Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 04-141584

Employee: Andrew Meyers

Employer: Wildcat Materials, Inc.

Insurer: Zurich American Insurance Co.

Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund

Date of Accident: On or about January 2, 2004

Place and County of Accident: Greene 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. We have reviewed the evidence, read the briefs of the parties, heard oral argument and considered the entire record. Pursuant to section 286.090 RSMo, the Commission modifies the award and decision of the administrative law judge dated March 19, 2007.

The Commission affirms all findings and conclusions of law made by the administrative law judge, but for the determination concerning the issue of future medical care and treatment. The administrative law judge concluded that the employee failed to meet his burden of proof with regard to the need for future medical treatment. The administrative law judge found that the employee was not entitled to future medical treatment because the evidence was too speculative to justify an award of future medical.

The Commission disagrees with that determination as employee has demonstrated a need for future medical care associated with his January 2, 2004 work injury. Therefore, we award employee future medical care and treatment to cure and relieve employee from the effects of his back injury.

The need for future medical care need not be established as a certainty, but it must be established as being reasonably probable through competent, medical testimony. *Bowers v. Highland Dairy Company*, 132 S.W.3d 260 (Mo. App. 2004).

In summary fashion, employee testified that he continued to suffer from stiffness and pain in his back and was unable to sit for long periods of time. Employee testified that he understood that his condition could get worse which would require additional surgery in the future. The principal medical opinion concerning the issue of future medical care and treatment was rendered by Dr. Crabtree.

The administrative law judge focuses on Dr. Crabtree's deposition testimony where he states that it is "possible" that employee would need additional surgery. However, Dr. Crabtree also testified that if employee had further problems then he would "most likely" need some type of fusion. Dr. Crabtree stated in his May 27, 2004, office note that employee would "no doubt require further surgery in the future." At that time, Dr. Crabtree noted that employee would "most likely require a multilevel fusion." Therefore, the record demonstrates that Dr. Crabtree provides a definitive opinion as to employee's need for future medical treatment. When evaluating all of Dr. Crabtree's assessments, we find that there is a reasonable probability of a need for future medical treatment regarding employee's back.

The Commission concludes that the competent and substantial evidence supports a finding that employee is entitled to receive future medical care and treatment reasonable and necessary to cure and relieve him from the effects of his back injury, and this benefit is awarded. As stated above, all remaining findings of fact and

conclusions of law are affirmed.

The award and decision of Chief Administrative Law Judge Victorine R. Mahon issued March 19, 2007, as modified, 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 ___11th___ day of September 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

_____
William F. Ringer, Chairman

_____
Alice A. Bartlett, Member

_____
John J. Hickey, Member

Attest:

_____
Secretary

AWARD

Employee: Andrew Meyers

Injury No. 04-141584

Dependents: N/A

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

Employer: Wildcat Materials, Inc.

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

Insurer: Zurich American Insurance Co.

Hearing Date: February 5, 2007

Checked by: VRM/meb

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: On or about January 2, 2004.
5. State location where accident occurred or occupational disease was contracted: Greene 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? Notice not required.

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 incurred a repetitive injury to his back.

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: Back.

14. Nature and extent of any permanent disability: 25 percent Permanent Partial Partial Disability to the body as a whole referable to the low back.

15. Compensation paid to-date for temporary disability: 0.

16. Value of necessary medical aid paid to date by employer/insurer? 0.

17. Value necessary medical aid not furnished by employer/insurer? 0.

18. Employee's average weekly wages: $717.59.

19. Weekly compensation rate: $478.35/$347.05.

21. Method of wage computation: By agreement.

COMPENSATION PAYABLE

22. Amount of compensation payable:

Unpaid Medical Expenses	$34,204.51
Temporary Total Disability (January 4, 2004, through May 4, 2004)	$8,268.63
Permanent Partial Disability ($347.05 x 100 weeks)	$34,705.00

TOTAL: $77,178.14

23. Second Injury Fund liability: None.

24. Future requirements awarded: None.

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 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: William W. Francis, Jr.

Employer: Wildcat Materials, Inc.

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

Insurer: Zurich American Insurance Co.

