

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

Injury No.: 02-073752

Employee: Eric Neathery
Employer: Accurate Fire Protection Systems
Insurer: American Home Assurance
c/o AIG
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Date of Accident: July 24, 2002

Place and County of Accident: St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. We have reviewed the evidence and considered the whole record and we find that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act, except as modified herein. Pursuant to section 286.090 RSMo, we issue this final award and decision modifying the October 19, 2005, award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Preliminaries

At the beginning of the August 8, 2005, hearing, the administrative law judge stated the issues the parties stipulated for trial:

The Court: It's my understanding that the parties have also stipulated and agreed that the sole issues for disposition in this case are future medical care, temporary disability, permanent disability, Second Injury Fund liability, and costs and expenses including attorney's fees under Sections 287.128, 287.203, 287.560, and 287.590.

Do you concur with what I've dictated for the record?

Mr. Nichols: I do sir.

Mr. Lory: The only issue I have is that the penalties of costs and expenses we had spoken before, Mr. Nichols and myself, that we weren't gonna do that. I do raise an objection for the record.

Mr. Nichols: That was if they paid it.

Mr. Lory: No, that was at the last mediation we said we weren't gonna do that.

The Court: Ms. Krispin.

Ms. Krispin: I have no issues with the issues, Your Honor.

The Court: Thank you. So, Mr. Lory, did you want to proceed today or not?

Mr. Lory: I'm ready to proceed. I mean what are my options otherwise?

(Tr. 3)

Additional Evidence

On December 7, 2005, employee, through counsel, filed a Motion to Submit Additional Evidence. The proposed evidence was an October 4, 2005, medical report of Dr. Robert C. Russell. Employer/insurer and the Second Injury Fund filed responses opposing the motion. By Order dated January 4, 2006, the Commission entered an order denying the motion.

On March 1, 2006, employee, through counsel, filed another Motion to Submit Additional Evidence seeking admission of the same October 4, 2005, report. Employee does not attempt to show this Commission that the report satisfies the criteria of Commission Rule 8 CSR 20-3.030(2). Rather, employee's argument seems to be that the Commission should allow the evidence and remand this matter to the Division of Workers' Compensation because the administrative law judge should have issued a temporary award rather than a final award disposing of all issues.

Employee's Motion is again denied. The portion of the transcript reproduced above confirms that employee stipulated to the disposition of all issues.

Permanency

The administrative law judge did not err by deciding the issues of permanent disability and Second Injury Fund liability or by issuing a final award in this case. 8 CSR 50-2.010(14) provides that "prior to hearing, the parties shall stipulate uncontested facts and present evidence only on contested issues." "Stipulations are controlling and conclusive, and the courts are bound to enforce them." *Boyer v. Nat'l Express Co.*, 49 S.W.3d 700, 705 (Mo. App. 2001)

Temporary Total Disability

We modify the award of temporary total disability. The administrative law judge denied temporary total disability for the period September 11, 2003, through June 29, 2004.

Dr. Strecker determined employee was at maximum medical improvement as of September 10, 2003, and needed no further medical care. Dr. Strecker released employee to return to work with several restrictions.

In December 2003, Dr. Hanaway identified that employee was suffering symptoms of ulnar nerve compression and further treatment in the form of surgery was necessary. Dr. Hanaway believed employee remained totally disabled. In January 2004, Dr. Russell also determined that employee needed a third surgery – a submuscular transposition of the ulnar nerve at the level of the elbow.

When employee was finally referred to Dr. Brown on June 21, 2004, Dr. Brown agreed that employee needed a submuscular transposition of the ulnar nerve at the level of the elbow and also felt he needed a decompression of the ulnar nerve at the level of the wrist. Dr. Brown performed those surgeries on September 17, 2004.

We are persuaded that Dr. Strecker's opinion that employee was at maximum medical improvement was incorrect in light of the impressions of Dr. Hanaway, Dr. Russell, and Dr. Brown. Employee did not reach maximum medical improvement until he was released by Dr. Brown on January 4, 2005. Because we believe Dr. Strecker erred in finding employee at maximum medical improvement in September 2003, we are unable to rely upon the physical restrictions he believed would allow employee to return to work in September 2003. We find more persuasive the opinion of Dr. Hanaway that employee remained unemployable as of December 2003. Because Mr. England relied upon Dr. Strecker's restrictions in forming his opinion that employee was employable during the period September 11, 2003, through June 29, 2004, we do not find his opinion regarding this period persuasive. We believe employee remained unemployable from September 2, 2002, until he was released by Dr. Brown.

The administrative law judge relied upon the case of *Boyles v. USA Rebar Placement, Inc.*, 26 S.W.3d 418 (Mo. App. 2000), in reaching his conclusion. *Boyles* is distinguishable. In *Boyles*, the claimant did not offer any expert testimony concerning his ability to obtain employment on the open labor market under his condition. In the instant

case, employee offered the medical opinion of Dr. Hanaway and the vocational opinion of Dr. Bernstein to support his contention that he was unemployable during the period in question.

We conclude that in addition to the temporary total disability awarded by the administrative law judge, employee is entitled to temporary total disability benefits for the period September 11, 2003, through January 4, 2005. We modify the administrative law judge's award accordingly.

The Commission 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.

The award and decision of Administrative Law Judge Edwin J. Kohner, issued October 19, 2005, is attached and incorporated by this reference except to the extent modified herein.

