

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

Injury No.: 04-078049

Employee: William Maxwell
Employer: Three Rivers Travel
Insurer: Great American Insurance Co.
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 25, 2010. The award and decision of Administrative Law Judge Maureen Tilley, issued May 25, 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 25th day of January 2011.

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

FINAL AWARD

Employee: William Maxwell

Injury No. 04-078049

Dependents: N/A

Employer: Three Rivers Travel

Additional Party: Second Injury Fund

Insurer: Great American Insurance Co.

Hearing Date: 12-15-2009 and 2-19-2010

Checked by: MT/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? April 10, 2004.
5. State location where accident occurred or occupational disease contracted: Butler County.
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: The employee was washing a bus and moving a bucket when he slipped on a wet, soapy floor and felt a sudden onset of right groin pain and presentation of obvious bulge. The employee was eventually diagnosed with an inguinal hernia.

12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Abdomen; groin, right testicle, and body as a whole.
14. Nature and extent of any permanent disability: See findings.
15. Compensation paid to date for temporary total disability: \$2,126.38
16. Value necessary medical aid paid to date by employer-insurer: \$21,984.25
17. Value necessary medical aid not furnished by employer-insurer: None.
18. Employee's average weekly wage:
 - Weekly compensation rate:
 - Based on 13 weeks prior to accident/injury = \$148.56 (applicable to TTD)
 - Based on 30 hour rule = \$240.00 (applicable to PPD, PTD or Death rate)
 - TTD \$ 99.04
 - PPD/PTD \$160.00
19. Method wages computation: By agreement
20. Amount of compensation payable: See findings
21. Second Injury Fund liability: See findings
22. Future requirements awarded: 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: Ron Little.

FINDINGS OF FACT AND RULINGS OF LAW

On December 15, 2009 and February 19, 2010, the employee, William Maxwell, appeared in person and with his attorney, Ron Little, for a hearing for a final award. The employer was represented at the hearing by its attorney, Bob Evans. The Second Injury Fund was represented by attorney, Frank Rodman. 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. Covered Employer: Employer was operating under and subject to the provisions of the Missouri Workers Compensation Act, and liability was fully insured by Great American Insurance Company.
2. Covered Employee: On or about April 10, 2004, William Maxwell was an employee of Donna Brooks d/b/a Three Rivers Travel and was working under the Workers' Compensation Act.
3. Accident: On or about April 10, 2004, the employee sustained an accident out of and in the course of his employment.
4. Notice: Employer had notice of employee's accident.
5. Statute of Limitations: Employee's claim was filed within the time allowed by law.
6. Average Weekly Wage and Rate: Employee's average weekly wage calculated from the average of his actual earning in the 13 weeks immediately preceding the April 10, 2004 injury was \$148.56 resulting in a weekly compensation rate for TTD of \$99.04. Employee's average weekly wage, calculated under the applicable 30-hour rule is \$240.00 resulting in a weekly compensation rate for PTD and PPD of \$160.00.
7. Medical Aid furnished by Employer/Insurer: Amount paid: \$21,984.25
8. Temporary Disability paid by Employer/Insurer: Employer/Insurer paid approximately 7.83 weeks or \$775.86.
9. Employer/Insurer owes Employee the amount of \$2,126.38 for additional temporary total disability for the period 9/20/2005 to 2/17/2006 (approximately 21-4/7 weeks).
10. Employer/Insurer owes Employee the amount of \$264.19 for previously incurred medical aid.
11. Employer/Insurer owes Employee the amount of \$600.00 for mileage reimbursement under Section 287.140 RSMo.

ISSUES

1. Medical Causation
2. Additional Future Medical Aid
3. Permanent Total Disability
4. Permanent Partial Disability
5. Second Injury Fund Liability

EXHIBITS

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- Exhibit A Records - Ricky Lents, M.D. (2/16/98 to 8/3/98)
- Exhibit B Records - Physicians Alliance Surgery Center (10/11/00)
- Exhibit C Records - James Wilkerson, M.D. (7/12/02 to 2/21/07)
- Exhibit D Records - Edward Bender, M.D. (7/16/02 to 8/6/02)
- Exhibit E Records - St. Francis Medical Center (7/16/02 to 8/6/02)
- Exhibit F Records - Carl Bosley, M.D. (10/7/02 to 8/9/07 & 12/23/02 to 5/5/03)
- Exhibit G Records - Kneibert Clinic (8/19/03 to 10/11/06; 11/29/06 to 7/19/07 & 7/19/07 to 9/25/09)
- Exhibit H Withdrawn
- Exhibit I Records - Poplar Bluff Regional Medical Center (5/6/04 to 5/11/04)
- Exhibit J Withdrawn
- Exhibit K Records - Missouri Delta Medical Center (8/2/05 to 9/20/05)
- Exhibit L Records - Missouri Delta Physicians (6/20/05 to 2/17/06)
- Exhibit M Records- The Surgery Center of Poplar Bluff (3/24/06 to 7/10/07)(bills withdrawn)
- Exhibit N Records - Cape Urology Associates (2/13/07)
- Exhibit O Withdrawn
- Exhibit P Withdrawn
- Exhibit Q Dr. Raymond Cohen Deposition & Exhibits
- Exhibit R Mr. Jim England Deposition & Exhibits
- Exhibit S Dr. John McKinney Deposition & Exhibits
- Exhibit T Report of Injury (Claim No.:04-078049)
- Exhibit U Withdrawn
- Exhibit V Attorney Contract
- Exhibit W Stipulation for Compromise Settlement (Claim No: 03-147913)

Exhibits Q and R were objected to at the hearing and taken under advisement. After considering the objections, these exhibits were admitted into evidence after the hearing.

