

**FINAL AWARD ALLOWING COMPENSATION**  
(Affirming Award and Decision of Administrative Law Judge  
with Supplemental Opinion)

Injury No.: 02-087791

Employee: James K. Pippen  
Dependents: Jacob Pippen, Zachary Pippen and Brandy Henderson  
Employer: Missouri Highway and Transportation Commission  
Insurer: Self-Insured  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

**Discussion**

Second Injury Fund liability

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid in "all cases of permanent disability where there has been previous disability." The Second Injury Fund is liable for permanent total disability benefits where the evidence demonstrates that: (1) the employee suffered a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with a prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007). Section 287.220.1 requires us to first determine the compensation liability of the employer for the last injury, considered alone. If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, not the Second Injury Fund, is responsible for the entire amount of compensation. "Pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003).

We affirm and adopt the administrative law judge's findings that, as a result of the work injury, employee sustained a 20% permanent partial disability of the body as a whole referable to his lumbar spine, a 7.5% permanent partial disability of the body as a whole referable to the cervical spine, and a 30% permanent partial disability of the body as a whole referable to psychiatric injury. Dr. Cohen and Wilbur Swearingen agree that employee's need to lie down to control pain renders him unemployable in the open labor market; we find their opinions to be persuasive on this point. The pertinent question is whether employee's need to lie down to control pain is a product of the work injury considered in isolation.

Employee: James K. Pippen

It is uncontested that employee suffered a preexisting low back injury in the form of a herniated L5-S1 disc which required surgical intervention in 1994. Employee and the Second Injury Fund argue that employee's preexisting low back condition was asymptomatic or non-disabling, such that employer should be held liable for permanent total disability benefits. We are not persuaded. Both Dr. Cohen and Dr. Wagner rated preexisting permanent partial disability referable to employee's low back condition, and employee testified that he had on-and-off back pain and limited his lifting prior to the work injury. We note also that Dr. Cohen testified that employee's need to lie down to control pain is a result of the 2002 primary injury and his preexisting low back condition. See *Transcript*, page 186.

After careful consideration, we find persuasive Dr. Cohen's testimony (and so find) that employee's need to lie down is a product of both the work injury and employee's preexisting low back condition. It follows that employee's need to lie down does not result from the work injury alone, and in turn, that employee is not permanently and totally disabled as a result of the work injury considered in isolation.

We conclude, instead, that employee is permanently and totally disabled owing to a combination of his preexisting disabling condition in combination with the effects of the work injury. For this reason, we affirm the administrative law judge's conclusion that the Second Injury Fund is liable for permanent total disability benefits.

**Conclusion**

We affirm and adopt the award of the administrative law judge, as supplemented herein.

The award and decision of Administrative Law Judge Carl Strange, issued November 19, 2012, is attached and incorporated by this reference.

We approve and affirm 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 10<sup>th</sup> day of July 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING  
John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

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Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

**FINAL AWARD**

Employee: James K. Pippen

Injury No. 02-087791 & 03-017442

Dependents: Jacob Pippen, Zachary Pippen, and Brandy Henderson

Employer: Missouri Highway and Transportation Commission

Additional Party: Second Injury Fund

Insurer: Self-insured

Hearing Date: August 15, 2012

Checked by: CS/rm

**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? 02-087791: August 22, 2002; 03-017442: January 23, 2003.
5. State location where accident occurred or occupational disease contracted: 02-087791: Butler County, Missouri; 03-017442: Ripley 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: 02-087791: Employee was trying to fix his dump truck tailgate when the

chains broke causing injury to his lumbar spine, cervical spine, and body as a whole. 03-017442: Employee tripped on the outriggers of a backhoe while putting up a sign and fell with his arms out causing injury to his bilateral wrists.

12. Did accident or occupational disease cause death? N/A.
13. Parts of body injured by accident or occupational disease: 02-087791: lumbar spine, cervical spine, and body as a whole referable to depression; 03-017442: right wrist and left wrist.
14. Nature and extent of any permanent disability: (See Findings).
15. Compensation paid to date for temporary total disability: 02-087791: \$14,783.78; 03-017442: \$0.00.
16. Value necessary medical aid paid to date by employer-insurer: 02-087791: \$40,408.44; 03-017442: \$76.00.
17. Value necessary medical aid not furnished by employer-insurer: 02-087791: \$0.00; 03-017442: \$4,020.74 (See Findings).
18. Employee's average weekly wage: Not calculated.
19. Weekly compensation rate: \$310.77 for temporary total disability, permanent total disability, and permanent partial disability.
20. Method wages computation: By Agreement.
21. Amount of compensation payable:  
  
02-087791:
  - a. Employee awarded permanent partial disability from the employer in the amount of \$71,477.10 (See Findings).
  - b. Employee awarded permanent total disability benefits from Second Injury Fund at a rate of \$310.77 per week beginning May 3, 2008 (See Findings).  
03-017442:
  - a. Employee awarded permanent partial disability and disfigurement from the employer in the amount of \$16,936.97 (See Findings).
  - b. Employee awarded previously incurred medical aid from the employer in the amount of \$4,020.74 (See Findings).
  - c. Employee's claim against the Second Injury Fund is denied (See Findings).