Given at Jefferson City, State of Missouri, this 22nd day of August 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Eric Neathery

Injury No.: 02-073752

Dependents: N/A

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

Employer: Accurate Fire Protection Systems

Additional Party:

Insurer: American Home Assurance c/o AIG

Hearing Date: August 8 and 12, 2005

Checked by: EJK:tr

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: July 24, 2002

5. State location where accident occurred or occupational disease was contracted: St. Louis County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
The employee slipped on a piece of drywall and suffered an ulnar neuropathy in his left arm.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Left elbow
14. Nature and extent of any permanent disability: 30% of the left elbow
15. Compensation paid to-date for temporary disability: \$51,667.32
16. Value necessary medical aid paid to date by employer/insurer? \$60,506.59

Employee: Eric Neathery

Injury No.:

02-073752

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$973.98
19. Weekly compensation rate: \$649.32/\$340.12
20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:

63 weeks of permanent partial disability from Employer	\$21,427.56
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22. Second Injury Fund liability: Yes

40.25 weeks of permanent partial disability benefits from Second Injury Fund	\$13,689.83
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TOTAL:	\$35,117.39
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23. 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% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Harry J. Nichols, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Eric Neathery	Injury No.:	02-073752
Dependents:	N/A	Before the	
Employer:	Accurate Fire Protection Systems	Division of Workers'	
Additional Party:	Second Injury Fund	Compensation	
		Department of Labor and Industrial	
		Relations of Missouri	
		Jefferson City, Missouri	
Insurer:	American Home Assurance c/o AIG	Checked by:	EJK

This workers' compensation case raises several issues arising out of an alleged work related injury in which the claimant, a sprinkler fitter, slipped on a piece of drywall and suffered an ulnar neuropathy in his left arm. The issues for determination are (1) Future medical care, (2) Temporary disability, (3) Permanent disability, (4) Second Injury Fund liability, (5) Mileage, and (6) Costs and Attorney Fees. The evidence compels an award for the claimant for permanent partial disability benefits from the employer and the Second Injury Fund.

At the hearing, the claimant and Samuel Bernstein, Ph.D., testified in person, and the claimant offered a deposition of Joseph Hanaway, M.D., a list of prior injuries, a vocational report and curriculum vita of Dr. Bernstein, Ph.D., a medical report from Joseph Hanaway, M.D., and medical records from Dr. Hanaway, BarnesCare, Ravi Yadava, M.D., Sports Medicine & Occupational Ortho Clinic, Des Peres Square Surgery Center, Gateway Rehab PT, Joseph Hanaway, M.D., Robert C. Russell, M.D., and Surgery Center of Kirkwood. The defense offered depositions of William B. Strecker, M.D., David M. Brown, M.D., and James M. England, Jr., photos of the claimant, a copy of the claim for compensation, correspondence between counsel, and medical records from John Wagner, M.D., and Joseph Hanaway, M.D. The Second Injury Fund offered a deposition bill from Concannon & Jaeger from July 7, 2005.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident occurred in Missouri.

SUMMARY OF FACTS

On July 24, 2002, this forty year old claimant slipped on a piece of drywall, fracturing a bone in his left arm. He had no prior disabilities to his left arm. Initially, he went to BarnesCare where he received a left elbow x-ray, revealing a radial head fracture. See Exhibit A. He was then referred to an orthopedist, Dr. Wagner, who placed the claimant's arm in a splint and sling and opined that he could work light duty. See Exhibit 9. The claimant returned to work for three to four weeks, but was eventually laid off. He contacted his union hall, but they could not place him due to the injury. He has not worked since the injury. Dr. Wagner opined that the fracture healed, but the claimant continued to have left elbow pain. See Exhibit 9. On October 22, 2002, Dr. Yadava performed electrical studies revealing a moderate to severe ulnar nerve neuropathy in the medial elbow or cubital tunnel syndrome. See Exhibit B.

Dr. Wagner performed an ulnar release on August 20, 2002. See Exhibit 9. On November 18, 2002, Dr. Wagner performed a transposition of the ulnar nerve to correct the ulnar neuropathy in the claimant's left arm. See Exhibit 9. The claimant testified that he received no relief from this surgery and that his elbow got worse. A second electrical study on March 21, 2003, revealed an entrapment neuropathy of the ulnar nerve in the medial elbow. See Exhibit B. The claimant went to Dr. Strecker, who performed surgery on April 25, 2003, to explore the ulnar nerve with external neurolysis. See Exhibit D. On April 25, 2003, Dr. Strecker performed an exploration of the left ulnar nerve with external neurolysis. See Exhibit D. An electrical study on July 18, 2003, revealed interval improvement. See Exhibit B. But, there was some activity to suggest early re-entrapment versus residual irritation. See Exhibit B. There was also some interval worsening of the ulnar nerve across the Guyon's canal. See Exhibit B. The claimant testified that he received no relief from this surgery. Dr. Strecker discharged him from treatment and opined that the claimant was at maximum medical improvement. The claimant testified that he underwent a functional capacity evaluation with Dr. Strecker and that he gave a full effort. Dr. Strecker released him on September 10, 2003, told him that he would not be able to return to his prior employment, and placed permanent restrictions on him. He did not look for employment after Dr. Strecker released him. He contacted the Illinois Rehabilitation Service and reported that he had not reached maximum medical improvement, but they told him that they could not help him.

The claimant consulted Dr. Russell who recommended another surgery. On September 17, 2004, Dr. Brown performed an exploration of the ulnar nerve at the left elbow with an anterior submuscular transposition. See Exhibit H. He also performed a left flexor pronator tendon origin myofascial lengthening and a left Guyon's canal release of the left ulnar nerve at the left wrist. See Exhibit H. These procedures were performed to relieve the claimant's persistent ulnar neuropathy following a subcutaneous transposition and his Guyon's canal syndrome. See Exhibit H. After the claimant completed treatment with Dr. Brown, he underwent another functional capacity evaluation. Dr. Brown then released him on January 4, 2005. Dr. Brown also told him that he would not be able to return to his prior employment and placed permanent restrictions on him. The claimant did not look for work after Dr. Brown released him. The claimant testified that he received physical therapy in Litchfield, Illinois.

The claimant testified that his condition is now worse with weakness, finger cramping and left arm atrophy. He takes Aleve daily for his aches and pains. He has had no other injuries to his left elbow since the July 2002 work-related injury and wants to consult another physician to see if anything else could be done for his elbow.

The claimant is a high school graduate who served two years in the Marines. After the Marines he joined an apprenticeship in sprinkler fitting setting up fire protection systems. His job duties required the use of math, reading blue prints, making calculations, design and maintenance. In 1990, he became a sprinkler fitter journeyman. His hobbies included competition shooting, trap shooting, and archery. He was a world-class shooter before the accident. He has not competed since the accident, but has actively engaged in this activity after the accident. See Exhibit 5. The exhibit portrays pictures from a hunt in the 2003-2004 season, the 1997 season, the 1998 season, a trade show he attended, and hunts on November 4, 2004, and November 13, 2004. He takes his son hunting. He hunted three times in 2003 and twice in 2004. He bow hunts and uses a shotgun. He testified that he is limited in the way and amount of hunts he can do, but had no problems before the July 24, 2002, work related injury.