Employer-Insurer's Exhibits

- Exhibit 1 Deposition of Dr. Cantrell with attached Exhibits.
- Exhibit 2 Not admitted after SIF objections.
- Exhibit 3 Deposition of Employee dated 3/27/09
- Exhibit 4 Not admitted after SIF objections.
- Exhibit 5 Time records
- Exhibit 6 Time records (payroll summary)
- Exhibit 7 Time card of Employee for 6/23/05
- Exhibit 8 Nordyne employment records

Employer-insurer's Exhibit 2 was not admitted into evidence. However, the employer/insurer made an offer of proof and requested that the exhibit be retained with the file for appellate purposes. Therefore, the exhibit has been retained with the file.

The Second Injury Fund did not offer any exhibits.

FINDINGS OF FACT

Employee's background

- At the time of trial, the employee, William Maxwell was 68 years old and had been married for more than 30 years. He and his wife had seven children, four of which were under the age of 21 and living at home: Sara, age 20; Matthew, age 19; Aaron, age 16 and Rachel, age 14.
- The employee testified that during the 1940's and 1950's when he was growing up, he lived in what he described as "labor camps" where the group harvested fruit/vegetables and picked cotton on farms in southern California. He attended 8th grade and started the 9th but didn't really go to school that much, did not make passing grades, and did not learn to read as a result of his schooling. His was taught to read by his wife when he was an adult. He stated that he does not read "real good." He estimated his math skills to be at the 4th or 5th grade level.
- He served in the military, completed welding school and also had some training on diesel engines.

Employee's work history

- Farming Operations: As a youth and into early adulthood, the employee worked as a farm hand harvesting produce for a number of years.
- BF Chemical: The employee worked for some period for this fertilizer company. This job required that he secure a commercial driver's license. As a part of his job, he drove a tanker truck and fertilizer spreader rig.
- Flying M. Cattle Ranch: The employee testified that his work on this ranch involved raising alfalfa. He operated a tractor some, dug ditches and directed Mexican farm laborers on what to do in the alfalfa fields. During this employment he fell off a ladder and hurt his tailbone. He sought medical treatment and his tailbone pain cleared up after a few months. He was not having tailbone pain in April 2004. He also sustained an injury to his ribs when he fell and struck his ribs on a tractor. He saw a doctor and was given one prescription of pain pills. He had no other treatment for his rib contusion. He had no knowledge of any work restrictions imposed due to the tailbone injury or rib injury.
- Crystal Ice: During the late 1970's, the employee worked in this cooling plant as a setup and line worker. In 1979, while loading lettuce for Crystal Ice, the employee sustained an injury which resulted in neck surgery by Dr. Joseph Miller in Memphis, Tennessee. He has no memory of permanent work restrictions from Dr. Miller after the neck surgery although he continued to have neck pain and problems especially when looking up and

when moving his head from side to side. In the many years since this neck injury, the employee has worked through his neck problems and pain.

- Madera Disposal: At this landfill, the employee operated a scraper used to move dirt and directed trash dumping traffic at the landfill.
- Royal Oaks: For seven or eight years, the employee worked for this Elsinore, Missouri charcoal factory in the maintenance department and as a supervisor in the packing department. The employee's work at the factory was physically demanding and required repetitive heavy lifting using huge chains and guards. A small part of his job required that he complete certain forms with a pencil by filling in tonnage amounts. During the employee's first five years at Royal Oaks, no hearing protection devices were recommended for or provided to factory employees. The employee's hearing was permanently and severely damaged as a result of this occupational noise exposure. The employee also sustained a right thumb/hand crush injury in 1996 while working at Royal Oaks. He missed little or no work due to this crush injury but required two surgeries.
- In 2002, the employee missed a few months from his work at Royal Oaks while recovering from heart surgery. Following his recovery from the quadruple by-pass, the employee was health conscious to the point of regular vigorous exercise including jogging, cycling, push-ups and weight training. The employee's cardiologist did caution that he should limit his heavy lifting. Upon release to return to work, the employee resumed his same full-time job and duties at the charcoal plant. Mr. Maxwell continued to work for Royal Oaks for nine months after his return to work.
- In May of 2003, the employee turned age 62 and became eligible for early retirement benefits from Social Security. With a large family and dependent children, he determined his Social Security early retirement income would amount to nearly what he was making while working full time at the factory. When he learned he would also be permitted to supplement his early retirement benefits with some limited earnings for part-time work, he quit his job at Royal Oaks in June/July of 2003 and notified Social Security of his election to retire "early." Had his Social Security early retirement options not been what they were, he would not have retired but would have continued his full time work at Royal Oaks.
- During his last several years at Royal Oaks, the employee experienced pain and continuing problems with his neck, right hand, heart disease and hearing loss. He was able to fulfill the duties and obligations of his Royal Oaks' job however he had difficulty fulfilling his duties. At the time he retired, the pain and problems he was having from his neck, right hand, heart disease and hearing loss had been ongoing for quite some time.
- Donna Brooks d/b/a Three Rivers Travel: After retirement, the employee remained able to work and looked for available part-time employment to supplement his early retirement income from Social Security. With the assistance of the US Forestry service, he located a part-time job cleaning tour buses, inside and out, and doing some minor repair work for Three Rivers Travel.
- The employee's work at Three Rivers Travel depended on when the company tour buses arrived and were available for cleaning. If there were no buses to clean or repair, there was no work. A review of the time cards admitted into evidence at trial by Employer/Insurer, reveal that Mr. Maxwell worked any day of the week or weekend at whatever time of day or night a tour bus presented for cleaning.

