

**FINAL AWARD ALLOWING COMPENSATION**

(Modifying Amended Award and Decision of Administrative Law Judge)

Injury No.: 04-136988

Employee: Glen Nickelson  
Employer: Washington County  
Insurer: Missouri Association of Counties  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.<sup>1</sup> We have reviewed the evidence and briefs, heard oral argument, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the June 22, 2011, amended award and decision of the administrative law judge (ALJ). We adopt the findings, conclusions, decision, and amended award of the ALJ to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

We find that the ALJ erred in concluding that employer waived its right to choose employee's medical providers for his future medical care.

In pertinent part, § 287.140.1 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.' ... 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. 1995). This principle, however, is subject to an important caveat. If the employer is on notice that the employee needs treatment and fails or refuses to provide it, the employee may select his or her own medical provider and hold the employer liable for the costs thereof. *Jones v. Dan D. Services, L.L.C.*, 91 S.W.3d 214, 220-21 (Mo. App. 2002); *Sheehan v. Springfield Seed and Floral, Inc.*, 733 S.W.2d 795, 798 (Mo. App. 1987); *Hawkins v. Emerson Electric Co.*, 676 S.W.2d 872, 880 (Mo. App. 1984).

*Martin v. Town & Country Supermarkets*, 220 S.W.3d 836, 848 (Mo. App. 2007).

In this case, employee requested additional medical treatment based on the opinions of Dr. Volarich. Employer refused to provide said treatment to employee, as employee's treating physicians had previously released him from their care. In accordance with the provisions listed above, employee was then free to select his own medical provider and attempt to hold employer liable for the costs of that specific treatment. In essence,

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<sup>1</sup> Statutory references are to the Revised Statutes of Missouri 2003 unless otherwise indicated.

Employee: Glen Nickelson

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employer was waiving its right to select employee's medical provider as to that specific treatment. However, going forward, employer maintains its right to direct all of employee's medical treatment.

Based upon the aforementioned, we agree with the ALJ's award of future medical care, but find that the ALJ erred in concluding that employer waived its right to select employee's medical providers for employee's future medical care. We find that employer shall be in control of the selection of employee's medical providers.

The amended award and decision of Administrative Law Judge Carl Strange, as modified herein, is attached and incorporated by 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 23<sup>rd</sup> day of March 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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James Avery, Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

**AMENDED AWARD**

Employee: Glen Nickelson

Injury No. 04-136988

Dependents: N/A

Employer: Washington County

Additional Party: Second Injury Fund

Insurer: Missouri Association of Counties  
(TPA: Gallagher Bassett Services)

Hearing Date: February 7, 2011

Checked by: CS/rf

**SUMMARY OF FINDINGS**

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease? August 3, 2004
5. State location where accident occurred or occupational disease contracted: Washington County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident happened or occupational disease contracted: Employee was driving down the road when he was broadsided by another driver who ran a stop sign which caused injury to his low back.

12. Did accident or occupational disease cause death? N/A
13. Parts of body injured by accident or occupational disease: Low Back.
14. Nature and extent of any permanent disability: (See Findings).
15. Compensation paid to date for temporary total disability: \$7,333.50
16. Value necessary medical aid paid to date by employer-insurer: \$45,905.44
17. Value necessary medical aid not furnished by employer-insurer: Denied (See Findings).
18. Employee's average weekly wage: \$556.75
19. Weekly compensation rate:  

\$371.16 for temporary total disability and permanent total disability; and  
\$354.05 for permanent partial disability.
20. Method wages computation: By Agreement.
21. Amount of compensation payable:
  - a. Employee awarded permanent partial disability from the employer-insurer in the amount of \$17,702.50 (See Findings).
  - b. Employee's awarded permanent partial disability benefits from Second Injury Fund in the amount of \$7,437.53 (See Findings).
22. Second Injury Fund liability: Yes (See Findings).
23. Future requirements awarded: Employer-insurer directed to pay future medical aid pursuant to Section 287.140 RSMo (See Findings).

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

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

## FINDINGS OF FACT AND RULINGS OF LAW

On February 7, 2011, the employee, Glen Nickelson, appeared in person and by his attorney, Kenneth Seufert, for a hearing for a final award. The employer-insurer was represented at the hearing by its attorney, David Weidner. The Second Injury Fund was represented at the hearing by Assistant Attorney General Jonathan Linter. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows.