Hearing Date: February 5, 2007

COMPENSATION
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Checked by: VRM/meb

FINDINGS OF FACT and RULINGS OF LAW:

A final hearing was conducted in this case on February 5, 2007 before Chief Administrative Law Judge Victorine Mahon. Attorney William W. Francis, Jr., represented Andrew Meyers, the employee and claimant (Claimant). Kevin M. Johnson represented Wildcat Materials, Inc., and its insurer Zurich American Insurance Co. (Employer). The Treasurer of the State of Missouri, as custodian of the Second Injury Fund, was represented by Assistant Attorney General Susan Colburn.

The parties stipulated that Andrew Meyers was a covered employee of Wildcat Materials, Inc., which was fully insured. The parties agreed to venue in Springfield, Greene County, Missouri. They also agreed that Claimant's average weekly wage was $717.59 which yields a Temporary Total Disability rate of $478.35 and a Permanent Partial Disability of $347.05. The Employer has paid no medical or Temporary Total Disability benefits. Claimant seeks $34,204.51 in past medical benefits and $8,268.63 in Temporary Total Disability from January 4, 2004 to May 4, 2004.

Issues

1. Whether Claimant sustained a compensable injury or occupational disease;
2. Whether Claimant provided employer with notice as required under Missouri law;
3. Whether Claimant is entitled to past Temporary Total Disability;
4. Whether Employer is liable for past medical expenses;
5. Whether Claimant is entitled to future medical care;
6. The nature and extent of Permanent Partial Disability;
7. The liability of the Second Injury Fund.

Exhibits

The following exhibits were admitted on behalf of Claimant:

A. Deposition of Dr. Shane Bennoch

B. Supplemental Report of Dr. Bennoch

C. Records – Cox Medical Center

D. Records – Cox Occupational Medicine

E. Records – Cox Sports Medicine

F. Records – Ferrell-Duncan Clinic

G. Records – Southwest Physical Medicine

H. Records – Springfield Neurological and Spine

I. Deposition of Dr. Crabtree

J. Medical Expenses

L. Temporary Total Disability Chart

Exhibits admitted on behalf of Employer:

1. Disability Claim Form

The Administrative Law Judge also takes notice of the Division's records.

Witnesses

Andrew Meyers – Claimant

Steve Breesawitz – Employer's Managerial Supervisor

Findings of Fact

Claimant is a 28-year-old man, who began working as a driver and stocker for Employer Wildcat, Inc., in April 2001. At the time of his employment he weighed more than 300 pounds. His job duties included loading, delivering, and unloading sheet rock and other building materials such as metal studs, ceiling tile, and fiberglass insulation. It was labor intensive work, frequently lifting loads of 100 pounds or more with a helper or alone, twisting, and bending. When Claimant was not lifting and moving materials, he was driving or riding in a truck. He normally worked five days per week, but could incur up to 20 hours of overtime.

Claimant sustained a number of injuries while working for the Employer for which he was provided treatment. Claimant experienced problems with his knee at work on June 4, 2001, April 19, 2002, and December 3, 2003. Claimant states that, although he was released to full duty on each occasion, he has swelling and weakness in his knee.

On August 27, 2003, Claimant sought treatment at St. John's Regional Health Center for his back. The medical record indicates that Claimant had no recent trauma but "he does a lot of pulling and lifting with his work." (Ex. F). At the time Claimant was working for Employer. An MRI performed on August 29, 2003, revealed congenital central canal stenosis and prominent extruded disc fragment at the L2-3, 3-4 and 4-5 levels, and mild to moderate disc bulge at T11-12, and a mild L5-S1 disc bulge with mild left subatricular stenosis (Ex. F). There is no evidence that Claimant had any pain in his back or numbness in his leg prior to August 2003. The medical records fail to indicate that Claimant obtained any follow-up care after his August 2003 episode.

Five months later, however, on January 4, 2004, Claimant began experiencing a charley horse pain in his left leg. He went to the emergency room at Cox Medical Center for treatment. The emergency room physicians ordered an MRI, directed Claimant to be off work, and referred Claimant to Dr. Mark Crabtree, a neurosurgeon. The following day, Claimant provided his supervisor and operations manager, Steven Breesawitz, a note to remain

off work and advised him of his appointment with Dr. Crabtree.