- After the April 2004 accident and first surgery for inguinal hernia repair by Dr. Griffith, the employee returned to work for Three Rivers Travel until sometime in June/July 2005. He worked every day he was called in and continued that work for about another year until the pain in his groin was just too much and he could not continue. In June/July 2005 he quit Three Rivers Travel due to the chronic pain in his groin.
- Nordyne: In January of 2008 the employee applied for a job with Nordyne where his son was working and was finally hired as a forklift operator in April of that year. After only a few days of work, he was operating the forklift and had that sudden "kick" pain hit. Because of the pain he was not able to stop the forklift and it ran into a truck and tore it up. He was moved from the forklift to another job and then another but he was having so much groin pain he had to quit. He has not looked for work since his attempt at Nordyne. He testified that during his short time at Nordyne, he did experience trouble communicating with his supervisor because of his hearing loss.
- The records from Nordyne indicate that the employee returned to work without restriction. They also indicate that the employee was terminated for failing to show up to work. The records from Nordyne do not mention the accident that the employee had. The records indicate that the employee was transferred to a different position because of seasonal needs.

Work Accident (April 10, 2004)

- The employee was washing a bus and moving a bucket when he slipped on a wet, soapy floor and felt a sudden onset of right groin pain and presentation of obvious bulge. He wrapped his lower abdomen with an ACE bandage and finished the bus he was working on. He then contacted Jeff Brooks and reported his accident and injury. He was instructed to go ahead and see his doctor.

Authorized Treatment for 2004 Work Accident

- The accident happened on the Saturday of Easter weekend in April of 2004. The employee waited until Monday and then saw his primary care physician, Dr. Kirby Turner at Kneibert Clinic in Poplar Bluff. Dr. Turner diagnosed the inguinal hernia and referred the employee to Dr. Keane Griffith, a surgeon. He saw Dr. Griffith four days later and surgery was scheduled for May 11, 2004. A laparoscopic right inguinal hernia repair was performed at Poplar Bluff Regional Medical Center. The employee followed up with Dr. Griffith for staple removal on the 19th of May and was released at MMI on June 11, 2004.
- The employee testified that his groin pain worsened after the hernia surgery.
- In June/July 2005 when the groin pain progressed to the point he could not continue his work at Three Rivers Travel, he was referred to Dr. Helfrich in Sikeston. Dr. Helfrich examined the employee and thought his symptoms were consistent with nerve entrapment resulting from the hernia repair/mesh placement. A second surgery was offered to relieve the nerves. Surgery was performed on September 20, 2005 at the Missouri Delta Medical Center. Dr. Helfrich's Report of Operation stated that the "Indication" was that "The patient had a laparoscopic repair done elsewhere a year and a half ago. He has a

crippling inguinodynia since that time with extreme sensitivity of the groin and extreme motion pain in the right groin.” The “procedure” stated “Three relatively prominent nerve bundles in the region of the iliohypogastric, genitofemoral, and ilioinguinal nerves were identified. These were isolated with vascular tapes and dissected as far proximal as possible. Amputations were then completed within the muscle bundle at this level. Frozen section diagnosis confirmed nerve tissue in all three specimens. The patient tolerated the procedure well. Wound closure was completed with 3-0 Polysorb on the external oblique. The subcuticular 4-0 Polysorb and Steri-strips. The patient tolerated the procedure well. He was transported to the recovery room in stable condition.” The employee followed up with Dr. Helfrich six days later and was released at MMI on November 11, 2005.

- The employee consulted with Dr. Wilkerson and a urologist in Cape Girardeau about the orchiectomy. He was discouraged from entertaining that procedure as a surgical option and told that it was unlikely to relieve any of his continuing pain symptoms.

Current Complaints due to 2004 Work Accident

- The employee stated that he is in pain all the time. He stated that the pain is constant however, the pain is sometimes worse than others. He estimated that probably 10-12 times each week the groin pain feels like he is being kicked full force in the testicles. This "kick" pain is overwhelming and leaves him feeling sick and weak. When that happens he has to lie down and try to relax. He will take a pain pill but it takes so long for them to have any effect that lying down and relaxing is usually about as effective in reducing his pain.
- The employee stated that he never goes a week without experiencing the "kick" pain. There are some days when the "kick" pain does not happen but then other days it will happen several times. He also said the "kick" pain occurs without warning and will happen during the day or during the night when he is sleeping. There are times he will get the "kick" pain and it will let up relatively soon. There are other times when it hits and then hits again. The double "kick" is the pain that really puts him down.
- The employee currently takes ibuprofen and Tylenol frequently. The employee stated that he takes at least 5 or 6 prescription pain pills each week. He currently has a prescription for Hydrocodone through his primary care physician. He testified that he doesn't take the pain pills as often as the prescription allows because they take so long to take effect.