### UNDISPUTED FACTS:

1. On or about August 3, 2004, Washington County was operating under and subject to the provisions of the Missouri Workers' Compensation Act and its liability was insured by Missouri Association of Counties with a third party administrator of Gallagher Bassett Services.
2. On or about August 3, 2004, the employee was an employee of Washington County and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. On or about August 3, 2004, the employee sustained an accident during the course of his employment.
4. The employer had notice of employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage was \$556.75, his rate for temporary total disability and permanent total disability is \$371.16, and his rate for permanent partial disability is \$354.05.
7. The employee's injury is medically causally related to the work injury on or about August 3, 2004.
8. The employer has furnished \$45,905.44 in medical aid to employee.
9. The employer has paid temporary total disability benefits at a rate of \$371.16 per week for a total of \$7,333.50.
10. The employee reached maximum medical improvement on March 11, 2008, so employer and Second Injury Fund liability, if any, for permanent total disability benefits will begin on March 12, 2008.

### ISSUES:

1. Previously Incurred Medical Aid.
2. Future Medical Aid.
3. Nature and Extent of Disability.
4. Liability of the Second Injury Fund.

**EXHIBITS:**

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Report of Dr. David Volarich dated July 6, 2009;
- B. Curriculum Vitae of Dr. David Volarich;
- C. Letter to Dr. David Volarich from Employee Attorney;
- D. Claim for Compensations from 04-120274, 04-076814, 04-136988, and 06-059192 along with Reports of Injury from 04-076814 and 04-136988;
- E. Medical Records from 04-120274, 04-076814, 04-136988, and 06-059192;
- F. Medical Records of St. Louis University Hospital related to 2000 amputation of the left ring finger;
- G. Medical Records of St. John's Mercy Medical Center related to 1989 injuries to head, neck, and right shoulder;
- H. Records of the Division of Workers' Compensation;
- I. Pharmacy Records;
- J. Work History;
- K. Education History;
- L. Report of James M. England of November 16, 2009;
- M. Curriculum Vitae of James M. England;
- N. Deposition of Dr. David Volarich;
- O. Deposition of James M. England;
- P. Prescription Printout from Pharmax Pharmacy; and
- Q. Correspondence between Parties concerning Pain Management and Further Treatment.

Employer-Insurer's Exhibits

- 1. Deposition of Dr. James Coyle;
- 2. Deposition of Dr. David Fagan; and
- 3. Deposition of Dr. Anthony Sudekum.

**FINDINGS OF FACT:**

Based on the testimony of Glen Nickelson ("Employee") and the medical records and reports admitted, I find as follows:

At the time of the hearing, Employee was 60 years old and currently living in Washington County, Missouri. In 1970, Employee graduated from Potosi High School and has only received on the job training since that time (Employee Exhibit K). Prior to beginning work for Washington County, Missouri ("Employer") in 1993, Employee worked making meat hooks, assembling steering columns, performed maintenance work, operated heavy equipment, welded, worked as a foreman, drove a truck, and ran a drag line down the river (Employee Exhibit J). On August 3, 2004, Employee was driving down the road when he was broadsided by another driver

who ran a stop sign which caused injury to his low back. An MRI taken on May 11, 2005 indicated that there was a central disc bulge at L3-4 causing mild effacement of the thecal sac, a right paracentral focal disc protrusion and bulge causing mild effacement of the thecal sac at L4-5, and a disc bulge to the left with bilateral neural foramina stenosis at L5-S1 secondary to a combination of bulge and degenerative facet disease (Employee Exhibit E). Dr. David Volarich examined Employee and opined that Employee suffered a 25% permanent partial disability of the body as a whole referable to his lumbosacral spine (Employee Exhibits A & N).

Prior to his primary injury of August 3, 2004, Employee had pre-existing injuries to his left wrist, right wrist, left hand, neck, low back, and right shoulder. On July 26, 2004, Employee underwent a nerve conduction study that indicated he had bilateral carpal tunnel syndrome and bilateral ulnar tunnel syndrome (Employee Exhibit E). On February 15, 2005, Dr. Sudekum performed a right open carpal tunnel release and a right open ulnar tunnel release on Employee. On March 1, 2005, Dr. Sudekum performed a left open carpal tunnel release and a left ulnar tunnel release on Employee. In 1989, Employee was in a crane accident and injured his neck, low back and right shoulder (Employee Exhibit G). Employee settled his claim against the employer-insurer for 10% body as a whole referable to his neck and head along with 6% of his right shoulder in 89-061684 (Employee Exhibit H). On August 3, 2004, Employee was removing a heavy transmission that slipped and injured his right shoulder. On June 29, 2005, Dr. David Fagan performed an arthroscopy of Employee's right shoulder with debridement of subscapularis tendon, open rotator cuff repair and open Mumford procedure (Employee Exhibit E). On February 1, 2006, Dr. Fagan released Employee to full duty and opined that he suffered a 12% permanent partial disability at the level of the shoulder (Employee Exhibit E, (Employer-Insurer Exhibit 2). In 2000, Employee suffered a degloving injury to his left ring finger that resulted in a complete amputation of his left ring finger at the metacarpal phalangeal joint (Employee Exhibit F). Employee settled his claim against the employer-insurer for 110% of his left ring finger in 00-160620 (Employee Exhibit H). Dr. David Volarich examined Employee and opined that prior to the primary injury in this case that Employee had a 40% permanent partial disability of the right upper extremity and left upper extremity at the level of the wrist, a 20% permanent partial disability of the left hand, a 15% permanent partial disability of the body as a whole referable to his neck, a 20% permanent partial disability of the body as a whole referable to right upper extremity at the shoulder for the 1989 injured shoulder, a 35% permanent partial disability of the right upper extremity at the level of the shoulder for the 2004 injured shoulder, and a 15% permanent partial disability of the body as a whole referable to his lumbosacral spine (Employee Exhibits A & N).