On January 6, 2004, Claimant saw Dr. Crabtree who ordered a myelogram and directed Claimant to remain off work. Claimant then went to Employer and obtained a disability insurance application from Donna Battles in the personnel office. With considerable assistance from Ms. Battles, Claimant completed the disability application on which he indicated that his back problems were not work related.

When Dr. Crabrtree advised Claimant he needed a three-level surgery to his back, Claimant informed Mr. Breesawitz that he needed surgery. Mr. Breesawitz said it was "okay." A reasonable inference is that Mr. Breesawitz was giving his consent to Claimant's being off work, not that he was authorizing treatment. In fact, Claimant never requested medical treatment and never inquired about workers' compensation or submitted bills to Employer until after his surgery. Steven Breesawitz said Employer's policy required employees to report any injury incurred at any time to one's supervisor, irrespective of its significance. But Claimant did not know that back injuries, other than those due to traumatic events, were compensable under workers' compensation. He testified that the first time he considered his back condition work related was after he spoke with an attorney.

On cross-examination Claimant admitted that he previously had developed work related carpal tunnel syndrome from repetitive trauma while working for Tyson Foods and received treatment in that case. Thus, through personal experience, Claimant knew that some types of repetitive trauma were compensable. But, Employer's witness Steven Breesawitz testified that he also did not call Claimant's doctor to investigate whether Claimant's back condition was work related, even though he admitted that he was aware that repetitive trauma could be work related.

Claimant underwent back surgery on February 11, 2004, and then attended physical therapy for several months. On May 4, 2004, Dr. Crabtree gave Claimant a permanent 50-pound lifting restriction, released him, and sent him to see Dr. Marquis for management of his complaints of back pain.

Subsequently, Claimant returned to work, but not with Employer. He obtained a job at Banta Foods and worked there two months. His job included deliveries to restaurants and the lifting of 50 pounds, although not on a repetitive basis. Mr. Breesawitz testified that he saw Claimant in July of 2004 at the Ozark Empire Fairgrounds pushing a two-wheel dolly with boxes, making a Banta Foods delivery. Claimant currently experiences pain and stiffness in his back, especially if he sits too long, as well as popping, cracking, and swelling in his left knee. His leisure activities are limited. At the current time claimant is employed by Delphin Allergen Systems in a desk job.

Claimant has incurred medical expenses in the amount of $34,204.51. He identified those bills which are contained in Exhibit J. Claimant also seeks Temporary Total Disability from January 4, 2004, through May 4, 2004, totaling $8,268.63, as noted in Exhibit L.

Expert Testimony

Dr. Mark Crabtree, the treating physician and board-certified neurosurgeon, reported that he had diagnosed

Claimant with spinal stenosis and multiple levels of disc herniations or protrusions, with a near complete block at L3-4. He testified that the type of job activity performed by Claimant at Wildcat could be a substantial factor in causing or contributing to cause the disc herniations he observed in Claimant. He also stated that Claimant's work activities at Wildcat would cause or contribute to cause the disc herniations he diagnosed. As Dr. Crabtree noted, Claimant was a 25-year-old with the back of a 45 to 55-year-old man. And, even though Claimant may have had some genetic or congenital predisposition, "the bottom line he has some significant lesions that represent injuries related to axial loading…attributed to – to his daily activities." (Ex. I – p. 26). Dr. Crabtree explained that by "daily activities," he meant, "Work and work-related issues as far as manual lifting…." (Ex. I. p. 26).

Dr. Crabtree admitted that his original office notes reflect that Claimant's back condition was not work related and that is what he indicated on the disability claim form (Ex. 1). But Dr. Crabtree said that Claimant had not described his job duties to him. And he was not aware at that time what had been explained to Claimant regarding the claim form.

Dr. Shane Bennoch performed an Independent Medical Examination (IME) of Claimant on June 20, 2005. Dr. Bennoch testified unequivocally that work was a substantial factor in the cause of the Claimant's condition and back pain. Dr. Bennoch reported that the Wildcat job activities that occurred up to and including January 2, 2004, were a substantial cause of the injuries to Claimant's low back. Dr. Bennoch testified:

> Q. Now, Dr. Bennoch, with respect to Mr. Meyers' back as it existed at the time you diagnosed it on June 14, 2005, can you tell us in your opinion whether or not his job activities at Wildcat caused or contributed to cause any of these diagnoses to his back?
>
> A. Yes. I think if you look at the patient's age, he at a relatively young age was having significant changes to his MRI with disks, and this is something that you can commonly see in patients that do heavy manual labor or patients that drive trucks or drive forklifts or drive something where there's a lot of micro trauma that way.