Pre-existing Disabilities

- The employee had physical disabilities, including pain, which pre-existed the work accident/injury of April 10, 2004. The employee's pre-existing physical problems were in his neck, heart, right hand, and ears/hearing.
- Neck: In 1979 the employee suffered a work injury to his neck loading lettuce while working in California for Crystal Ice. At first he thought he had strained his arms because his initial symptoms were numbness and shooting pain into both arms. Later he was diagnosed with a neck injury which resulted in surgery by Dr. Joseph Miller, a neurosurgeon in Memphis, Tennessee. He described the surgery as "not a fusion" but

where the C6 disc was removed. He estimated being out of work for more than a year after the neck injury. After surgery and a period of recovery, he was able to return to the workforce. The arm symptoms, numbness and shooting pains, were relieved by the surgery. The employee stated that his neck gave him problems even after the surgery. He stated that his neck would be painful with "cricks", would hurt, get tired and that looking up and around would bother him, everyday and some days all day long. These neck problems with pain have continued, unabated, since 1979.

- Right hand: The employee sustained a right thumb/hand crush injury in 1996 while working at Royal Oaks. Dr. Hansbrough performed exploratory surgery in 1996 and in 1998 Dr. Lents reconstructed the ulnar collateral ligament at the MP joint of his right thumb.
- Following the reconstruction surgery, the employee had some improvement in his right thumb symptoms but developed numbness in his fingers with pain in his wrist at the site of the ligament harvest for the reconstruction surgery. Dr. Lents diagnosed the employee with post-operative carpal tunnel syndrome and treated his carpal tunnel symptoms conservatively with an injection and splinting. Dr. Lents later provided a disability rating for the employee's injury of "10% disability of the right upper extremity."
- Since the injury and surgeries, his right hand "hurts a lot," his right thumb remains numb and this makes it difficult for him to pick up small items like nuts. He said the grip in his right hand was generally weaker than the grip in his left hand. He acknowledged limitations with his right hand and as a result has learned to do more things with his left hand since the right hand crush injury. The employee was not aware of any permanent work restrictions imposed by the doctors after the injury and subsequent treatment. He did not recall missing time from work due to this hand injury.
- Heart: In July 2002, the employee had heart surgery (quadruple bypass) and missed a few months from his work at the charcoal factory as a result. After heart surgery and a recovery period, he returned to his same job in maintenance and as supervisor over the packing department at Royal Oaks. He continued working full-time at Royal Oaks for another nine months or so until he reached age 62 and took "early retirement." During his return to work at Royal Oaks after the heart surgery, he continued to have some problems but could still do his job. After returning to work, he did not miss work because of his heart and did not miss any assignments as a result. Following the heart surgery, the employee was cautioned by his doctors to limit heavy lifting.
- Ears/Hearing: The employee acknowledged having hearing problems for many years. The employee's hearing was permanently and severely damaged as a result of his occupational noise exposure at Royal Oaks. He really started noticing his hearing difficulties in late 1990's. He thought his hearing seemed to "really get bad in early 2000."
- In 2002, Dr. Bosley diagnosed the employee with hearing loss from industrial noise exposure. He initially placed tubes in the employee's ears, but later removed them when the employee had no improvement in his hearing. The employee's hearing loss was the subject of Claim #03-147913 filed against Royal Oak Enterprises. The employee settled that claim for 16.4% permanent partial disability of the ears for binaural hearing loss.
- The employee was evaluated by Dr. John McKinney on May 14, 2007 regarding his occupational hearing loss. According to Dr. McKinney, by the time the employee retired from Royal Oaks in 2003, he had suffered right ear occupational hearing loss of 32.2%

and left ear occupational hearing loss of 12.1% with a resulting occupational binaural hearing loss of 15.4%.

Dr. Cohen

- Dr. Cohen's diagnosis regarding the April 10, 2004 work accident was:
 1. Surgery for right indirect inguinal hernia repair;
 2. Second surgery for resection of iliohypogastric, genitofemoral, and ilioinguinal nerves;
 3. Severe neuropathic pain due to the involvement of the above three nerves.
- In a deposition, Dr. Cohen was asked "If he had numbness at the incision site, he could not also have sensitivity there because it would be numb; is that essentially correct, or not?" Dr. Cohen stated that logically that might sound how the nervous system works, but in reality, that is not how the nervous system works. He stated that in the ordinary way a sensory nerve would work is that if it were cut, that one would have decreased feeling or perception around the distribution of that nerve. However, in the situation of the employee "a patient that has neuropathic pain may have a loss of feeling of where the nerve would normally transmit sensation, but actually have pain or some different perception due to damage of the nerve or this abnormal process called neuropathic pain, in which they have this process in which the nerve has an exaggerated response, a hyperactive response, or an increased response, in which this normal or numbness-like perception is greatly perceived in the pain-in the brain as severe pain."
- Dr. Cohen opined that "due to the injury at work on or about April 10, 2004 for Donna May Brooks, d/b/a Three Rivers Travel, he has a 30% whole person disability at the level of the right groin/lower right abdomen level and that the injury at work on or about that date is a substantial factor in his disability."
- Dr. Cohen also stated that the employee has a 30% whole person disability due to the coronary artery disease, a 35% whole person disability at the cervical spine, and a 40% permanent partial disability at the right hand and that his pre-existing conditions or disabilities combine with the primary work-related injury up through June 16, 2003 to create a greater overall disability than their simple sum and that his pre-existing conditions or disabilities were a hindrance or obstacle to his employment or re-employment. He also stated that it is reasonably probable that he does need the hearing amplification (hearing aids) for his severe hearing loss. He stated that the level of disability at each of his ears would be the amount of hearing loss per the State Statute for Hearing Loss from Industrial Noise Exposure. He stated that the employee does have a minimal amount of hearing left and that he does need to avoid any type of loud noises or vibration. He also stated that the employee's noise exposure did become disabling before his work injury on or about April 10, 2004.
- Dr. Cohen stated that the employee was temporarily and totally disabled from the post-operative period after both of the surgeries that he had-the post-operative period after the May 11, 2004 and the post-operative period after the September 20, 2005 surgeries. The temporary total disability time would end after each of those surgeries at the point that the operating surgeon released the employee from their post-operative care.