The claimant has bow hunted several times since the date of injury and uses a forty-five pound compound bow. He is also able to drive a John Deere Gator, which is similar to an ATV. He has participated as a member of "Team Hammerdog" for Southern Outdoor Products. He lets his picture be used on their web site as well as

narratives of his hunts. He records his hunts for them and has tested products for them. He claims that he has received a tree stand and other products in exchange for this service. In fact, he testified that he has received a lot of free products and has been able to give them away. The claimant testified that he is able to hike fifteen miles and bike two to three miles. He drives an automobile with a standard transmission drove one hundred miles to the hearing without having to stop.

The claimant has not worked since this injury. His union hall would not send him out, but he has not tried to work anywhere else. The claimant testified that no doctor has told him that he needs further medical treatment or surgical procedure, but he wanted additional physical therapy. He testified that he does home exercises and has a positive attitude that it might improve. No doctor has told him that his condition might improve.

Preexisting Conditions

The claimant testified that he was in reasonably good health prior to this injury and could do his job. The claimant had several preexisting conditions, including a fractured right elbow and right thumb, a right shoulder that "pops out", a ruptured L4-5 disc, a fractured left leg and shattered ankle.

Dr. Hanaway

Dr. Hanaway, a neurologist, examined the claimant on December 16, 2003, and diagnosed a radial head fracture and a compression of the ulnar nerve. See Dr. Hanaway deposition, page 16. He also opined that the claimant had regional pain syndrome. See Dr. Hanaway deposition, page 16. He testified that the claimant required more treatment for his work injury. Dr. Hanaway opined that the claimant could not do the type of work he was doing before the accident. See Dr. Hanaway deposition, page 18. He rated the claimant's permanent partial disability at forty-five percent of the left elbow. See Dr. Hanaway deposition, page 19. Dr. Hanaway issued an off work slip dated July 15, 2003, taking the claimant off work for 120 days. This was an arbitrary number given, so the claimant could get treatment. See Dr. Hanaway deposition, pages 21, 46. He examined the claimant on August 26, 2004, and found no change in exam findings. See Dr. Hanaway deposition, page 23.

Dr. Hanaway also examined the claimant on February 17, 2005. He put in his report that the claimant had undergone a carpal tunnel release, but testified that the diagnosis was wrong. See Dr. Hanaway deposition, page 24. The claimant actually underwent a Guyon's canal release. He testified that the claimant told him that since he did not have any further medical records. See Dr. Hanaway deposition, page 25. Dr. Hanaway prepared a supplemental report dated February 21, 2004, but testified that it actually should have been February 21, 2005. See Dr. Hanaway deposition, page 26. He testified that it was a typographical error. See Dr. Hanaway deposition, page 26. He again erroneously referenced carpal tunnel instead of Guyon's tunnel. See Dr. Hanaway deposition, page 27. In his report, he rated the claimant at twenty-five percent of the elbow for the current work injury, but then testified that this was a mistake as well. See Dr. Hanaway deposition, page 30. He testified that it should have been a forty-five percent permanent partial disability. See Dr. Hanaway deposition, page 31. He claimed that this was his mistake, because he did not look back at his old report. See Dr. Hanaway deposition, page 31. He also opined that the claimant was permanently and totally disabled based on a combination of the claimant's injuries. See Dr. Hanaway deposition, page 32.

He prepared a final supplemental report on March 2, 2005, opining that the claimant was still temporarily and totally disabled based on his elbow and shoulder condition. See Dr. Hanaway deposition, page 33. Dr. Hanaway testified that this was erroneous, because the report should have just referenced the elbow. See Dr. Hanaway deposition, page 33. Dr. Hanaway testified that he had not seen the operative notes from Dr. Wagner or Dr. Strecker, until the deposition. See Dr. Hanaway deposition, page 37. He also testified that they were sent to him previously, were in his file, but he had not reviewed them. See Dr. Hanaway deposition, page 38. He also testified that he was not provided the September 2003 functional capacity evaluation, and he had to rely on the claimant for the restrictions that Dr. Strecker placed on the claimant. See Dr. Hanaway deposition, pages 41-42. He testified that he did not agree with the functional capacity evaluation findings or Dr. Strecker's restrictions. See Dr. Hanaway deposition, page 43. He reviewed the January 3, 2005, functional capacity evaluation, but disagreed with the findings. See Dr. Hanaway deposition, page 49. He also disagreed with Dr. Brown's assessment of the claimant's work ability. See Dr. Hanaway deposition, page 50. Dr. Hanaway testified that he is not a vocational counselor, but he would not defer to one, unless he knew what the vocational counselor recommended. See Dr.

Based on the claimant's verbal medical history, Dr. Hanaway opined that the claimant suffered the following preexisting permanent partial disabilities: twenty-five percent of the right shoulder from a fractured clavicle in 1991, twenty-five percent of the left ankle from a fractured ankle with open reduction with a halo immobilization around his foot and a screw through the lower end of the tibia, twenty-five percent of the low back from lumbar disc herniation at L4-5 related to a work related injury. See Dr. Hanaway deposition, pages 27, 28, 29. He appeared to opine that the claimant's overall disability exceeds the simple sum of the claimant's individual disabilities. See Dr. Hanaway deposition, page 32. Dr. Hanaway did not review any medical records regarding preexisting conditions. See Dr. Hanaway deposition, page 57. He rated preexisting permanent partial disabilities by taking a history of an injury from the claimant and then "decide twenty-five percent." See Dr. Hanaway deposition, page 59.