(Ex. A, page 10-11).

* * *

> Q. Okay. Doctor, in your opinion was Mr. Meyers' employment at Wildcat Trucking a substantial factor in causing or contributing to cause these three diagnoses that you're just mentioned?
>
> A. Yes.

(Ex. A., p. 11). Dr. Bennoch further testified that this type of injury to the back may initially be asymptomatic and the onset was gradual:

> A. Well, I mean logically, in other words when you start getting this type of injury to the back where you have disks, et cetera, they may initially be asymptomatic. In other words there may not be any symptoms to his back. At some point he starts to have pain, and he had the pain when he saw Dr. Pennington in August of 2003. And then for some reason they did not act on that MRI, which was fairly significant at that point, and then he was seen again I think, well, January, so let's see, he was seen about five months later, and at that point it was emergent. In other words, he actually was having enough stenosis where he had to be taken care of immediately. So that was an obvious gradual worsening of his back from August. But this was a gradual process, even though he may not have had back pain before August of 2003. It just didn't magically appear then.

(Ex. A, p. 12-13).

Dr. Bennoch testified that Claimant weighed more than 300 pounds as far back as 2001 when he began working at Wildcat, and the weight made him more susceptible to the back diagnosis. But, there is no evidence that the weight, alone, caused the back problems. Employer presented no contrary expert evidence.

Pre-existing Disabilities

Claimant had a right carpal tunnel release in November 1998 and a left carpal tunnel release in September 1999. Dr. Bennoch noted in his report that following surgery Claimant did "quite well and today, other than occasional numbness does not have any significant problems with either hand." (Ex. A, Depo. Ex. 1). Dr. Bennoch rated each upper extremity at 25 percent at the level of the wrist.

Dr. Bennoch noted that Claimant was diagnosed with knee sprain on three occasions in 2001, 2002, and 2003. After each event Claimant returned to full duty work with no surgery. Claimant exhibited full range of motion in both right and left knees without any discomfort, but he suffers severe patellar chondromalacia in the left knee. Dr. Bennoch rated the left lower extremity at 25 percent at the knee due to traumatic injury with sprain and strain and severe chondromalacia.

Dr. Bennoch opined that the combination of the preexisting and present disabilities creates a substantially greater disability than the total of each separate injury and a loading factor should be added.

Claimant identified no problems with his hands other than occasional numbness. He also testified that he has ongoing problems with cracking, popping, and swelling in his left knee. The Second Injury Fund did not admit any additional opinions as to disability, but Employee's counsel admits that Claimant previously settled his bilateral carpal tunnel for 10 percent to each upper extremity at the wrist.

Future Medical Needs

In a May 27, 2004 office report, Dr. Crabtree indicated that Claimant would need surgery in the future, stating:

> The patient has a permanent 50-pound restriction in lifting. This is based on his recent surgical treatment at multiple levels for disc herniations, as well as presence of multilevel spondyltic change and stenosis on a congenital basis. The patient will no doubt require further surgery in the future. We hope to postpone this as long as possible since this will most likely require multilevel fusion.

(Exhibit H, page 1).

At deposition, however, Dr. Crabtree retracted from the above statement and testified that "*if* he had further problems he would most likely end up coming to the need for some type of fusion [emphasis added]." (Ex. I, p. 14). In his original report, Dr. Bennoch stated that without prior records it was difficult to predict what future course the left knee would be." (Ex. A, Depo Ex. 1). At deposition, Dr. Bennoch was asked about future medical and he replied that Claimant should avoid jobs involving physical labor and lose weight (Ex. A, p. 19). In his supplemental report, Dr. Bennoch indicated it was possible Claimant would need a knee replacement at some time in the future.