- Dr. Cohen stated that the employee's pre-existing disabilities combined with the work-related injury of April 10, 2004 to create a greater overall disability than their simple sum and that due to this combination of disabilities, the employee is permanently and totally disabled and not capable of gainful employment and that his pre-existing conditions or disabilities before April 10, 2004 were a hindrance or obstacle to his employment or re-employment and this includes noise exposure.
- Dr. Cohen stated that although the employee is at maximum medical improvement regarding the April 10, 2004 work-related injury to the right groin, he is in severe pain and it is medically reasonable that he needs to be on appropriate medications for his pain. He stated that treating his pain and attempting to offer some relief of the severity of this neuropathic pain would be for symptomatic relief but would not affect the employee's maximum medical improvement. Dr. Cohen stated that it is reasonably probable that the employee needs ongoing appropriate pain medications. Dr. Cohen stated that the employee will need to be followed by a physician to prescribe these medications.
- Dr. Cohen stated that the employee needs to be restricted from any type of prolonged sitting, bending, twisting at the waist, lifting greater than 10 pounds or any type of repetitive use with the right lower extremity.
- Dr. Cohen stated that in regard to the employee's pre-existing conditions or disabilities, he needs to avoid any type of increased pressure or any type of direct blows or trauma to the chest, any awkward or sustained positions of the neck, and limited repetitive and forceful work with the right hand. Dr. Cohen stated that he needs to avoid any type of work in which the right thumb would be exposed to extremes in temperature as he has a loss of feeling in the right thumb.

Dr. Cantrell

- The employee's complaints to Dr. Cantrell on his first examination of September 8, 2008 were that he did not have any tenderness in the right inguinal (groin) area, but did have localized numbness along the surgical incision site.
- Dr. Cantrell did not agree with Dr. Cohen's finding of "slight" tenderness of the right testicle, specific tests showing no increase in the abdominal pressure, no tenderness in the right inguinal area or the right groin, localized numbness at the incision site, normal sensation along the penile shaft, bilaterally descended testicles with no evidence of swelling or enlargement, inconsistent complaints of tenderness varying from time to time during the exam.
- He did not find any tenderness in the right inguinal area or the right groin, but only at a localized area at the surgical incision site with inconsistent responses to tenderness in the testicles, no palpable masses. His tests were normal, including a negative Valsalva maneuver, a test to increase abdominal pressure.
- The employee provided inconsistent responses to the presence of tenderness in right greater than the left testicle, no palpable masses, no recurrent hernia, Patrick's testing of both hips actively and passively not producing any pain complaints.
- On the second examination by Dr. Cantrell on April 28, 2009, the employee had not tried the suggested medication of Lyrica. Upon deep palpation the employee described tenderness at the base of the testicle, but there were no localized scrotal masses present.

Again, on a pressure test, the Valsalva maneuver, he had no evidence to suggest recurrent inguinal hernia. Rotation of the hips produced no pain complaints.

- Dr. Cantrell stated that the employee's complaint was in the scrotal area, the very lower abdomen where it joins with the hip. He concluded that the case should be rated at the level of the hip, not on the body as a whole for this reason.
- Dr. Cantrell found that the surgical incisions cut the tiny nerve endings, causing a loss of sensation localized to the distribution of the ilioinguinal and iliohypogastric nerve endings, little tiny nerve fibers. He disagreed with Dr. Cohen that there could be both numbness in the area (loss of sensation) and also sensitivity.
- Dr. Cantrell stated that swelling of the testicle could not be quantified without an ultrasound. For all men the testicular size is not exactly the same right to left, there being a baseline natural size difference between them. The employee told Dr. Cantrell that on self-examination visually and manually he could not tell if there was any swelling of the testicle.
- Dr. Cantrell stated that any rating of permanent partial disability should be at the level of the hip because the residual symptoms are localized to the hip area in anatomical terms. He rated the permanent partial disability at 7% of the right leg at the hip. The injury had nothing to do with the lumbar or thoracic spine.
- Dr. Cantrell stated that operating a five-horsepower rototiller, a power washer and a chain saw would be inconsistent with complaints of severe tenderness and pain. If he were able to do these activities this would be a level of activity inconsistent with consistent hypersensitivity of the scrotal area.
- Dr. Cantrell found that the injury of April 10, 2004 was not in and of itself the competent medical producing cause of any permanent total disability. He concluded that the employee had a successful surgical result for the repair of the hernia but was complicated by residual neuropathic pain.
- Dr. Cantrell stated that the employee may have improvement in his subjective complaints with a trial of an anti-epileptic medication for residual neuropathic pain complaints in his right groin and testicular area, which had not yet been tried (as of 4-28-2009). Dr. Cantrell also stated that the employee could be reasonably considered at maximum medical improvement, as was suggested by Dr. Cohen.
- Dr. Cantrell stated that if the employee was permanently totally disabled it would be due to a combination of his pre-existing medical conditions combined with the groin injury. The pre-existing injuries include: hearing loss, persistent neck pain complaints status post cervical spine surgery, and residual complaints in reference to his right hand.