At the time of the hearing, Employee continued to have problems with his low back that included difficulty walking, difficulty bending, problems climbing, pain, numbness, and difficulty squatting or stooping. In his report, Dr. Volarich opined that Employee in order to maintain his current state, required ongoing care for his pain syndrome using modalities including but not limited to narcotics and non-narcotic medications, muscle relaxants, physical therapy, and similar treatments as directed by the current standard of medical practice for symptomatic relief of his complaints. Further, Dr. Volarich opined that Employee would benefit from treatments at a pain clinic because of his ongoing cervical and lumbar pain syndromes including epidural steroid injections, foraminal nerve root blocks, trigger point injections, TENS units, and ongoing therapy with oral medications for his chronic pain syndrome. Although no

additional surgeries are indicated presently, Dr. Volarich noted that there was always the potential that the orthopedic fixating hardware placed in the neck might become infected, loosen or fail and would need to be removed or replaced (Employee Exhibit A). At the time of his deposition, Dr. Volarich further discussed the need for future medical treatment and specifically attributed the need for future medical treatment to Employee's injuries in 04-120274, 04-076814, 04-136988, and 06-059192 (Employee Exhibit N, Deposition Pages 39-41).

#### **APPLICABLE LAW:**

- Although the workers' compensation law must be liberally construed in favor of the employee, the burden is still on the claimant to prove all material elements of her claim. *Melvia v Morris*, 422 S.W.2d 335 (Mo. App.1968), and *Marcus v Steel Constructors, Inc.*, 434 S.W.2d 475 (Mo.App.1968).
- Under Section 287.140.1 "the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance, and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury". Further, the employer is given the right to select the authorized treating physician. Subsection 1 also provides that the employee has the right to select his own physician at his own expense. The employer, however, may waive its right to select the treating physician by failing or neglecting to provide necessary medical aid. *Emert v Ford Motor Company*, 863 S.W. 2d 629 (Mo.App. 1993); *Shores v General Motors Corporation*, 842 S.W. 2d 929 (Mo.App.1992) and *Hendricks v Motor Freight*, 520 S.W. 2d 702, 710 (Mo.App.1978).
- In *Martin v Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo. 1989), the Court held that when the employee testified that her visits to the hospital and various doctors were the product of her fall and that the bills she received were the result of those visits, a sufficient factual basis exists for the commission to award compensation when the bills are offered into evidence and they relate to the professional services rendered as shown by the medical records in evidence. However, the employer, of course, may challenge the reasonableness or fairness of these bills or may show that the medical expenses incurred were not related to the injury in question. See also *Metcalf v Castle Studios*, 946 S.W.2d 282, 287 (Mo.App. W.D. 1997)
- The standard of proof for entitlement to an allowance for future medical aid cannot be met simply by offering testimony that it is "possible" that the claimant will need future medical treatment. *Modlin v Sunmark, Inc.*, 699 S.W. 2d 5, 7 (Mo.App.1995). The cases establish, however, that it is not necessary for the claimant to present "conclusive evidence" of the need for future medical treatment. *Sifferman v Sears Roebuck and Company*, 906 S.W. 2d 823, 838 (Mo. App.1995). To the contrary, numerous cases have made it clear that in order to meet their burden, claimants are required to show by a "reasonable probability" that they will need future medical treatment. *Dean v St. Lukes Hospital*, 936 S.W. 2d 601 (Mo.App.1997). In addition, employees must establish through competent medical evidence that the medical care requested, "flows from the accident" before the employer is responsible. *Landers v Chrysler Corporation*, 963 S.W. 2d 275, (Mo.App.1997).
- The test for finding the Second Injury Fund liable for permanent partial disability benefits is set forth in Section 287.220.1 RSMo as follows:

“All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a pre-existing permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining re-employment if the employee becomes unemployed, and the pre-existing permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no pre-existing disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee’s disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for.”