22. Second Injury Fund liability: Yes (See Findings).

23. Future requirements awarded: Yes (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 costs plus 25% of all payments hereunder in favor of the following attorneys for necessary legal services rendered to the claimant: Ronald Little and Sheila Blaylock.

## **FINDINGS OF FACT AND RULINGS OF LAW**

On August 15, 2012, the employee, James K. Pippen, appeared in person and by his attorneys, Ronald Little and Sheila Blaylock, for a hearing for a final award. The employer was represented at the hearing by its attorney, John W. Koenig. The Second Injury Fund was represented by Assistant Attorney General, Jonathan Lintner. 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.

### **Injury Number 02-087791**

#### **UNDISPUTED FACTS:**

1. On or about August 22, 2002, Missouri Highway and Transportation Commission was operating under and subject to the provisions of the Missouri Workers' Compensation Act and was a self-insured employer.
2. On or about August 22, 2002, the employee was an employee of Missouri Highway and Transportation Commission and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. On or about August 22, 2002, the employee sustained an accident arising out of and in 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 rate for temporary total disability, permanent total disability, and permanent partial disability is \$310.77.
7. The employee's injury is medically causally related to the work injury occurring on or about August 22, 2002.
8. The employer has furnished \$40,408.44 in medical aid to employee.
9. The employer has paid temporary total disability benefits at a rate of \$310.77 per week for a total of \$14,783.78.
10. Employee reached maximum medical improvement on December 4, 2003.

#### **ISSUES:**

1. Future Medical Aid.
2. Nature and Extent of Disability.
3. Liability of the Second Injury Fund.
4. Dependency under Schoemehl.

**Injury Number 03-017442**

**UNDISPUTED FACTS:**

1. On or about January 23, 2003, Missouri Highway and Transportation Commission was operating under and subject to the provisions of the Missouri Workers' Compensation Act and was a self-insured employer.
2. On or about January 23, 2003, the employee was an employee of Missouri Highway and Transportation Commission and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. On or about January 23, 2003, the employee sustained an accident arising out of and in 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 rate for temporary total disability, permanent total disability, and permanent partial disability is \$310.77.
7. The employer has furnished \$76.00 in medical aid to employee.
8. The employer has paid no temporary total disability benefits.
9. The employee reached maximum medical improvement on January 16, 2009.

**ISSUES:**

1. Medical Causation.
2. Previously Incurred Medical Aid.
3. Future Medical Aid.
4. Additional Temporary Total Disability.
5. Nature and Extent of Disability.
6. Liability of the Second Injury Fund.
7. Dependency under Schoemehl.

**Injury Number 02-087791 & Injury Number 03-017442**

**EXHIBITS:**

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Deposition of Dr. Wayne Stillings;
- B. Depositions of Dr. Raymond Cohen;
- C. Deposition of Wilber Swearingin;
- D. Medical report of Dr. Matthew Gornet;
- E. Medical records and bills of Cox Medical Center;
- F. Medical records of Dr. Robert Hufft;

- G. Medical records of Les Lamoureux Chiropractic Centre;
- H. Medical records of Dr. Patrick LeCorps;
- I. Medical records and bills of Poplar Bluff Medical Partners;
- J. Medical records of Three Rivers Healthcare;
- K. Medical records of Brain & Neurospine Clinic;
- L. Medical records of Southeast Missouri Hospital;
- M. Medical records and bills of Poplar Bluff Neurology Center;
- N. Medical records of St. John's Clinic;
- O. Medical records and bills of St. John's Health Center;
- P. Records of Missouri Division of Workers' Compensation;
- Q. Correspondence Requesting/Denying Additional Treatment;
- R. Attorney Contract for James Pippin and Dependents; and
- S. Deposition of Dr. Scott Gibbs.

#### Employer's Exhibits

- 1. Medical records of Dr. John Wagner;
- 2. Deposition of Dr. John Wagner;
- 3. Medical records of Dr. Michael Jarvis; and
- 4. Deposition of Dr. Michael Jarvis.

#### **FINDINGS OF FACT:**

Based on the testimony of James K. Pippen ("Employee") and the medical records and reports admitted, I find as follows:

At the time of the hearing, Employee was 49 years old. After graduating high school in Doniphan, Employee attended a one year trade school to learn heating and cooling. His past employment history includes working in heating and cooling, farming, working construction, running heavy equipment, selling cars, selling insurance and driving a truck. Employee began working for Missouri Highway and Transportation Commission ("Employer") in 2000. On August 22, 2002 and January 23, 2003, Employee was divorced, but was supporting and living with his three children: Jacob Pippin, date of birth August 27, 1999; Zachary Pippin, date of birth May 2, 1996; and Brandy Henderson, date of birth August 27, 1987.

On August 22, 2002, Employee was lifting on his dump truck tailgate after the chain broke when he felt a pop and strain in his back and neck. Although Employee had prior back problems, Employee had a new pain that ran down into his leg. After reporting it to his supervisor, he was sent to Lamoreoux Chiropractic in Doniphan by his Employer. Dr. Lamoreoux provided treatment for Employee's low back, neck, and left shoulder (Employee's Exhibit G). Employer then sent Employee to Dr. LeCorps for treatment of his neck and back that included injections, physical therapy, pain medication, and anti-inflammatories (Employee's Exhibit H).