Dr. Russell

Dr. Russell, a hand surgeon, examined the claimant on January 6, 2004, and obtained a history of the accident as well as the medical treatment, from the claimant but did not review any actual medical records. After the examination, he recommended further treatment. He testified that he was unsure as to whether the claimant was totally disabled from performing his work duties as a sprinkler fitter, but opined that he could do some type of light duty. See Dr. Russell deposition, pages 16-17. He opined that the claimant was probably able to work as a sprinkler fitter. See Dr. Russell deposition, page 22. He opined that if the nerve was released on time, then he might have been able to go back, but probably would not have any permanency. See Dr. Russell deposition, page 23. In the claimant's case, there probably was some nerve damage, so there would be some permanency. See Dr. Russell deposition, page 23. He also testified that after surgery he recommended, that patients usually go back to some type of work. See Dr. Russell deposition, page 24. He opined that a functional capacity evaluation can be very helpful in determining the claimant's work ability. See Dr. Russell deposition, page 26. Based on that, he would defer to a vocational expert to determine if there were jobs available for the claimant. See Dr. Russell deposition, page 26. Dr. Russell opined that a subcutaneous nerve transposition is a generally accepted procedure. See Dr. Russell deposition, page 27. He testified that at the time he saw the claimant, that it was possible that the claimant could do some type of work. See Dr. Russell deposition, page 29.

Dr. Strecker

Dr. Strecker, a board certified orthopedic surgeon, specializing in hand and upper extremities, examined the claimant on April 4, 2003, found progressive scarring or entrapment of the ulnar nerve, and recommended re-exploration with neurolysis of the nerve. See Dr. Strecker deposition, page 6. He performed that surgery on April 25, 2003. Dr. Strecker followed the claimant after the surgery and prescribed physical therapy, work hardening, and a functional capacity evaluation. He also ordered another EMG to address persistent paresthesias, which revealed improvement with nerve dysfunction at the wrist. See Dr. Strecker deposition, page 9. Dr. Strecker found that the claimant was asymptomatic at his wrist, and opined that the electrical findings had nothing to do with his work injury. See Dr. Strecker deposition, page 9.

After the functional capacity evaluation, Dr. Strecker told the claimant that he would need to look for some other vocation. See Dr. Strecker deposition, page 10. He released the claimant from treatment on September 10, 2003. The claimant had full range of motion, no longer had the pre-operative pain, some slight decrease in light touch, but full motor function. See Dr. Strecker deposition, pages 10-11. He placed permanent restrictions on the claimant of no overhead work greater than fifty pounds, no lifting more than fifty pounds to shoulder level and no lifting more than seventy-five pounds to his waist. See Dr. Strecker deposition, page 11. Based on those restrictions, Dr. Strecker opined the doctor did believe that the claimant could return to work in some capacity. See Dr. Strecker deposition, page 11. Dr. Strecker diagnosed a radial head fracture and ulnar neuropathy. See Dr. Strecker deposition, page 11. When he released him he opined that the claimant was at maximum medical improvement. He also testified that if a patient's condition worsens, then the patient is not at maximum medical improvement. See Dr. Strecker deposition, pages 21-22. He testified that on the claimant's last office visit, the condition was not worsening, but showed improvement. See Dr. Strecker deposition, page 25. He rated the claimant at fifteen percent of the elbow, but the rating did not include the radial head fracture, just the ulnar entrapment. See Dr. Strecker deposition, pages 27, 28. Dr. Strecker testified that the numbness was consistent with a neuropathy of the ulnar nerve. See Dr. Strecker deposition, page 17. Dr. Strecker also testified that the

ulnar problem of the wrist was not related to the ulnar problem of the elbow, or the work injury. See Dr. Strecker deposition, page 26.

Dr. Brown

On June 29, 2004, Dr. Brown examined the claimant and opined that the claimant had persistent significant ulnar neuropathy of the elbow. See Dr. Brown deposition, Exhibit 2, page 4. He recommended a submuscular transposition and a decompression of the ulnar nerve at the wrist. See Dr. Brown deposition, Exhibit 2, page 5. Dr. Brown opined that the claimant could work within the restrictions of the functional capacity evaluation. See Dr. Brown deposition, Exhibit 2, page 6. Dr. Brown also opined that the claimant could not return to work as a sprinkler fitter. See Dr. Brown deposition, Exhibit 2, page 15.

On September 17, 2004, Dr. Brown explored the ulnar nerve at the left elbow with an anterior submuscular transposition and did a Guyon's canal release. After the surgery, the claimant received physical therapy. When Dr. Brown released the claimant from treatment, he noted improvement in the claimant's symptoms. See Dr. Brown deposition, Exhibit 3, page 8. The claimant underwent a functional capacity evaluation on January 3, 2005. After the functional capacity evaluation, Dr. Brown opined on January 4, 2005, that the claimant was at maximum medical improvement and released him from treatment. See Dr. Brown deposition, Exhibit 3, page 9. He placed permanent restrictions on him, as outlined in the functional capacity evaluation. Dr. Brown opined that the claimant could probably do more than work in the medium demand level. See Dr. Brown deposition, Exhibit 3, page 11. Dr. Brown also rated the claimant at fifteen percent permanent partial disability of the elbow including all of the claimant's surgeries and his fractured elbow. See Dr. Brown deposition, Exhibit 3, pages 12, 13. Dr. Brown testified that there are many different ways to treat cubital tunnel syndrome or compression neuropathy of the ulnar nerve, and that one surgery is not proven to be better than another. See Dr. Brown deposition, Exhibit 3, page 20. Dr. Brown elected to do a submuscular transposition. Dr. Brown opined that the claimant's arm did not worsen between Dr. Russell's appointment and Dr. Brown's surgery. See Dr. Brown deposition, Exhibit 3, page 21.

James England, Jr.

Mr. England, a rehabilitation counselor, reviewed records on the claimant and opined that the claimant had knowledge that could be usable in plumbing or building maintenance, as well as customer service or selling sprinkler systems. See England deposition, pages 10-11. He opined that the claimant was a younger worker with a high school education. See England deposition, page 12. He opined that the claimant could not go back to sprinkler fitting, but that there were other job opportunities. See England deposition, page 13. Mr. England opined that the claimant was employable from September 10, 2003, through June 29, 2004, based on the prior functional capacity evaluation, Dr. Strecker's restrictions, and Dr. Brown's testimony. See England deposition, page 14-15.