Mr. Jim England

- Mr. England testified that "pain in and of itself can limit a person's ability to function and function consistently in a work setting." He also stated that:

Mr. Maxwell is a 67-year-old man who looked even older than his actual age. He is extremely hard of hearing and has tremendous difficulty communicating as a result. He had a well-established work history but has always been involved in at least light to medium work activity that involved being on his feet with a lot of bending, twisting, etc. Obviously

if one assumes just Dr. Cantrell's findings, there would be no contraindication to the man returning to work. Considering, however, Dr. Cohen's restrictions, he would not be able to go back to doing any of his past work. Combining his physical restrictions from Dr. Cohen with his limited education and his age and appearance, I do not believe that he is likely to be able to compete successfully for alternative employment or to sustain it in the long run. Just his communication problems would make an interview very difficult. Considering him as a whole, I simply do not believe that he is competitively employable or capable of sustaining work activity in the long run. I believe that he is likely to remain totally disabled from a vocational standpoint.

- Mr. England also testified that the employee's hearing loss "affects his ability to handle any kind of employment where communication - where hearing, you know, just clear hearing and the ability to communicate are required as part of the job . . . I think it certainly would limit his options and has for a long time."

APPLICABLE LAW:

- Under the version of Section 287.020.2 RSMo., that was in effect at the time of the injury, an injury is "clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor".
- The burden is on the employee to prove all material elements of his claim. *Melvies v Morris*, 422 S.W.2d, 335(Mo.App.1968).
- 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).

- 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 employer waives the right to select the treating physician by failing or neglecting to provide necessary medical aid. See *Herring v. Yellow Freight System*, 914 S.W.2d 816 (Mo. App. 1995) and *Banks v. Springfield Park Care Center*, 981 S.W.2d 161 (Mo. App. 1998).

RULINGS OF LAW:

Issue 1. Medical Causation

Employee has alleged injury to his abdomen and groin (body as a whole) from the April 10, 2004 work accident. At trial, employer-insurer denied that employee's injury was medically causally related to the April 10, 2004 accident.

Although medical causation was identified as a disputed trial issue, the evidence presented wholly supports a finding that employee's injury to his abdomen and groin (body as a whole) was a direct result of the April 10, 2004 work accident. There is no evidence to the contrary in the record and therefore no evidence to support a finding of some alternative cause.

The facts in this case clearly trace employee's injury to the work accident of April 10, 2004. The employee’s authorized medical treatment was provided by Dr. Kirby Turner, Dr. Keane Griffith at Poplar Bluff Regional Medical Center and by Dr. Loring Helfrich at Missouri Delta Medical Center in Sikeston. The diagnosis of "right inguinal hernia" as well as Mr. Maxwell's continuing complaints of residual pain in the "right groin" are consistent throughout the medical evidence.

Dr. Cohen's diagnosis regarding the April 10, 2004 work accident was:

1. Surgery for right indirect inguinal hernia repair;
2. Second surgery for resection of iliohypogastric, genitofemoral, and ilioinguinal nerves;
3. Severe neuropathic pain due to the involvement of the above three nerves.

Dr. Cohen also stated his medical opinion within a reasonable degree of medical certainty that "due to the injury at work on or about 4-10-04 for Donna May Brooks, d/b/a Three Rivers Travel, he has a 30% whole person disability at the level of the right groin/lower right abdomen level and that the injury at work on or about that date is a substantial factor in his disability."

Even Dr. Cantrell, on behalf of employer-insurer, attributes the employee's right inguinal hernia and residual neuropathic pain complaints to the work accident of April 10, 2004 and assigns a rating for the work injury and resulting disability.

The evidence is consistent and supports a finding of medical causation in that the work accident of April 10, 2004 was a substantial factor in causing Mr. Maxwell's injuries to his abdomen, groin and right testicle. I find that the employee's work accident on April 10, 2004 was a substantial factor in causing his abdomen, groin and right testicle injury. Furthermore, I find that the employee's injury was medically causally related to the April 10, 2004 work accident.

Issue 2. Additional Future Medical Aid

The employee is seeking an award ordering that employer-insurer provide him with future medical aid to cure and relieve the effects of his work injuries resulting from the accident of April 10, 2004. The employee is asking for an award of future medical treatment to include, but not be limited to, the treatment recommendations of Dr. Cohen.