After treating with Dr. LeCorps, Employee was referred to Dr. Scott Gibbs who treated his back and neck. After treating Employee for several months, Dr. Gibbs opined that Employee

had neck pain likely related to mild cervical spondylosis at C5-C6, bilateral carpal tunnel syndrome confirmed by EMG/NCV studies, and back and right leg pain likely related to sacroiliac joint dysfunction (Employee's Exhibit K). At his deposition, Dr. Gibbs testified that he did not recommend surgery for Employee's back and neck due to risk factors, but did recommend surgery for his bilateral carpal tunnel. Dr. Gibbs further testified that Employee had prior "surgery but he had an intervening period of time wherein he was doing very well and not consistently seeing a physician for such back and leg pain. So I judge from that there is a strong temporal relationship between this event that he alleged and his onset of these pains, and therein I arrive at the conclusion that these pains in his neck and arm and his back and leg are related to this event" (Employee's Exhibit S).

On January 23, 2003, Employee was carrying sign posts and tripped over the downriggers on a backhoe. When he fell, Employee reached out and fell on both out-stretched hands which resulted in immediate pain in both hands. Employee reported it to Employer who declined to provide substantial treatment for it. Consequently, Employee received diagnosis and treatment at his own cost at Cox Medical Center, Poplar Bluff Neurology and St. John's Medical Center. On December 5, 2008, Employee had surgery on his right hand in December of 2008 by Dr. Woodbury. As a result of the surgery, Employee has a one inch solid white scar on the bottom of his right palm. The total cost of his bilateral carpal tunnel treatment was \$4,020.74 (Employee's Exhibits E & O).

Prior to his work injuries of August 22, 2002 and January 23, 2003, Employee had several pre-existing conditions. First, Employee had diabetes with associated diabetic lower extremity neuropathy and need to avoid sun due to medications. Second, Employee suffered a right medial collateral ligament injury as a result of running sprints in the Marines. As a result of that injury, Employee has knee popping, difficulty kneeling, and difficulty squatting. Finally, Employee was involved in a motor vehicle accident in 1992 and injured his low back. In 1994, Dr. Hufft performed a right L5-S1 laminectomy to repair Employee's low back (Employee's Exhibit F). Following the surgery, Employee recovered from his low back symptoms which allowed him to work without restrictions.

Employee has been evaluated several times a result of his work injuries of August 22, 2002 and January 23, 2003. On October 27, 2003, Dr. Matthew Gornet evaluated Employee and opined that Employee's work-related injury was a substantial factor in causing his C5-6 injury and L5-S1 injury, his disability, as well as his requirement for further treatment. Further, Dr. Gornet noted that he based his opinion on the fact that Employee was not seeking any substantial treatment for his back prior to the injury (Employee's Exhibit D).

On January 12, 2004, Employee was evaluated by Dr. John Wagner who opined that Employee's hand symptoms are on the basis of a diabetic neuropathy and not related to any work, Employee has some degenerative disc disease in the cervical spine with a diffusely bulging disc which are causing his complaints, Employee's bilateral numbness in his legs is a result of his degenerative lumbar spine, and Employee sustained a sprain injury with a 2.5% permanent partial disability as a result of his August 22, 2002 work injury (Employer's Exhibit 2).

On January 27, 2005, Dr. Raymond Cohen evaluated Employee and opined that as a result of the August 22, 2002 work-related injury Employee suffered an 1) aggravation of lumbar

degenerative spine disease at L5-S1, 2) lumbar myofascial pain disorder, 3) Cervical disc bulge at C5-C6, and 4) depression. Further, Dr. Cohen opined that as a result of the August 22, 2002 work-related injury Employee suffered a 15% permanent partial disability of the whole person at the level of the cervical spine and a 30% permanent partial disability of the whole person at the level of the lumbar spine. With regard to Employee's pre-existing injuries, Dr. Cohen opined that Employee had 1) diabetes mellitus with lower extremity peripheral neuropathy, 2) right knee internal derangement, and 3) prior lumbar surgery for disc herniation on the right at L5-S1. After noting that Dr. Hurley had previously rated Employee's depression, Dr. Cohen opined that Employee had a pre-existing 20% permanent partial disability of the whole person at the level of the lumbar spine, a pre-existing 20% permanent partial disability of the right knee, and a pre-existing 25% permanent partial disability of the whole person due to diabetes. With regard to his pre-existing conditions combining with the August 22, 2002 work-related injury, Dr. Cohen opined that they create a greater overall disability than their simple sum and that due to this combination of disabilities, Employee is permanently and totally disabled and not capable of gainful employment and that his pre-existing conditions or disabilities were a hindrance or obstacle to his employment or re-employment. Finally, Dr. Cohen noted that Employee was not at maximum medical improvement with regard to his hand injury of January 23, 2003, and needs an NCV (Employee's Exhibit B).