Conclusions of Law

Compensability

"Occupational diseases are compensable under the Missouri Workers' Compensation Act, [section] 287.067.1 [and] .2, RSMo." *Kent v. Goodyear Tire and Rubber Co.,* 147 S.W.3d 865, 867 (Mo. App. W.D. 2004. "Subsection 2 of ... [section] 287.067 adopts the causation standard for occupational disease claims as stated in [section] 287.020.2; the employee's work must be 'a substantial factor' in causing the medical condition." *Kent,* 147 S.W.3d at 867 (quoting
§ 287.020.2, RSMo 2000). A causative factor may be substantial even if not the primary or most significant factor. "There is no bright-line test or minimum percentage . . . defining 'substantial factor.'" *Cahall v. Cahall*, 963 S.W.2d 368-371 (Mo. App. E.D. 1998) *overruled on other grounds, Hampton v. Big Boy Steel Erection,* 121 S.W. 3d 220 (Mo. banc 2003). While an injury is not compensable merely because work is a triggering or precipitating factor, it can be both a triggering and a substantial factor. *Loven v. Greene County,* 94 S.W.3d 475, 478 (Mo. App. S.D. 2003).

Claimant began employment with Wildcat Materials in April of 2001. Claimant first experienced pain in his back or leg numbness in August 2003, after he had been working more than two years with Wildcat Materials. Claimant often worked overtime and lifted 100 pounds or more on a frequent basis. There was no evidence Claimant had back pain or numbness before his employment at Wildcat Materials. There was no evidence that Claimant was engaged in any alternative activity that would have caused the back pain and his back condition. Based on Claimant's testimony and the opinions of the only experts in the case, the record supports a finding, under the pre 2005 Workers' Compensation Law, that work was a substantial factor in the resulting medical condition and disability. Work was not merely a triggering or precipitating event.

Notice

Workers' compensation statutes requiring Claimant to provide Employer with written notice within 30 days after an accident are inapplicable to claims of occupational disease. *Edicott v. Display Technologies, Inc.,* 77 S.W.3d 612 (Mo. banc 2002). Arguably, even if Claimant's condition was considered something other than an occupational disease for which notice was required, Employer had actual knowledge of a potentially compensable claim when Claimant told Employer of his need for surgery and need to be off work due to back pain. Employer knew that Claimant's job duties involved frequent heavy lifting. Claimant's supervisor admitted he was aware that repetitive trauma could be compensable. The notice issue is found in Claimant's favor.

Temporary Total Disability

Claimant seeks Temporary Total Disability from January 4, 2004, through May 4, 2004. The purpose of Temporary Total Disability is to cover the cost for a worker's healing period. Temporary Total Disability is to be paid until the employee can return to work, his condition stabilizes, or he has reached a point where further

progress is not expected. The test is whether an employee is able to compete in the open labor market, given the employee's present physical condition. *Cooper v. Medical Center of Independence,* 955 S.W.2d 570, 575 (Mo.App. W.D. 1997).

Claimant was taken off work by Dr. Crabtree from January 4, 2004, through May 4, 2004. Claimant is entitled to Temporary Total Disability for that time period. There is no evidence that Claimant could work during this time period.

Employer argues that because Claimant failed to provide notice, and Employer never had an opportunity to provide Temporary Total Disability, it has no obligation to provide such benefits now. I can find no case that supports Employer's position when the injury is due to cumulative trauma/occupational disease.

Past Medical Expenses

In pertinent part, § 287.140.1, RSMo 2000, states that "the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury." An employer's duty to provide statutorily-required medical aid to an employee is absolute and unqualified. *Jennings v. Station Casino St. Charles,* 196 S.W.3d 552, 557 (Mo.App. E.D. 2006). But as a general rule, the employer is given control over the selection of the employee's medical providers. *Blackwell v. Puritan-Bennett Corp.,* 901 S.W.2d 81, 85 (Mo. App. E.D. 1995). Employer argues, citing *Blackwell,* that it owes no medical care because it did not have the opportunity to control medical. At hearing, Employer raised objection to the reasonableness of the bills. And, Employer supplied evidence that Claimant had insurance pay for at least some of his bills.

A. Control of Medical Care

Employer argues that without notice that an employee needs treatment, it is not liable for the medical bills. This case is nothing like *Blackwell,* wherein the employee received authorized treatment paid by the employer, and then, after his release to return to work, sought treatment on his own without ever notifying the employer of a need for additional treatment. Here, Claimant never sought or received authorized treatment, but he did advise Employer that he needed surgery before he obtained it. I find Claimant credible that he just did not know at the time that the need for treatment was related to work.