Mr. England testified that the claimant was probably not at maximum medical improvement when Dr. Brown recommended further treatment. See England deposition, page 21. Also, based on Dr. Russell's report, the claimant was probably not at maximum medical improvement. Even though he was not at maximum medical improvement, Mr. England opined that the claimant could have worked during the time from Dr. Strecker's release until Dr. Brown's surgery. See England deposition, page 23.

Dr. Bernstein

Dr. Bernstein, a psychologist and vocational expert, testified that the claimant was not employable based on the elbow injury alone. Since it has gotten worse it has impacted his ability to work. He testified that if the claimant takes care of certain things, he would be good for retraining. He opined that the claimant is skilled, intellectually average, and young enough to be retrained. If the claimant was retrained, he believed that the claimant could then find work in the engineering sciences or building inspection fields.

He testified that based on Dr. Strecker's restrictions the claimant was employable. He also testified that

based on Dr. Brown's restrictions that the claimant was employable. He opined that based on the claimant's extensive history of hunting, that it was possible that he could work in a sporting goods store. Dr. Bernstein testified that the claimant was employable from a physical standpoint, but not a psychological standpoint. He opined that the claimant should get some psychological treatment and then he could be retrained. Dr. Bernstein opined that the claimant has a preexisting posttraumatic stress disorder from his service in the Marines and has an adjustment disorder. He testified that work was not a substantial factor in his psychological conditions. Dr. Bernstein testified that the claimant does get out on occasion and that he wants to work, but his child immobilizes him. Dr. Bernstein also testified that the claimant was an assassin in the Marines and that he had many traumatic events. Noises now make him hit the ground and he does not hunt as often, but he does not avoid shooting. He opined that the claimant's adjustment disorder resulted from a number of stressors including not working, his divorce, supporting his son, and his medical condition.

FUTURE MEDICAL CARE

Awards may and often do include an allowance for the expense of reasonable future medical care and treatment. Rana v. Landstar TLC, 46 S.W.3d 614, 622 (Mo. App. W.D. 2001). Future medical care and treatment are provided for in Section 287.140.1, which states:

In addition to all other compensation, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

This statute has been interpreted to mean that a claimant is entitled to compensation for care and treatment "which gives comfort [relieves] even though restoration to soundness [cure] is beyond avail." Id. Of course, the appellant bears the burden to prove an entitlement to benefits for such care and treatment. Id. To prove an entitlement to workers' compensation benefits for future medical care and treatment, an employee must show something more than a possibility that he will need such medical care and treatment. Id. However, the claimant is not required to present evidence demonstrating with absolute certainty a need for future medical care and treatment. Id. Rather, it is sufficient for the claimant to show his/her need for additional medical care and treatment by a "reasonable probability." Id. "'Probable' means founded on reason and experience which inclines the mind to believe but leaves room for doubt." Id. "In determining whether this standard has been met, the court should resolve all doubt in favor of the employee." Id. "[A] claimant is not required to present evidence of specific medical treatment or procedures which will be necessary in the future in order to receive an award for future medical care." Id. Such a requirement could "put an impossible and unrealistic burden" upon the claimant. Id. The only requirement is that the finding of a need for future medical care and treatment be shown to be reasonably probable and be founded upon reason and experience. Id.

Future medical may be awarded even though the claimant has reached maximum medical improvement. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271 (Mo.App. 1996). "The worker's compensation act permits the allowance for the cost of future medical treatment in a permanent partial disability award." Sharp v. New Mac Electric Cooperative, 92 S.W.3d 351, 354 (Mo. App. S.D. 2003). There is no requirement for a claimant to prove specific medical treatment will be required in order for payment of future medical expenses to be made available. Id. What is required is proof there is a "reasonable probability" that additional medical care will be needed to treat the work-related injury. Id.

The medical records contain no reference to further medical care after Dr. Brown released the claimant from treatment on January 4, 2005. Dr. Hanaway and Dr. Russell recommended additional surgery in 2003, but the record discloses no additional procedures indicated by either expert after January 4, 2005. Dr. Bernstein opined that the claimant required "appropriate psychological services ... to move forward with his life. The psychological factors are confusing him and hindering his movement vocationally." See Exhibit J. However, none of the evidence shows that the claimant's psychological disorders resulted from the accident. To the contrary, the conditions appear to be a product of the claimant's military service. See Exhibit J. In addition, Dr. Bernstein testified that other aspects of the condition are the claimant's divorce and child custody situation. The claimant testified that no doctor has told him that he needs future medical care. For those reasons, the claim for future medical care is denied.

TEMPORARY DISABILITY

Compensation must be paid to the injured employee during the continuance of temporary disability but not more than 400 weeks. Section 287.170, RSMo 1994. Temporary total disability benefits are intended to cover healing periods and are unwarranted beyond the point at which the employee is capable of returning to work. Brookman v. Henry Transp., 924 S.W.2d 286, 291 (Mo.App. E.D. 1996). Temporary awards are not intended to compensate the Employee after the condition has reached the point where further progress is not expected. Id.

When an employee is injured in an accident arising out of and in the course of his employment and is unable to work as a result of his or her injury, Section 287.170, RSMo 2000, sets forth the TTD benefits an employer must provide to the injured employee. Section 287.020.7, RSMo 2000, defines the term "total disability" as used in workers' compensation matters as meaning the "inability to return to any employment and not merely mean[ing the] inability to return to the employment in which the employee was engaged at the time of the accident." The test for entitlement to TTD "is not whether an employee is able to do some work, but whether the employee is able to compete in the open labor market under his physical condition." Thorsen v. Sachs Electric Co., 52 S.W.3d 611, 621 (Mo.App. W.D. 2001). Thus, TTD benefits are intended to cover the employee's healing period from a work-related accident until he or she can find employment or his condition has reached a level of maximum medical improvement. Id. Once further medical progress is no longer expected, a temporary award is no longer warranted. Id. The claimant bears the burden of proving his entitlement to TTD benefits by a reasonable probability. Id. In determining whether an employee is totally disabled, the main issue is whether any employer, in the usual course of business, would reasonably be expected to employ claimant in his present physical condition. Boyles v. USA Rebar Placement, Inc., 26 S.W.3d 418, 424 (Mo.App 2000).