## **RULINGS OF LAW:**

### ***Issue 1. Previously Incurred Medical Aid***

Employee has requested an order requiring employer-insurer to reimburse him for certain medical expenses incurred for treatment of his work-related injuries. In support of his claim, Employee has offered the medical records and medical bills of Dr. Pairat Vibulakaopun along with the pharmacy bills of Pharmax Pharmacy (Employee Exhibits R & P). After reviewing the records, it is unclear whether or not the treatment and medication was for the work related injuries or other non-related injuries. Consequently, I find that Employee failed to meet his burden of proof that the employer-insurer is liable for the previously incurred medical aid. Accordingly, Employee's claim for previously incurred medical expenses is denied.

***Issue 2. Future Medical Aid***

Employee is seeking an award ordering employer-insurer to provide him with future medical aid to cure and relieve the effects of his work injury as a result of the August 3, 2004 injury. In his report, Dr. Volarich opined that Employee in order to maintain his current state, required ongoing care for his pain syndrome using modalities including but not limited to narcotics and non-narcotic medications, muscle relaxants, physical therapy, and similar treatments as directed by the current standard of medical practice for symptomatic relief of his complaints. Further, Dr. Volarich opined that Employee would benefit from treatments at a pain clinic because of his ongoing cervical and lumbar pain syndromes including epidural steroid injections, foraminal nerve root blocks, trigger point injections, TENS units, and ongoing therapy with oral medications for his chronic pain syndrome (Employee Exhibit A). At the time of his deposition, Dr. Volarich further discussed the need for future medical treatment and specifically attributed the need for future medical treatment to Employee's injuries in 04-120274, 04-076814, 04-136988, and 06-059192 (Employee Exhibit N, Deposition Pages 39-41). Based on the evidence, I find that Dr. Volarich is the most credible person regarding future medical aid and that Employee has met his burden of proof by offering substantial competent evidence to support an award of future medical care resulting from the August 3, 2004 work injury. Therefore, the employer-insurer is ordered to provide all medical treatment and medication that is necessary to cure and relieve Employee from the effects of his low back injury for the remainder of his life.

Under Section 287.140.1, Employer is given the right to select the authorized treating physician, but may waive its right to select the treating physician by failing or neglecting to provide necessary medical aid. Employee has offered correspondence between the parties concerning his repeated requests for treatment in support of a finding that Employer has waived its right to select the treating physician (Employee Exhibit Q). Based on the evidence, I find that Employer has waived its right to select the treating physician.

***Issue 3. Nature and Extent of Disability & Issue 4. Liability of the Fund***

Based on the evidence, I find that Employee sustained a twelve and one-half percent (12.5%) permanent partial disability of the body as a whole which is equal to 50 weeks as a result of his low back injury and associated symptomology. Accordingly, Employer is therefore directed to pay Employee the sum of \$354.05 per week for 50 weeks for a total of \$17,702.50.

Employee in this case has also alleged that the Second Injury Fund is liable for permanent partial disability benefits. Employee has pre-existing disabilities involving his left wrist, right wrist, left hand, neck, low back, and right shoulder. With regard to his left wrist, I find that Employee suffered a thirty-two percent (32%) permanent partial disability at the level of the wrist or 56 weeks of compensation. With regard to his right wrist, I find that Employee suffered a twenty-five percent (25%) permanent partial disability at the level of the wrist or 43.75 weeks of compensation. With regard to his neck, I find that Employee suffered a five percent (5%) permanent partial disability of the body as a whole or 20 weeks of compensation which does not meet threshold for Second Injury Fund liability purposes. With regard to his low back, I find that Employee suffered a five percent (5%) permanent partial disability of the body as a whole or 20 weeks of compensation which does not meet threshold for Second Injury Fund

liability purposes. With regard to his right shoulder, I find that Employee suffered a twenty-six percent (26%) permanent partial disability at the level of the shoulder or 60.32 weeks of compensation.

After considering all of the evidence, I further find that Employee’s pre-existing injuries referable to his right wrist and left wrist along with the last injury to his right shoulder combined synergistically to create a total disability of 231.077 weeks. This total disability is based on a loading factor of 10%. After deducting the percentage of disability that existed prior to the last injury (160.07 weeks), and the disability resulting from the last injury, considered alone (50 weeks), from the total disability attributable to all injuries or conditions existing at the time of the last injury (231.077 weeks), the remaining balance to be paid by the Second Injury Fund is equal to 21.007 weeks. The Second Injury Fund is therefore directed to pay to Employee the sum of \$354.05 per week for 21.007 weeks for a total award of permanent partial disability equal to \$7,437.53.

**ATTORNEY’S FEE:**

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

**INTEREST:**

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

Made by:

\_\_\_\_\_  
Carl Strange  
*Administrative Law Judge*  
*Division of Workers' Compensation*

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

A true copy: Attest:

\_\_\_\_\_  
Ms. Naomi Pearson