B. No Prejudice

Further, notice to Employer of a work-related accident is not a prerequisite for the recovery of the cost of medical services where the employer suffers no prejudice. *Wiedower v. ACF Industries, Inc.,* 657 S.W.2d 71, 74 (Mo.App.E.D.1983). In examining for prejudice, the issue is whether Claimant's resulting disability would have been less if Employer had been afforded the opportunity to promptly furnish him with medical aid. *See e.g., Klopstein v. Schroll House Moving Co.,* 425 S.W.2d 498, 504 (Mo. App. St. L. D.1968), wherein the appellate court

concluded that the employee's injury became worse due to his continued activities and failure to advise his employer of his injury. In this case, Claimant went to the doctor, stopped his activities that would have exacerbated his condition, and had a good result from his surgery. I conclude there was no prejudice to Employer and the payment of medical bills is appropriate.

C. Reasonable & Necessary

When the employee identifies medical bills and testifies that the bills relate to and are a product of his injury or occupational disease, and the bills relate to the services provided as demonstrated by the medical records, there is a sufficient factual basis for the award of past medical benefits. *Martin v. Mid-America Farm Lines, Inc.,* 789 S.W.2d 105 (Mo. banc 1989).

Claimant identified and submitted Exhibit J which is compilation of his bills. It is clear from Claimant's testimony that the medical bills submitted in Exhibit J were for treatment he received on account of his cumulative trauma injury. His medical treatment records also were admitted and one can correlate the bills to the treatment. Dr. Crabtree also testified that the surgery he performed for Claimant was necessary to cure and relieve the conditions he diagnosed in Claimant and the bills generated by him and the hospital were reasonable and necessary to accompany such treatment. That is sufficient under Missouri law to prove the reasonableness and necessity of the bills.

D. Insurance

Some of Claimant's medical bills may have been paid by a health insurance carrier, but Employer presented no evidence that the *Employer* paid the bills. The law is clear in Missouri that Employer is not entitled to credit against workers' compensation benefits paid for the amount of medical bills submitted by Claimant to a health insurance carrier. *Shaffer v. St. John's Regional Health Center*, 943 S.W.2d 803 (Mo. App. S.D. 1997). It has long been held that payments from an insurance company or from any source other than Employer or Employer's insurer for liability for workers' compensation are not to be credited on workers' compensation benefits. *Ellis v. Western Elec. Co.,* 664 S.W.2d 639, 643 (Mo. App. S.D. 1984). There is no evidence that the medical bills were paid by this Employer or its workers' compensation insurer. Employer is liable for the full amount of bills submitted at the hearing totaling $34,204.51.

Future Medical Expenses

Claimant has sought future medical care for his injuries. Section 287.140, RSMo 2000, requires Employer to provide medical treatment as reasonably may be required to cure and relieve Claimant from the effects of the work-related injury. To "cure and relieve" means treatment that will give comfort, even though restoration to soundness is beyond avail. *Landman v. Ice Cream Specialties, Inc.,* 107 S.W.3d 240, 249 (Mo. banc 2003). Claimant must provide evidence of the need for treatment by "reasonable probability" rather than "reasonable certainty." *Downing v. Williamette Industries, Inc.,* 895 S.W.2d 650, 655 (Mo. App. W.D. 1995) *overruled on other*

grounds, Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. banc 2003). "Probable" means founded on reason and experience, which inclines the mind to believe, but leaves room for doubt. *Sifferman v. Sears, Roebuck & Co.,* 906 S.W.2d 823, 828 (Mo. App. S.D. 1995) *overruled on other grounds, Hampton v. Big Boy Steel Erection*, 121 S.W.3d 200 (Mo. banc 2003).

Given this standard, I conclude that the record as a whole fails to support an award of future medical. When asked during deposition, Dr. Bennoch's list of future medical care options for Claimant was advising him to lose weight (Ex. A, p. 19). Claimant argues that in a supplemental report, Dr. Bennoch stated that it is "highly likely" that Claimant would have further problems with his left knee and "possible" that he will need a knee replacement at some point. But, the possibility of future medical care does not constitute substantial evidence to support such an award. *Mathia v. Contract Freighters,* 929 S.W.2d 271, 277 (Mo. App. S.D. 1996); *Modlin v. Sun Mark, Inc.,* 699 S.W.2d 5, 7 (Mo. App. E.D. 1985). Similarly, Dr. Crabtree testified that it was "possible" Claimant would need further surgery, but "the biggest issue…that reflects upon his need or his lack of a need for future surgery will have to do with his body weight." (Ex. I, p. 31). I conclude this evidence is just too speculative to justify an award of future medical.