In this case, the defense paid temporary total disability benefits from September 2, 2003, through September 10, 2003, and from June 30, 2004, through January 4, 2005. The claimant alleges that he is entitled to temporary total disability benefits from September 11, 2003, to June 29, 2004, 41 5/7 weeks, and again from January 5, 2005, through the date of the hearing, August 12, 2005, 31 3/7 weeks.

Looking to the first period from September 11, 2003, to June 29, 2004, the claimant had received treatment for his elbow from Dr. Wagner and then Dr. Strecker. The claimant underwent a functional capacity evaluation revealing restrictions on the claimant's work abilities. Dr. Strecker released the claimant from treatment on September 10, 2003, at maximum medical improvement. He informed the claimant that he would not be able to return to working as a sprinkler fitter and placed permanent restrictions on him of no lifting greater than fifty pounds overhead, no lifting greater than fifty pounds to his shoulder, and no lifting of greater than seventy-five pounds to his waist. The claimant testified that he elected not look for any work after Dr. Strecker released him. Both of the vocational experts testified that there would be jobs available for the claimant based on Dr. Strecker's restrictions. Dr. Russell, the claimant's other expert, opined that the claimant should have been able to work in some capacity at that time as well. Dr. Brown testified that the claimant could have tried to work and if he was unable to, then his restrictions could be adjusted. The claimant elected to do not look for a job. He claims that he went to the Illinois Rehabilitation Service and reported that he was not at maximum medical improvement. This is inconsistent with Dr. Strecker's records and deposition testimony.

On the other hand, Dr. Hanaway opined that the claimant should "remain off work for treatment for 120 additional days" after December 16, 2003. He testified that the claimant would need that amount of time off work to get an appointment with a surgeon that he recommended and have additional surgery and rehabilitation on his arm. See Dr. Hanaway deposition, page 21. He also opined that the claimant "was temporarily and totally disabled from that injury to" March 2, 2005. See Exhibit 10.

This claim is similar to Boyles, supra. In Boyles, the claimant was a candidate for future surgery, but was found to be at maximum medical improvement until he received that surgery. Boyles, 26 S.W.3d at 425. The claimant was also told that he would need to change careers whether he had the surgery or not. Id. The Court held that the claimant was not entitled to temporary total disability benefits after the doctor found him to be at maximum medical improvement, even though future surgery was contemplated. Id. The Court held that the claimant needed to prove a reasonable inference that no employer could have been expected to hire the claimant under his condition during the time off. Id. The reasonableness of such an inference depends partly on how long the claimant's reaching the point of maximum medical progress will take. Id. If it is short, then it is reasonable to

infer that the claimant could not compete on the open labor market. If it is long, then it is never reasonable to make such a reference. Id. When looking at a five month period, the Court held that the claimant was not entitled to temporary total disability benefits and credited the employer/insurer for those five months, because the claimant offered no evidence that he was temporarily, totally disabled for that period. Id. at 426. Although Boyles was overruled on the issue of standard of review in Hampton v. Big Boy Steel Erections, 121 S.W.3d 220 (Mo. banc 2003), the facts and reasoning of the case regarding temporary total disability appear to be sound and valid.

Based on the above facts, the claimant is not entitled to temporary total disability benefits from September 11, 2003, through June 29, 2004, because he failed to prove that he was unemployable for that period. Although he knew that he could not return to his prior vocation, he did not look for work, and both vocational experts opined that there was work available based on the claimant's restrictions and limitations.

Looking to the second period, from January 5, 2005, through the date of the hearing, August 12, 2005, Dr. Brown released the claimant with permanent restrictions after his surgery on January 4, 2005. Dr. Brown told the claimant that he could not return to work as a sprinkler fitter. The claimant elected to not look for any work, and the experts testified that there would be work available within his restrictions. The claimant presented no evidence to show that he was unemployable in the open labor market during that period. Although Dr. Hanaway opined that the claimant was temporarily totally disabled from January 5, 2005, through March 2, 2005, the claimant's disability appears to be permanent, and the better evidence is that the claimant could obtain employment if he elected to apply for employment, although employment in his prior position was not an option. Dr. Bernstein suggested that the claimant's psychological disorders from his military service are a significant factor causing the claimant's lack of employability. However, the evidence does not support a finding that the work accident caused these psychological disorders. Dr. Bernstein attributes them to the claimant's military service, the claimant's divorce, child custody provisions, and his financial condition. See Exhibit J. Dr. Bernstein opined that the claimant would benefit from vocational retraining. See Exhibit J. However, vocational rehabilitation is voluntary on the part of the employer in Missouri. Section 287.143, RSMo 2000.

The claimant is and has been very active. He testified that he is able to hunt and even allows a web page to use his picture for advertising purposes. He has skills that allow him to arrange hunts to be filmed for the web page. He has also received products in exchange for his hunting expertise and product testing. The claimant has failed to prove that he is entitled to additional temporary total disability benefits.

PERMANENT DISABILITY

Workers' compensation awards for permanent partial disability are authorized pursuant to section 287.190. "The reason for [an] award of permanent partial disability benefits is to compensate an injured party for lost earnings." Rana v. Landstar TLC, 46 S.W.3d 614, 626 (Mo. App. W.D. 2001). The amount of compensation to be awarded for a PPD is determined pursuant to the "SCHEDULE OF LOSSES" found in section 287.190.1. "Permanent partial disability" is defined in section 287.190.6 as being permanent in nature and partial in degree. Further, "[a]n actual loss of earnings is not an essential element of a claim for permanent partial disability." Id. A permanent partial disability can be awarded notwithstanding the fact the claimant returns to work, if the claimant's injury impairs his efficiency in the ordinary pursuits of life. Id. "[T]he Labor and Industrial Relations Commission has discretion as to the amount of the award and how it is to be calculated." Id. "It is the duty of the Commission to weigh that evidence as well as all the other testimony and reach its own conclusion as to the percentage of the disability suffered." Id. In a workers' compensation case in which an employee is seeking benefits for PPD, the employee has the burden of not only proving a work-related injury, but that the injury resulted in the disability claimed. Id.

In a workers' compensation case, in which the employee is seeking benefits for PPD, the employee has the burden of proving, inter alia, that his or her work-related injury caused the disability claimed. Rana, 46 S.W.3d at 629. The standard for determining whether Claimant was permanently and totally disabled is whether the person is able to compete on the open job market, and the key test to be answered is whether an employer, in the usual course of business, would reasonably be expected to employ the person in his present physical condition. Joultzhouser v. Central Carrier Corp., 936 S.W.2d 908, 912 (Mo.App. S.D. 1997). "Total disability" is defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. Section 287.020.7, RSMo 2000. The test for permanent total

disability is whether, given the claimant's situation and condition, he or she is competent to compete in the open labor market. Sutton v. Masters Jackson Paving Co., 35 S.W.3d 879, 884 Mo.App. 2001). The question is whether an employer in the usual course of business would reasonably be expected to hire the claimant in the claimant's present physical condition, reasonably expecting the claimant to perform the work for which he or she is hired. Id.

In this case, Dr. Strecker rated the claimant at fifteen percent of the elbow, but testified that it did not include the fracture. Dr. Brown rated the claimant at fifteen percent of the elbow, and testified that it included all the surgeries and the elbow fracture. Dr. Hanaway originally rated the claimant at forty-five percent of the elbow, but later rated him at twenty-five percent. He then testified that this was an error on his behalf. None of the evidence supports a finding that the claimant is permanently unemployable in the open labor market due exclusively to the last accident alone. This issue is discussed in more detail below. Based on the evidentiary record, the claimant suffered a thirty percent permanent partial disability to his left elbow as a result of this work incident.

SECOND INJURY FUND

To recover against the Second Injury Fund based upon two permanent partial disabilities, the claimant must prove the following:

1. The existence of a permanent partial disability preexisting the present injury of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed. Section 287.220.1, RSMo 1994; Leutzinger v. Treasurer, 895 S.W.2d 591, 593 (Mo.App. E.D. 1995).
2. The extent of the permanent partial disability existing before the compensable injury. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).
3. The extent of permanent partial disability resulting from the compensable injury. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).
4. The extent of the overall permanent disability resulting from a combination of the two permanent partial disabilities. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).
5. The disability caused by the combination of the two permanent partial disabilities is greater than that which would have resulted from the pre-existing disability plus the disability from the last injury, considered alone. Searcy v. McDonnell Douglas Aircraft, 894 S.W.2d 173, 177 (Mo.App. E.D. 1995).
6. In cases arising after August 27, 1993, the extent of both the preexisting permanent partial disability and the subsequent compensable injury must equal a minimum of fifty weeks of disability to "a body as a whole" or fifteen percent of a major extremity unless they combine to result in total and permanent disability. Section 287.220.1, RSMo 1994; Leutzinger, supra.

To analyze the impact of the 1993 amendment to the law, the courts have focused on the purposes and policies furthered by the statute:

The proper focus of the inquiry as to the nature of the prior disability is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition. That potential is what gives rise to prospective employers' incentive to discriminate. Thus, if the Second Injury Fund is to serve its acknowledged purpose, "previous disability" should be interpreted to mean a previously existing condition that a cautious employer could reasonably perceive as having the potential to combine with a work related injury so as to produce a greater degree of disability than would occur in the absence of such

condition. A condition satisfying this standard would, in the absence of a Second Injury Fund, constitute a hindrance or obstacle to employment or reemployment if the employee became unemployed. Wuebbeling v. West County Drywall, 898 S.W.2d 615, 620 (Mo.App. E.D. 1995).

Section 287.220.1 contains four distinct steps in calculating the compensation due an employee, and from what source, in cases involving permanent disability: (1) The employer's liability is considered in isolation - "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 preexisting disability;" (2) Next, the degree or percentage of the employee's disability attributable to all injuries existing at the time of the accident is considered; (3) The degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the combined disability; and (4) The balance becomes the responsibility of the Second Injury Fund. Nance v. Treasurer of Missouri, 85 S.W.3d 767, 772 (Mo.App. W.D. 2002).

The standard for determining whether Claimant was permanently and totally disabled is whether the person is able to compete on the open job market, and the key test to be answered is whether an employer, in the usual course of business, would reasonably be expected to employ the person in his present physical condition. Joulzhouser v. Central Carrier Corp., 936 S.W.2d 908, 912 (Mo.App. S.D. 1997).

In this case, the claimant suffered a thirty percent permanent partial disability to his left elbow as a result of this work incident as discussed above.

Dr. Hanaway was the only expert to evaluate the claimant's preexisting conditions. Based on the claimant's verbal medical history, Dr. Hanaway opined that the claimant suffered the following preexisting permanent partial disabilities: twenty-five percent of the right shoulder from a fractured clavicle in 1991, twenty-five percent of the left ankle from a fractured ankle with open reduction with a halo immobilization around his foot and a screw through the lower end of the tibia, twenty-five percent of the low back from lumbar disc herniation at L4-5 related to a work related injury. See Dr. Hanaway deposition, pages 27, 28, 29. He appeared to opine that the claimant's overall disability exceeds the simple sum of the claimant's individual disabilities. See Dr. Hanaway deposition, page 32. Dr. Hanaway did not review any medical records regarding preexisting conditions. See Dr. Hanaway deposition, page 57. He rated preexisting permanent partial disabilities by taking a history of an injury from the claimant and then "decide twenty-five percent." See Dr. Hanaway deposition, page 59.

Based on the evidence as a whole, the claimant suffers from an overall disability of seventy-five percent or the equivalent of 300 weeks of disability and the sum of his individual disabilities equals 259.75 weeks. Therefore, the claimant is awarded 40.25 of permanent partial disability benefits from the Second Injury Fund.