On March 18, 2010, Dr. Raymond Cohen evaluated Employee again and opined that as a result of the August 22, 2002 work-related injury Employee suffered an 1) aggravation of lumbar degenerative spine disease at L5-S1, 2) chronic lumbar myofascial pain disorder, 3) Cervical disc bulge at C5-C6, symptomatic, 4) cervical strain, and 5) depression. Dr. Cohen reiterated his pre-existing diagnoses, August 22, 2002 permanent partial disability ratings, and pre-existing permanent partial disability ratings. With regard to the January 23, 2003 work-related injury, Dr. Cohen opined that Employee suffered a 30% permanent partial disability of the right wrist and a 15% permanent partial disability of the left wrist. Further, Dr. Cohen opined that his work is a substantial factor in the injuries that occurred on August 22, 2002 and January 23, 2003, as well as the disabilities that he sustained. After noting that Employee was permanently and totally disabled, Dr. Cohen stated that he would defer to a licensed vocational expert with regard to whether there were any jobs available for him in the open labor market within his restrictions. At the time of his second deposition, Dr. Cohen testified that Employee would not be able to return to any work when considering the restrictions from the August 2002 accident, the aggravation of the lumbar spine, the cervical disc bulge and strain, the symptomatic at C5-6 from that August 22, 2002 injury, the pain from that August 22, 2002 injury and the depression from that injury and those restrictions, and then subsequent treatment for those injuries (Employee's Exhibit B).

On January 3, 2007, Dr. Wayne Stillings evaluated Employee and opined that the August 22, 2002 work-related injury was a substantial factor in causing Employee to suffer a mood disorder with an associated 40% permanent partial psychiatric disability and a pain disorder with a 25% permanent partial psychiatric disability. After noting that Employee had a pre-existing 10% permanent partial psychiatric disability due to a paranoid and avoidant personality trait, Dr. Stillings noted the January 23, 2003 work-related injury was a substantial factor in causing Employee to suffer a pain disorder with an associated 5% permanent partial psychiatric disability. Finally, Dr. Stillings opined that Employee will require future psychiatric treatment in

relation to the August 22, 2002 work injury which would consist of either individual or combination antidepressant treatment in addition to a sleep aid. After noting that Employee would also benefit from supportive psychotherapy and cognitive and behavioral strategies to deal with his pain, Dr. Stillings opined that Employee will need ongoing treatment to stabilize his psychiatric condition and prevent deterioration into a more severe depressive state (Employee's Exhibit A).

On October 5, 2007 and June 7, 2010, Mr. Wilbur Swearingin, a vocational rehabilitation expert, evaluated Employee and opined that Employee was permanently and totally disabled as a result of the August 22, 2002 work-related injury in combination with his pre-existing impairments without consideration of any additional disability resulting from the fall in January of 2003. At the time of his deposition, Mr. Swearingin testified that he believes that Employee would not be able to return to any work when looking just at the problems from the August 2002 accident, the aggravation of the lumbar spine, the cervical disc bulge and strain, pain and depression, and then subsequent surgery and treatment for those injuries (Employee's Exhibit C).

On November 13, 2009, Dr. Michael Jarvis examined Employee and opined that Employee has not sustained permanent psychological damage as a result of the work related incidents. Further, Dr. Jarvis noted that at the time he examined Employee that given the recent psychiatric treatment including medication, it is too early for Employee to be declared at maximum medical improvement. At his deposition, Dr. Jarvis testified that he agrees with Dr. Stillings on the surface of things, but not the causation. In addition to stating that work related psychiatric condition was neither substantial nor permanent, Dr. Jarvis testified that whatever contribution that his back injury has to his psychiatric issue will go away as soon as this thing is resolved (Employer's Exhibit 4).

At the time of the hearing, Employee continued to have problems with his low back and neck that included pain, locking neck, problems fishing, problems playing sports and difficulty with certain activities. Further, Employee testified that he continued to have problems with his hands that included decreased strength, numbness in palms, difficulty driving, decreased grip, and more problems with the right hand than the left hand. With regard to his depression, Employee testified that he had no issues prior to August 22, 2002, and now feels useless along with not wanting to talk to people. Employee testified that he attempted to perform work following his termination by Employer, but was unable to perform the necessary requirements of each job. With regard to his preexisting issues, Employee continues to have problems that include popping, giving out, pain and difficulty with activities. Finally, Employee noted that he has to lie down during the day and take hydrocodone and ibuprofen for his symptoms.

#### **APPLICABLE LAW:**

- Although the worker's compensation law must be liberally construed in favor of the employee, the burden is still on the claimant to prove all material elements of his claim. *Melvies v Morris*, 422 S.W.2d 335 (Mo. App.1968), and *Marcus v Steel Constructors, Inc.*, 434 S.W.2d 475 (Mo.App.1968). Therefore the employee has the burden of proving not only that he sustained an accident, which arose out of and in the course of his employment, but also that there is a medical causal relationship between his accident and

the injuries and the medical treatment for which he is seeking compensation. *Griggs v A. B. Chance Company*, 503 S.W.2d 697 (Mo.App.1973).

- Under the version of Section 287.020.2 RSMo. that was in effect at the time of the employee's accident, the term accident is defined to include only those injuries that are "clearly work related". Under this section an injury is "clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor".
- Under the version of Section 287.140.1 RSMo. that was in effect at the time of the employee's accident, "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).
- Temporary total disability benefits are intended to cover the healing period and are not warranted beyond the point in which the employee is capable of returning to work.

Temporary total disability benefits are not intended to compensate the employee after her condition has reached the point where further progress is not expected. *Brookman v Henry Transportation*, 924 S.W. 2d 286 (Mo.App.1996). See also *Williams v Pillsbury Company*, 694 S.W. 2d 488, 489 (Mo.App.1985). The pivotal question in determining whether an employee is totally disabled is whether any employer, in the usual course of business, would reasonably be expected to employ the claimant in her present physical condition. *Brookman Id.* at 290.

- The test for finding the Second Injury Fund liable for permanent partial disability benefits is set forth in Section 287.220.1 RSMo as follows:

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

- The test for finding the Second Injury Fund liable for permanent total disability is set forth in Section 287.220.1 RSMo., as follows:

If the previous disability or disabilities, whether from compensable injuries or otherwise, and the last injury together result in permanent total disability, the minimum standards under this subsection for a body as a whole injury or a major

extremity shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employee at the time of the last injury is liable is less than compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under Section 287.200 out of a special fund known as the "Second Injury Fund" hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in Section 287.414.

- Section 287.020.7 RSMo. provides as follows:  
The term "total disability" as used in this chapter shall mean the inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident.
- The phrase "the inability to return to any employment" has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration, in the manner that such duties are customarily performed by the average person engaged in such employment. *Kowalski v M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922(Mo.App.1992). The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. *Reiner v Treasurer of the State of Missouri*, 837 S.W.2d 363, 367(Mo.App.1992). Total disability means the "inability to return to any reasonable or normal employment". *Brown v Treasurer of the State of Missouri*, 795 S.W.2d 479, 483(Mo.App.1990). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Id.* The key is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person's physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Reiner* at 365. See also *Thornton v Haas Bakery*, 858 S.W.2d 831,834(Mo.App.1993).
- Under Missouri Workers' Compensation Law, when an Employee is entitled to compensation and death ensues, compensation ceases when the Employee dies from a cause other than his work injury, "unless there are surviving dependents at the time of death." Section 287.230(2) RSMo. *Schoemehl v. Treasurer of the State of Missouri*, 217 S.W.3d 900, (Mo. 2007). The word 'dependent' is defined to mean a relative by blood or marriage of a deceased Employee, who is actually dependent for support, in whole or in part, upon the Employee's wages at the time of the injury. Section 287.240(4) RSMo. "As such any "dependent" would have to be born and dependent at the time of the injury." *Schoemehl*, 217 S.W.3d at 902.
- Section 287.240 RSMo. provides that "[a] natural . . . or adopted child or children . . . under the age of eighteen years" will be ". . . conclusively presumed to be totally dependent for support upon a deceased Employee."

**RULINGS OF LAW:*****Issue 1. Future Medical Aid (Injury Number 02-087791)***

Employee is seeking an award ordering Employer to provide him with future medical aid to cure and relieve the effects of his work injury as a result of the August 22, 2002 injury. Employee primarily relies on the opinions of Dr. Raymond Cohen and Dr. Wayne Stillings in support of his position that he will require additional medical aid. Employer primarily relies on the opinions of Dr. John Wagner and Dr. Michael Jarvis in support of their position that they are not liable for future medical aid benefits. Dr. Wagner opined that “there is nothing in his history or physical exam that would make one believe” that his hand symptoms are at all related to any work injury but instead related to neuropathy from his diabetes. At the time of his evaluation, Dr. Wagner did not have the EMG study that clearly identifies Employee’s bilateral carpal tunnel and ignores Dr. Gibbs diagnoses of the bilateral carpal tunnel and states “I believe that this is work related” (Employee's Exhibits K & M). Further, Dr. Wagner fails to provide a reasonable explanation how his cervical injury is not work related when Employee’s previously asymptomatic neck is symptomatic now following the August 22, 2002 injury. The evidence is very clear that Employee was having no neck problems immediately prior to August 22, 2002. Consequently, I find the opinions of Dr. Wagner to be not credible. After noting that Employee was not at maximum medical improvement and was benefiting from treatment, Dr. Jarvis opined that Employee’s work related psychiatric issue was neither substantial nor permanent and will go away as soon as this thing is resolved. Dr. Jarvis clearly has made up his mind about Employee’s psychiatric condition without having the benefit of evaluating Employee after he has reached maximum medical improvement. Dr. Jarvis’ opinion is clearly in conflict with the weight of the evidence. Therefore, I find Dr. Jarvis’ opinion to not be credible. It is important to note that the Employer and the Second Injury Fund have failed to offer sufficient credible evidence to discredit the opinions of Dr. Cohen and Dr. Stillings along with the testimony of the Employee. In addition to finding the Employee credible, I find the opinions of Dr. Cohen and Dr. Stillings to be more credible than any conflicting ones.

Based on the evidence, I find 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 22, 2002 work injury. Therefore, Employer is ordered to provide all medical treatment and medication that is necessary to cure and relieve Employee from the effects of his aggravation of low back injury, cervical injury, and depression in accordance with the opinions of Dr. Cohen and Dr. Stillings for the remainder of Employee’s life.

***Issue 1. Medical Causation (Injury Number 03-017442) & Issue 3. Future Medical Aid (Injury Number 03-017442)***

In accordance with my above findings, Employee’s credible testimony, Dr. Cohen’s opinions, Dr. Stillings opinions, and the medical records establish that Employee’s injury to right wrist and left wrist was directly caused by his January 23, 2003 work-related accident. I therefore find that Employee’s work-related accident on January 23, 2003, was a substantial factor in causing the injuries to Employee’s bilateral wrists and the resulting medical treatment.

Additionally, all of the medical bills submitted by Employee under Employee Exhibits E, O, & M are medically causally related to Employee's January 23, 2003 work-related accident. With regard to additional medical treatment for his bilateral wrists, Dr. Cohen opined that Employee will require additional medical care which may include a nerve conduction study followed by a hand surgery consultation. Based on the evidence and my above findings, I find that Employee has met his burden of proof by offering substantial competent evidence to support an award of future medical care resulting from the January 23, 2003 work injury. Therefore, Employer is ordered to provide all medical treatment and medication that is necessary to cure and relieve Employee from the effects of his bilateral carpal tunnel in accordance with the opinions of Dr. Cohen for the remainder of Employee's life.

***Issue 2. Previously Incurred Medical Aid (Injury Number 03-017442)***

Based on the evidence and my above findings, I find that Employer is obligated to pay to Employee the sum of \$4,020.74 for previously incurred medical expenses. I find that these medical expenses were causally related to Employee's January 23, 2003 work-related accident, and were reasonable and necessary to cure and relieve Employee from the effects of his injury. Employer is therefore directed to pay to Employee the sum of \$4,020.74 for previously incurred medical expenses.

***Issue 4. Additional Temporary Total Disability (Injury Number 03-017442)***

Employee is requesting an award for temporary total disability from December 5, 2008 to January 16, 2009 in the amount of \$1,892.34. It is important to note that Employee has failed to offer a sufficient credible medical opinion that he was totally disabled and that no employer, in the usual course of business, would reasonably be expected to employ him in his physical condition. After a thorough review of all the evidence, I therefore find that Employee has failed to meet his burden of proof that he was temporarily and totally disabled during that period as a result of the January 23, 2003 work-related accident. Employer is not required to pay and Employee is not entitled to receive any temporary total disability benefits in this matter.

***Issue 2. Nature and Extent of Disability & Issue 3. Liability of the Fund (Injury Number 02-087791)***

Employee has alleged that either Employer or the Second Injury Fund is liable for permanent and total disability benefits as a result of the August 22, 2002 work-related accident. In addition to Dr. Cohen's opinions, Employee has offered the opinion of vocational expert Wilbur Swearingin. It is important to note that the Employer and the Second Injury Fund have failed to offer sufficient credible evidence to discredit the opinions of Mr. Swearingin. Therefore, I find the opinions of Wilbur Swearingin to be credible. Both Dr. Cohen and Mr. Swearingin basically opined that Employee would not be able to return to any work when considering the restrictions from the August 2002 accident, the aggravation of the lumbar spine, the cervical disc bulge and strain, the symptomatic at C5-6 from that August 22, 2002 injury, the pain from that August 22, 2002 injury and the depression from that injury and those restrictions, and then subsequent treatment for those injuries. Since the August 22, 2002 work-related

accident involved an aggravation of a pre-existing condition to Employee's low back, the restrictions and resulting medical condition would necessarily and automatically include that pre-existing condition. Therefore, Dr. Cohen's and Mr. Swearingin's opinions along with the medical report unequivocally support a finding of permanent and total disability as a result of a combination of Employee's August 22, 2002 work-related injury and his pre-existing conditions. Consequently, I find that the Employer is not liable for permanent total disability benefits as a result of Employee's August 22, 2002 work-related injury.

Although Employer is not liable for permanent total disability benefits, Employer is still liable for permanent partial disability. Based on this evidence, I find that Employee suffered a 20% permanent partial disability of his body as a whole at the 400 week level referable to his lumbar spine, a 7.5% permanent partial disability of his body as a whole at the 400 week level referable to his cervical spine, and a total of 30% permanent partial psychiatric disability of the body as a whole at the 400 week level related to the August 22, 2002 work-related injury. This equals 230 weeks of disability. Employer is therefore directed to pay to Employee the sum of \$310.77 per week for 230 weeks for a total award of permanent partial disability relating to the August 22, 2002 work-related injury of \$71,477.10. Based on the evidence and stipulation of the parties, I find that Employee reached his maximum level of medical improvement and the end of the healing period on December 4, 2003. Employer's permanent partial disability payments should therefore have commenced on December 5, 2003, and would have continued for 230 weeks through May 2, 2008.

Based on the evidence and my above findings, the Second Injury Fund is clearly liable for permanent total disability benefits. Employee's pre-existing injuries and the August 22, 2002 work-related accident clearly combined to make Employee permanently and totally disabled. With regard to Employee's pre-existing injuries, I find that Employee had a 15% permanent partial disability of his body as a whole at the 400 week level referable to his lumbar spine, a 15% permanent partial disability of his right knee at the 160 week level, a 17.5% permanent partial disability of his body as a whole at the 400 week level referable to his diabetes, and a 5% permanent partial psychiatric disability of the body as a whole at the 400 week level. These pre-existing conditions equal 174 weeks of disability. I further find that these preexisting disabilities were a hindrance or obstacle to Employee's employment or reemployment and that Employee's preexisting disabilities and his August 22, 2002 work-related disabilities combined synergistically causing Employee to be permanently and totally disabled.

Since Employee's permanent partial disability rate (\$310.77) is the same as the agreed rate of compensation for permanent total disability, the Second Injury Fund is liable for the full amount of the permanent total disability benefits commencing May 3, 2008. The Second Injury Fund is therefore directed to pay to Employee the sum of \$310.77 per week commencing on May 3, 2008, and said weekly benefits shall be payable during the continuance of such permanent total disability for the lifetime of Employee pursuant to Section 287.200.1, unless such payments are suspended during a time in which the employee is restored to his regular work or its equivalent as provided in Section 287.200.2.

***Issue 4. Dependency under Schoemehl (Injury Number 03-017442)***

On the date of Employee's August 22, 2002 work-related accident, Employee was single and unmarried with three children under the age of 18: Jacob Pippin, date of birth August 27, 1999; Zachary Pippin, date of birth May 2, 1996; and Brandy Henderson, date of birth August 27, 1987. I find that Jacob Pippin, Zachary Pippin, and Brandy Henderson were, at the time of the work injury on August 22, 2002, conclusively presumed total dependents of Employee.

***Issue 5. Nature and Extent of Disability & Issue 6. Liability of the Fund (Injury Number 03-017442)***

Based on the evidence and my above findings, I find that Employee, as a direct result of his January 23, 2003 work-related accident, has suffered a 20% permanent partial disability of his right wrist at the 175 week level (35 weeks) and a 10% permanent partial disability of his left wrist at the 175 week level (17.5 weeks). I further find that Employee is entitled to 2 weeks of disfigurement for the scarring to his right wrist. As a result of Employee's January 23, 2003 work-related accident, I order Employer to pay to Employee 54.5 weeks at a rate of \$310.77 for a grand total of \$16,936.97.

Based on my above findings, Employee has been awarded permanent total benefits against the Second Injury Fund from the August 22, 2002 claim. Therefore, I find that Employee is not entitled to any further benefits against the Second Injury Fund from the January 23, 2003 work-related accident. The remaining issue of dependency under Schoemehl from the January 23, 2003 work-related accident is moot and shall not be ruled upon.

**ATTORNEY'S FEE:**

Ronald Little and Sheila Blaylock, attorneys at law, are allowed a fee of costs plus 25% of all sums awarded under the provisions of this award for necessary legal services rendered to Employee. The amount of this attorneys' 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:

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

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

Injury No.: 03-017442

Employee: James K. Pippen  
Dependents: Jacob Pippen, Zachary Pippen and Brandy Henderson  
Employer: Missouri Highway and Transportation Commission  
Insurer: Self-Insured  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the 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.

**Discussion**

*Employee's disability existing at the time of the primary injury*

The administrative law judge determined that employee is not entitled to benefits from the Second Injury Fund herein because employee was awarded permanent total disability benefits from the Second Injury Fund in his claim designated as Injury No. 02-087791 stemming from an August 22, 2002, work injury. But at the hearing before the administrative law judge (wherein the 2002 claim was heard together with this 2003 claim) the parties stipulated that employee did not reach maximum medical improvement from the effects of the August 2002 injury until December 4, 2003. Any determination that employee was permanently and totally disabled would be premature until that date, because "[o]ne cannot determine the level of permanent disability associated with an injury until it reaches a point where it will no longer improve with medical treatment." *Cardwell v. Treasurer of Mo.*, 249 S.W.3d 902, 910 (Mo. App. 2008). It follows that employee was not permanently and totally disabled as of January 23, 2003, the date that he suffered the primary injury at issue in this matter.

Section 287.220.1 RSMo requires us to assess "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 ..." (emphasis added). We conclude that Second Injury Fund liability is not precluded herein by virtue of the award of permanent total disability benefits in Injury No. 02-087791.

*Second Injury Fund liability*

Section 287.220.1 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there

Employee: James K. Pippen

has been previous disability." *Id.* We affirm and adopt the administrative law judge's findings with respect to the nature and extent of the primary injury and also employee's preexisting disabling conditions referable to the low back, diabetes, and the right knee. We also find persuasive and adopt the opinions from Dr. Cohen and Mr. Swearingen (and so conclude) that employee's preexisting disabling condition constituted hindrances or obstacles to employment. This is because we are convinced employee's preexisting conditions of ill had the potential to combine with a future work injury so as to cause a greater degree of disability than would have resulted in the absence of the conditions. See *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. 1995).

Accordingly, we calculate Second Injury Fund liability as follows: 37 weeks (for the primary right wrist injury) + 60 weeks (for the low back) + 70 weeks (for diabetes) + 24 weeks (for the right knee) = 191 weeks x 10% load factor = 19.1 weeks.

We conclude that the Second Injury Fund is liable for 19.1 weeks of permanent partial disability benefits at the stipulated rate of \$310.77, for a total of \$5,935.71.

**Conclusion**

We modify the award of the administrative law judge as to the issue of Second Injury Fund liability. The Second Injury Fund is liable for \$5,935.71 in permanent partial disability benefits.

The award and decision of Administrative Law Judge Carl Strange, issued November 19, 2012, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fees 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 10<sup>th</sup> day of July 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

\_\_\_\_\_  
John J. Larsen, Jr., Chairman

\_\_\_\_\_  
James G. Avery, Jr., Member

\_\_\_\_\_  
Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

**FINAL AWARD**

Employee: James K. Pippen

Injury No. 02-087791 & 03-017442

Dependents: Jacob Pippen, Zachary Pippen, and Brandy Henderson

Employer: Missouri Highway and Transportation Commission

Additional Party: Second Injury Fund

Insurer: Self-insured

Hearing Date: August 15, 2012

Checked by: CS/rm

**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? 02-087791: August 22, 2002; 03-017442: January 23, 2003.
5. State location where accident occurred or occupational disease contracted: 02-087791: Butler County, Missouri; 03-017442: Ripley 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: 02-087791: Employee was trying to fix his dump truck tailgate when the

chains broke causing injury to his lumbar spine, cervical spine, and body as a whole. 03-017442: Employee tripped on the outriggers of a backhoe while putting up a sign and fell with his arms out causing injury to his bilateral wrists.

12. Did accident or occupational disease cause death? N/A.
13. Parts of body injured by accident or occupational disease: 02-087791: lumbar spine, cervical spine, and body as a whole referable to depression; 03-017442: right wrist and left wrist.
14. Nature and extent of any permanent disability: (See Findings).
15. Compensation paid to date for temporary total disability: 02-087791: \$14,783.78; 03-017442: \$0.00.
16. Value necessary medical aid paid to date by employer-insurer: 02-087791: \$40,408.44; 03-017442: \$76.00.
17. Value necessary medical aid not furnished by employer-insurer: 02-087791: \$0.00; 03-017442: \$4,020.74 (See Findings).
18. Employee's average weekly wage: Not calculated.
19. Weekly compensation rate: \$310.77 for temporary total disability, permanent total disability, and permanent partial disability.
20. Method wages computation: By Agreement.
21. Amount of compensation payable:  
  
02-087791:
  - a. Employee awarded permanent partial disability from the employer in the amount of \$71,477.10 (See Findings).
  - b. Employee awarded permanent total disability benefits from Second Injury Fund at a rate of \$310.77 per week beginning May 3, 2008 (See Findings).  
03-017442:
  - a. Employee awarded permanent partial disability and disfigurement from the employer in the amount of \$16,936.97 (See Findings).
  - b. Employee awarded previously incurred medical aid from the employer in the amount of \$4,020.74 (See Findings).
  - c. Employee's claim against the Second Injury Fund is denied (See Findings).

22. Second Injury Fund liability: Yes (See Findings).

23. Future requirements awarded: Yes (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 costs plus 25% of all payments hereunder in favor of the following attorneys for necessary legal services rendered to the claimant: Ronald Little and Sheila Blaylock.

## **FINDINGS OF FACT AND RULINGS OF LAW**

On August 15, 2012, the employee, James K. Pippen, appeared in person and by his attorneys, Ronald Little and Sheila Blaylock, for a hearing for a final award. The employer was represented at the hearing by its attorney, John W. Koenig. The Second Injury Fund was represented by Assistant Attorney General, Jonathan Lintner. 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.

### **Injury Number 02-087791**

#### **UNDISPUTED FACTS:**

1. On or about August 22, 2002, Missouri Highway and Transportation Commission was operating under and subject to the provisions of the Missouri Workers' Compensation Act and was a self-insured employer.
2. On or about August 22, 2002, the employee was an employee of Missouri Highway and Transportation Commission and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. On or about August 22, 2002, the employee sustained an accident arising out of and in 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 rate for temporary total disability, permanent total disability, and permanent partial disability is \$310.77.
7. The employee's injury is medically causally related to the work injury occurring on or about August 22, 2002.
8. The employer has furnished \$40,408.44 in medical aid to employee.
9. The employer has paid temporary total disability benefits at a rate of \$310.77 per week for a total of \$14,783.78.
10. Employee reached maximum medical improvement on December 4, 2003.

#### **ISSUES:**

1. Future Medical Aid.
2. Nature and Extent of Disability.
3. Liability of the Second Injury Fund.
4. Dependency under Schoemehl.

**Injury Number 03-017442**

**UNDISPUTED FACTS:**

1. On or about January 23, 2003, Missouri Highway and Transportation Commission was operating under and subject to the provisions of the Missouri Workers' Compensation Act and was a self-insured employer.
2. On or about January 23, 2003, the employee was an employee of Missouri Highway and Transportation Commission and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. On or about January 23, 2003, the employee sustained an accident arising out of and in 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 rate for temporary total disability, permanent total disability, and permanent partial disability is \$310.77.
7. The employer has furnished \$76.00 in medical aid to employee.
8. The employer has paid no temporary total disability benefits.
9. The employee reached maximum medical improvement on January 16, 2009.

**ISSUES:**

1. Medical Causation.
2. Previously Incurred Medical Aid.
3. Future Medical Aid.
4. Additional Temporary Total Disability.
5. Nature and Extent of Disability.
6. Liability of the Second Injury Fund.
7. Dependency under Schoemehl.

**Injury Number 02-087791 & Injury Number 03-017442**

**EXHIBITS:**

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Deposition of Dr. Wayne Stillings;
- B. Depositions of Dr. Raymond Cohen;
- C. Deposition of Wilber Swearingin;
- D. Medical report of Dr. Matthew Gornet;
- E. Medical records and bills of Cox Medical Center;
- F. Medical records of Dr. Robert Hufft;

- G. Medical records of Les Lamoureux Chiropractic Centre;
- H. Medical records of Dr. