restrictions of Dr. Lichtenfeld and the other doctors, then claimant would in his opinion be unemployable in the open labor market.<sup>[12]</sup> He indicated that the main contributing problem to Mr. Lampe's unemployability was his complaint of low back pain from sitting. (Claimant's Exhibit C, Pages 17-18, 28 & 45)

Mr. Lalk stated that a person's symptoms and physical capabilities are important to him because if a person advised him that certain types of activities or positioning or environmental conditions cause an increase of that person's symptoms, then Mr. Lalk would try to help him or her find some type of employment or work situation in which he or she could avoid those exposures. (Claimant's Exhibit C, Page 10) Mr. Lalk stated that his opinion on unemployability was based upon his review of the medical evidence together with claimant's history. (Claimant's Exhibit C, Pages 29-30)

In discussing claimant's employability in a lighter duty position, such as a convenience store cashier, unarmed security guard or information clerk, desk clerk at a motel or rental store, customer service representative, or parking lot attendant, Mr. Lalk stated that "Mr. Lampe would not be the choice for an employer in those positions because he has no experience, no background doing that type of work. So he would have no preference in that regard." Mr. Lalk added that the other consideration a potential employer would have for that position is whether the prospective employee would be reliable in coming to work every day and would work the hours assigned to him or her. Mr. Lalk stated that a person with a medical condition that might prevent him or her from showing up for the day or working through the entire work shift would be a concern to a prospective employer and would place him or her in a less favorable position than any other individual who could demonstrate better health and better reliability. (Claimant's Exhibit C, Pages 56-57 & 66)

### **Findings on Permanent Disability**

Claimant clearly sustained significant injuries and limitations due to the September 22, 2003 work accident.<sup>[13]</sup> Dr. Kennedy did not place restrictions on claimant that would, taken alone, prevent claimant from light duty work. However, Dr. Kennedy only discussed the lower back problems from the work injury and did not provide an opinion concerning claimant's ongoing difficulties with his right knee and left ankle. Dr. Fagan did not place restrictions on claimant. Dr. Lichtenfeld recommended significant restrictions with respect to the injuries caused by the September 22, 2003 fall. Mr. Lalk opined that Dr. Lichtenfeld's restrictions limited claimant to sedentary positions, such as a convenience store cashier, unarmed security guard or information clerk, desk clerk at a motel or rental store, a variety of customer service representative positions, and a parking lot attendant.

Based on my observations of claimant during his testimony and the extensive documentation of his significant ongoing pain complaints to Dr. Shelton, I find that claimant's testimony regarding his low back pain and the things which he must do in order to lessen his low back pain are credible.<sup>[14]</sup>

Mr. Lalk opined that it is claimant's low back complaints and what he is required to do in order to reduce them which

renders him unemployable in the open labor market. As I have found claimant's testimony in this regard to be credible, I find Mr. Lalk's opinion that claimant is unemployable because of employee's low back complaints and what he must do in order to reduce them is high persuasive.

While it is conceivable that claimant could persuade someone to hire him in a sedentary environment, claimant's worsening of symptoms with activity, together with his need to be immobile to reduce his complaints, will not allow him to hold a job for any reasonable amount of time.

Based on the restrictions recommended by Dr. Lichtenfeld and the credible vocation assessment by Timothy Lalk and taking into account claimant's educational and employment background and his age of 49 years as of January 3, 2006, I find that no employer in the ordinary course of business would reasonably be expected to employ Mr. Lampe in his present physical condition and reasonably expect him to perform the work for which he is hired; he is not employable in the open labor market. Accordingly, I find that Mr. Lampe is permanently and totally disabled as a result of the injuries to his right knee, left ankle, and lumbar and thoracic spine from the September 22, 2003 fall and without regard to his preexisting disability in his lumbar spine.

As the parties stipulated that claimant reached maximum medical improvement and a state of permanency regarding his primary injuries as of January 3, 2006, I further find that claimant became permanently and totally disabled as of January 3, 2006. The obligation to pay permanent disability compensation commences under Section 287.160.1 Mo. Rev. Stat. (2000) on the date when the claimant's permanent disability begins. Kramer v. Labor & Indus. Rel. Com'n, 799 S.W.2d 142, 145 (Mo. App. 1990); Hall v. Wagner Div.-McGraw-Edison, 782 S.W.2d 441, 443-44 (Mo. App. 1989). As I have found that claimant became permanently and totally disabled on January 3, 2006, permanent total disability compensation should have begun on that date.

### **SECOND INJURY FUND LIABILITY**

Claimant also filed a claim against the Second Injury Fund.

Where the last injury alone causes the employee to become permanently and totally disabled, then the employer is liable for permanent disability compensation under Section 287.200. See Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 276 (Mo. App. 1996); Feldman v. Sterling Properties, 910 S.W.2d 808, 810 (Mo. App. 1995); Moorehead v. Lismark Distributing Co., 884 S.W.2d 416, 419 (Mo. App. 1994); Kern v. General Installation, 740 S.W.2d 691, 692 (Mo. App. 1987); see also Terrell v. Board of Education, City of St. Louis, 871 S.W.2d 20 (Mo. App. 1993); Reves v. Kindell's Mercantile Co., Inc., 793 S.W.2d 917 (Mo. App. 1990); Roby v. Tarlton Corp., 728 S.W.2d 586, 589 (Mo. App. 1987); Weinbauer v. Gray Eagle Distributors, 661 S.W.2d 652 (Mo. App. 1983); Fogelsong v. Banquet Foods Corporation, 526 S.W.2d 886 (Mo. App. 1975); Mashburn v. Chevrolet Kansas City Div., G.M. Corp., 397 S.W.2d 23 (Mo. App. 1965); Garrison v. Campbell "66" Express, 297 S.W.2d 22 (Mo. App. 1956).

Where the disability caused solely by the primary injury is total disability, there can be no liability for the Second Injury Fund. For the Second Injury to be liable for permanent total disability compensation, the total disability must result solely from the combination of the preexisting disabilities and the disability caused by the primary disability. If total disability is caused by the primary injury alone, there can no combination. The employee is not entitled to permanent total disability compensation from both the Second Injury Fund and the employer. Vaught v. Vaughts, Inc., 938 S.W.2d 931, 939 (Mo. App. 1997); Roller v. Treasurer of State of Mo., 935 S.W.2d 739 (Mo. App. 1996).

As I have previously found that the September 22, 2003 injuries alone caused claimant to be permanently and totally disabled, the Second Injury Fund claim is denied.

### **ATTORNEY'S FEES**

This award is subject to a lien in the amount of 25% of the additional payments hereunder in favor of the employee's attorney, Dean L. Christianson, for necessary legal services rendered to the employee.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

JOHN HOWARD PERCY

*Administrative Law Judge  
Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Patricia "Pat" Secret  
*Director  
Division of Workers' Compensation*

[1] The correct number was probably \$750.03.

[2] X-rays of the pelvis on September 22, 2003 showed a questionable fracture of the superior and inferior left pubic rami. (Claimant's Exhibits D, Page 13 and N, Page 8) There was no indication on x-rays of the pelvis taken on September 24, 2003 or on April 13, 2004 of any fracture or healed fracture of these areas. (Claimant's Exhibits N, Pages 14-15 and A, depo ex 2, p. 4)

[3] X-rays of claimant's lumbar and thoracic spine taken on November 2, 1998 showed that L4 was slightly forward on the vertebral body of L5. The lumbar vertebral bodies were of average height. There was a small segmented spur on the anterior superior margin of the L2 vertebral body. (Claimant's Exhibit N, Page 15)

X-rays of employee's lumbar spine taken on October 25, 1999 showed compression of the anterior margin of the superior vertebral endplate of L5 and degenerative disc space narrowing with anterior osteophytes at L2-3 and L3-4. An MRI of the lumbar spine also taken on October 25, 1999 showed marked degenerative disc space narrowing and disc degeneration at L2-3 and L3-4, 3 millimeters of anterior subluxation of L4 on L5 related to severe facet arthropathy with bony spinal stenosis and bilateral lateral recess stenosis, a concentric disc bulge at L5-S1, and minimal compression of the superior vertebral endplate of L5 with a large soft tissue spur. (Claimant's Exhibit K, Page 3)

An MRI of the lumbar spine taken on May 1, 2001 showed spondylolisthesis of L4 with respect to L5 secondary to severe degenerative facet disease, resulting in moderate to severe stenosis. (Claimant's Exhibit K, Page 13) X-rays of Mr. Lampe's lumbar spine taken on May 22, 2001 showed approximately 8 millimeters of anterior displacement of L4 on L5 and hypertrophic spurring at multiple levels. (Claimant's Exhibits I, Page 4 and J, Page 4)

[4] The diagnosis of an L1 fracture was based on x-rays taken by Dr. Hertel which showed a healed fracture of the body of L1 with approximately 1/3 decreased height of the anterior margin of the body of L1. (Claimant's Exhibit A, depo ex 2, p. 4)

[5] He apparently did not review the MRI of the lumbar spine performed on October 25, 1999. See footnote 3 supra.

[6] Claimant underwent a fusion of C1 to C2 on June 19, 2001 because of instability at that level. (Claimant's Exhibit J, Pages 6 & 9-10)

[7] Claimant's Exhibit V also includes several co-payments to Dr. Shelton which were included in Claimant's Exhibit R.

[8] See findings on Page 9 supra.

[9] See findings on Page 9 supra.

[10] Dr. Lichtenfeld opined that claimant had 7.5% permanent partial disability of the body referable to the lumbar spine due to his preexisting spinal conditions. (Claimant's Exhibit B, depo ex 2, p. 13)

[11] Dr. Lichtenfeld also opined that claimant was permanently and totally disabled when taking into consideration his educational background, vocational history, preexisting medical conditions, and the accident of September 22, 2003. (Claimant's Exhibit B, Page 39)

[12] Mr. Lalk acknowledged on cross-examination that no physician opined that claimant had to lie down for extended periods of time. (Claimant's Exhibit C, Page 30) He acknowledged that Mr. Lampe did not lie down during Mr. Lalk's two hour interview. (Claimant's Exhibit C, Pages 40-41) He indicated that Mr. Lampe alternated sitting and standing during the interview. He stood every 10 to 20 minutes. (Claimant's Exhibit C, Pages 42-43)

[13] See findings on Page 18 supra.

[14] Claimant was not cross-examined concerning his answer to Dr. Shelton's New Patient Questionnaire in which he indicated that lying down made his pain worse. (Claimant's Exhibit R, Page 4)