The employee testified that his groin pain has not improved but progressively worsened since the April 10, 2004 accident. He described his current groin pain as constant but sometimes worse than others. He described a frequently occurring and overwhelming "kick" pain that leaves him feeling sick and weak and requires that he lie down and try to relax. The employee currently takes a lot of ibuprofen and Tylenol and will take at least 5 or 6 prescription pain pills each week. He currently has a prescription for Hydrocodone through his primary care physician.

Dr. Cohen stated in his report of August 7, 2008 that the employee "needs to be on appropriate medications for his pain" and that "he will need to be followed by a physician to prescribe those medications." Dr. Cohen relates the need for this medication to Mr. Maxwell's "severe pain" resulting from "the April 10, 2004 work-related injury to the right groin."

In 2008, even Dr. Cantrell, on behalf of employer-insurer, recommended medication to treat the employee's continuing neuropathic pain complaints although the employer-insurer failed to authorize the recommended medications for Mr. Maxwell.

The treatment records and testimony of Mr. Maxwell support Dr. Cohen's opinion with respect to employee's need for future medical aid as a result of the injury of April 10, 2004.

I find that the employee has met his burden of proof and has offered the credible testimony and medical opinion of Dr. Cohen that supports his claim for future medical care for the injury he sustained to his abdomen and groin (body as a whole) on April 10, 2004. I find that the treatment Dr. Cohen has recommended for employee's chronic pain is reasonable. I further find that the employee's work accident of April 10, 2004 was a substantial factor in causing his abdominal and groin injury, resulting pain, medical condition, disability and need for future medical aid.

I further find that the medical treatment (antiepileptic medication, to treat neuropathic pain) recommended by Dr. Cantrell was intended to treat the employee's chronic pain resulting from the work accident but such treatment was never authorized by employer-insurer. The antiepileptic medical treatment was necessary, reasonable and medically causally related to treat the effects of the April 10, 2004 work accident. I further find that employer-insurer's failure to provide necessary, reasonable and medically causally related treatment has resulted in the employer having either lost or waived their right to control future medical treatment.

Based on these findings, employer-insurer is directed to provide all medical treatment that is necessary to cure and relieve the employee from the effects of his work injury for the remainder of his life. Furthermore, such care shall include appropriate medications for the employee's chronic groin pain which will require that he be followed by a physician to prescribe these medications and such other care as may be reasonably necessary to either cure or relieve the employee from the effects of his work-related injury to his abdomen and groin (body as a whole).

Issue 4. Permanent Partial Disability

I find that the employee suffered an accident on April 10, 2004 which resulted in the employee injuring his abdomen and groin (body as a whole). This injury produced a disability of 12 1/2% of the body as a whole. The 12 1/2% disability of the body as a whole equals 50 weeks. Accordingly, the employer and the insurer are directed to pay the employee the sum of \$160.00 per week for 50 weeks for a total of \$8,000.

Issue 3. Permanent Total Disability, and Issue 5. Second Injury Fund Liability

The first question that must be addressed is whether the employee is permanently and totally disabled. If the employee is permanently and totally disabled, then it must next be determined whether the accident of April 10, 2004 alone, caused his permanent total disability. If so, the employer-Insurer is liable to the employee for his permanent total disability benefits and the Second Injury Fund has no liability to the employee. If not, the Second Injury Fund is only liable for permanent total disability benefits if the employee's permanent total disability was caused by a combination of his preexisting injuries and conditions and the employee's injury of April 10, 2004. Under Section 287.220.1, the preexisting injuries must also have constituted a hindrance or obstacle to the employee's employment or reemployment.

Is the employee permanently and totally disabled?

The employee stated that his persistent groin pain is constant and has not improved but progressively worsened since the April 10, 2004 accident and that his pain is sometimes worse than at other times. He also described a frequently occurring and overwhelming "kick" pain that "puts him down" and leaves him feeling sick and weak.

The employee's complaints of pain are credible and are supported by the medical records of his treatment since the work accident. His complaints of excruciating levels of right testicular pain are validated by the treatment records. The employee was even considering the voluntary, surgical amputation of his right testicle. This is compelling evidence of the employee's described excruciating level of pain.

The employee offered detailed testimony concerning the impact his injuries have had on his daily ability to function. Based on all of the evidence presented, I find that the employee was a credible witness. Furthermore, the employee's testimony supports a conclusion that the employee will not be able to compete in the open labor market. With his physical limitations and level of pain, it is unlikely any employer would reasonably be expected to hire the employee in his present physical condition.

Dr. Cohen's opined that the employee's "pre-existing conditions or disabilities, . . . coronary artery disease . . . cervical spine . . . right hand . . . bilateral industrially disabling hearing loss . . . combine with the primary work-related injury of 4-10-04 to create a greater overall disability than their simple sum and that due to this combination of disabilities, Mr. Maxwell is permanently and totally disabled and not capable of gainful employment and that his pre-existing conditions or disabilities before 4-10-04 were a hindrance or obstacle to his employment or re-employment and this does include the noise exposure disability which was prior to 4-10-04."

Dr. Cohen stated that the employee should be "restricted from any type of prolonged sitting, bending, twisting at the waist, lifting greater than 10 pounds or any type of repetitive use with the right lower extremity. In regard to his pre-existing conditions and disabilities, he needs to avoid any type of increased pressure or any type of direct blows, or trauma to the chest, any awkward or sustained positions of the neck, and limited repetitive and forceful work with the right hand, and needs to avoid any type of work in which the right thumb would be exposed to extremes in temperature as he has lost feeling in the right thumb." He also "needs to avoid any type of loud noises or vibration."

Mr. England stated that:

Mr. Maxwell is a 67-year-old man who looked even older than his actual age. He is extremely hard of hearing and has tremendous difficulty communicating as a result. He had a well-established work history but has always been involved in at least light to medium work activity that involved being on his feet with a lot of bending, twisting, etc. Obviously if one assumes just Dr. Cantrell's findings, there would be no contraindication to the man returning to work. Considering, however, Dr. Cohen's restrictions, he would not be able to go back to doing any of his past work. Combining his physical restrictions from Dr. Cohen with his limited education and his age and appearance, I do not believe that he is likely to

be able to compete successfully for alternative employment or to sustain it in the long run. Just his communication problems would make an interview very difficult. Considering him as a whole, I simply do not believe that he is competitively employable or capable of sustaining work activity in the long run. I believe that he is likely to remain totally disabled from a vocational standpoint.

Mr. England also testified that the employee's hearing loss "affects his ability to handle any kind of employment where communication - where hearing, you know, just clear hearing and the ability to communicate are required as part of the job."

Dr. Cantrell agreed that if Mr. Maxwell was permanently totally disabled it would be due to a combination of his pre-existing medical conditions combined with the groin injury.

After the first surgery for inguinal hernia repair by Dr. Griffith, the employee returned to work for Three Rivers Travel until June/July 2005. He worked every day he was called in and continued that work for about another year until the pain in his groin was just too much and he could not continue. In June/July 2005 he quit Three Rivers Travel due to the chronic pain in his groin. In September 2005, he had his second surgery by Dr. Helfrich.

The second surgery did not relieve his groin pain, the employee still wanted to try and return to the workforce. In January of 2008 he applied for a job with Nordyne where his son was working and was finally hired as a forklift operator in April of that year. After only a few days of work, he was operating the forklift and had that sudden "kick" pain hit. Because of the pain he was not able to stop the forklift and it ran into a truck and tore it up. He was moved from the forklift to another job and then another but he was having so much groin pain he had to quit. He has not looked for work since his attempt at Nordyne. Nordyne did not have documentation regarding the forklift accident, however I find that the employee is a credible witness and therefore, the employee's testimony regarding this accident is credible.

Based on a review of all the evidence, I find that the opinions of Dr. Cohen and Mr. England are credible regarding whether the employee is permanently and totally disabled.

Based on the credible testimony of the employee and the supporting medical and vocational expert evidence, I find that no employer in the usual course of business would reasonably be expected to employ the employee in his present condition and reasonably expect the employee to perform the work for which he is hired. I find that the employee is unable to compete in the open labor market and is therefore permanently and totally disabled.

Next, I must determine whether the April 10, 2004 work injury alone is enough to make him permanently and totally disabled.

The opinions of Dr. Cohen, Dr. Cantrell and Mr. England all attributed the employee's permanent and total disability to the combined effect of the April 10, 2004 injury and his pre-existing conditions. While these medical and vocational experts addressed the concept of permanent and total disability from the standpoint of cumulative injuries and disabilities, including disabilities pre-existing the accident of April 10, 2004, only Dr. Cantrell specifically

addressed whether the impact of the April 10, 2004 injury alone caused Mr. Maxwell to be permanently and totally disabled. Dr. Cantrell did not believe the last accident alone, the injury to the groin occurring April 10, 2004, was in and of itself the competent medical producing cause of any total disability.

Based upon the evidence I find that as a direct result of the last injury the employee sustained a permanent partial disability of 12 1/2% of the body as a whole. I find that the last injury alone did not cause the employee to be permanently and totally disabled.

Based on a review of the evidence, I find that the employee's pre-existing disability and conditions regarding his neck, heart, right hand, and ears/hearing constituted a hindrance or obstacle to his employment or to obtaining re-employment.

I find that the prior injuries to the employee's neck, heart, right hand, and ears/hearing combined synergistically with the primary injury to the body as a whole (abdomen and groin,) to cause the employee's overall condition and symptoms. Based on the supporting medical evidence and the employee's testimony, I find that the employee is permanently and totally disabled as a result of the combination of his pre-existing injuries and condition and the April 4, 2004 injury and condition.

Based on the evidence presented, I find that the employee reached maximum medical improvement on February 17, 2006. The employer-insurer's permanent partial disability payments would therefore have commenced on February 18, 2006 and would have continued for 50 weeks through February 3, 2007.

The permanent partial disability rate and the permanent total disability rate are both \$160.00 therefore, the Second Injury Fund is not liable for this specific time period.

The Second Injury Fund is liable for the full amount of the permanent total disability benefits commencing on February 4, 2007. The Second Injury Fund is therefore directed to pay the employee the sum of \$160.00 per week commencing on February 4, 2007 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 282.200.2

ATTORNEY'S FEE

Ron Little, 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.

Date: _____

Made by:

Maureen Tilley
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Person
Division of Workers' Compensation