Permanent Partial Disability

The only rating in this case was from Dr. Bennoch who opined that Claimant suffered a 35 Permanent Partial Disability to the body as a whole rated at the lumbar spine due to multi-level disc disease and nerve impingement. Employer argues that this rating is excessive in light of the following facts: 1) Dr. Bennoch performs 95 percent of his assessments on behalf of employees rather than employers, 2) medical records indicate a 60 to 70 percent improvement in Claimant's symptoms post surgery, 3) Claimant has no scheduled appointments for his back, and 4) Dr. Bennoch's records reveal that Claimant is doing reasonably well and does not have significant pain. I note that the record also indicates that Claimant initially returned to a manual labor job, he was released with a 50-pound lifting restriction, and he currently is working full time, albeit in a different line of work.

The fact finder is not bound by the exact percentages of any expert witness and has authority to find another percentage of disability. *Ransburg v. Great Plains Drilling,* 22 S.W.3d 726, 732 (Mo. App. W.D. 2000). Given all of the facts in this case, and considering that Claimant's surgery was to three levels of the back, I conclude that Claimant is entitled to 25 percent Permanent Partial Disability to the body as a whole referable to the low back.

Second Injury Fund Liability

The lynch pin of liability against the Second Injury Fund is the existence of a preexisting permanent partial disability of such seriousness as to constitute a hindrance or obstacle to employment or to becoming reemployed if the employee becomes unemployed. § 287.220.1, RSMo 2000; *Leutizinger v. Treasurer of Missouri,* 895 S.W.2d 592, 593 (Mo. App. E.D. 1995). Such disability must exist at the time of the last accident and be actual and measurable. *Messex v. Sach Electric*

Co., 989 S.W.2d 206. 215 (Mo. App. E.D. 1999) *overruled on other grounds Hampton v. Big Boy Steel Erection,* 121 S.W.3d 220 (Mo. banc 2003). Moreover, Claimant's preexisting permanent partial disabilities must meet a statutory threshold of fifty weeks if it is a body as a whole injury or, "if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability…." § 287.220.1, RSMo 2000.

Although Claimant suffered three injuries to his knee, each time he was returned to full duty. The knee diagnoses have all been sprains/strains. He has had no surgery to his left knee. After being released by Dr. Crabtree, Claimant found himself another job doing deliveries. Thus, it appears that the knee has not been a hindrance or obstacle to employment. But even assuming that the knee disability limits the work Claimant could obtain on the open labor market, I do not find the 25 percent rating of Dr. Bennoch credible. I conclude that Claimant's current permanent partial disability to his knee is more in the range of 10 percent or less, and thus fails to meet the statutory threshold for a major extremity disability.

Likewise, Dr. Bennoch's rating of 25 percent to each wrist is excessive. I find more credible the settlements of 10 percent each. Such settlements are relevant in establishing the percentage of disability. *Conley v. Treasurer of Missouri,* 999 S.W.2d 269 (Mo. App. E.D. 1999), *overruled on other grounds by Hampton v. Big Boy Steel Erectors,* 121 S.W.3d 220 (Mo. banc 2003). I conclude that the wrists also do not meet the statutory threshold in order to assess Second Injury Fund liability. Moreover, there is no evidence in this case that the occasional numbness in Claimant's hands is a hindrance or obstacle to employment. No Second Injury Fund benefits are awarded.

Summary

Employer shall pay Claimant $77,178.14 in workers' compensation benefits. The total accounts for $34,204.51 in past medical bills; $8,268.63 in Temporary Total Disability, for the period of January 4, 2004, through May 4, 2004, and $34,705.00 for Permanent Partial Disability (25 percent to the body as a whole attributable to the back).

This award is subject to a lien in favor of Attorney William W. Francis, Jr., in the amount of law.

Date: March 19, 2007

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

A true copy: Attest:

/s/ Patricia "Pat" Secrest
Patricia "Pat" Secrest
Director
Division of Workers' Compensation