The claimant may suggest that he is permanently and totally disabled as a result of a combination of his preexisting permanent partial disabilities and his work-related permanent partial disability to his elbow. The claimant offered Dr. Bernstein's finding that the claimant is totally disabled due to his psychological disorders and his physical condition. See Exhibit J. Although Dr. Bernstein testified that the claimant is unemployable in the open labor market, he also testified that the condition was only temporary based on the claimant's need for psychological care. Thus, the condition is not permanent. He also testified that the claimant's psychological disorder resulted from the claimant's military service, his divorce, financial instability, and his child custody conditions. The record does not support a finding that the claimant's psychological disorder is a preexisting permanent partial disability. It could be a progressive disorder that deteriorated after the accident due to other events. Based on Dr. Bernstein's testimony, the psychological disorder is not permanent at all, because the condition is treatable. Based on the above, no permanent partial disability benefits are awarded.

Dr. Hanaway also testified that the claimant "is unable to work. He is permanently and totally disabled." See Dr. Hanaway deposition, page 32. Dr. Hanaway also testified that he could not defer to the opinion of a vocational expert unless the position would not aggravate the claimant's arm condition. See Dr. Hanaway deposition, page 63. Mr. England recommended light or sedentary positions in plumbing, building maintenance, parts supply, and sales. See England deposition, page 11. These positions appear to meet the restrictions set by the treating physicians. Mr. England's findings appear to be more specific and credible given Mr. England's education and training as a vocational counselor.

PENALTIES

Section 287.560, RSMo 1994, provides, inter alia, as follows:

The division, any administrative law judge thereof or the commission, shall have power to issue process, subpoena witnesses, administer oaths, examine books and papers, and require the production thereof, and to cause the deposition of any witness to be taken and the costs thereof paid as other costs under this chapter. Any party shall be entitled to process to compel the attendance of witnesses and the production of books and papers, and at his own cost to take and use depositions in like manner as in civil cases in the circuit court. ... Each witness shall receive the fees and mileage prescribed by law in civil cases, but the same shall not be allowed as costs to the party in whose behalf the witness was summoned unless the persons before the hearing is had shall certify that the testimony of the witness was necessary. All costs under this section shall be approved by the division and paid out of the state treasury from the fund for the support of the Missouri division of workers' compensation; provided, however, that if the division or commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them...

The courts have set forth the standard for determination.

The record unequivocally demonstrates that the employer has offered absolutely no ground, reasonable or otherwise, for its refusal to pay the ... benefits it clearly owed. The record also reflects that no basis for such a refusal could be offered, for the statute is clear and the facts supporting the obligation are uncontested. Stillwell v. Universal Const. Co., 922 S.W.2d 448, 457 (Mo.App. W.D. 1996).

In this case, the claimant prevailed on issues relating to permanent disability, but the defense prevailed on other issues. Given the mixed result, none of the parties appear to have prosecuted or defended its case without reasonable grounds. The claimant elected not to brief the issue, so the claimant's theory was not disclosed. The claimant also requested penalties under Sections 287.128.2, 287.203, 287.790 RSMo 2000, but elected not to present any evidence or brief his case. The penalty for violation of Sections 287.128 and 287.790, are fines or imprisonment if convicted in a criminal proceeding for violation of a misdemeanor. The Division of Workers' Compensation has a unit to investigate fraud and noncompliance with the Workers' Compensation Law. The Division's Fraud and Noncompliance Unit is directed to investigate the claimant's allegations of fraud and noncompliance if the claimant will submit any facts to the unit relating to fraud or noncompliance with the Missouri Workers' Compensation Law.

The Second Injury Fund offered a fifty dollar bill from a deposition that apparently never took place. See Exhibit I. The Second Injury Fund presented a logical and understandable reason for its request for recovery of the court reporter cancellation fee:

The Second Injury Fund requests the \$50.00 cancellation fee of Mr. Neathery's deposition. Mr. Nichols argued that Mr. Neathery had car trouble in Troy, Illinois. The deposition was scheduled fro 2:00 pm, while he was still in Troy, Illinois. The Second Injury Fund contends that there was ample time for Mr. Neathery to call and cancel the deposition, without incurring the cost of the court reporter. The attorney is not requesting costs for her time spent waiting for Mr. Neathery. See Second Injury Fund brief.

However, under the above standard, the Second Injury Fund offered no evidence that the claimant prosecuted his case without reasonable grounds, because the claimant recovered benefits from the Second Injury Fund. If the claimant failed to appear for a deposition, the claimant's conduct may be reprehensible, but the Second Injury Fund failed to prove its case under our statute. The claimant could be compelled to reimburse and adverse party for such conduct if the adverse party proves service of notice in a civil case under Rules 61.01(f) and 61.01 (d)(4) of the Missouri Rules of Civil Procedure. However, the tenor of our statute, Section 287.560, RSMo 2000, does not appear to incorporate sanctions under the rules of discovery. While any party may "take and use depositions in like manner as in civil case in the circuit court," the statute appears to have very specific provisions and standards regarding costs of discovery and party abuse of process. These specific provisions for costs

appear to control the general grant of power to take and use depositions in like manner as in civil cases.

MILEAGE

The claimant seeks mileage for the treatment that he received from June 29, 2004, until his release on January 4, 2005.

When an employee is required to submit to medical examinations or necessary medical treatment at a place outside of the local or metropolitan area from the place of injury or the place of his residence, the employer or its insurer shall advance or reimburse the employee for all necessary and reasonable expenses; except that an injured employee who resides outside the state of Missouri and who is employed by an employer located in Missouri shall have the option of selecting the location of services provided in this section either at a location within 100 miles of the injured employee's residence, place of injury or place of hire. Section 287.140.1, RSMo 2000.

The claimant testified that he is not a resident of Missouri, and lives in Girard, IL. The employer is located in Missouri. Under this section, the employer can choose a medical provider within one hundred miles of his residence or the place of the accident. Dr. Brown's office in St Louis County, Missouri, is within a hundred miles of the place of the accident, which was also in St Louis County, Missouri. The claimant did not present any evidence regarding the distance from the claimant's residence to Dr. Brown's office or to Gateway Rehabilitation Company. The claimant offered no evidence on the distance from the claimant's residence to the places of treatment or the dates he received treatment other than the treatment records. Based on these facts the claimant is not entitled to any mileage reimbursement for the treatment that he received.

Date: _____

Made by: _____

Edwin J. Kohner
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation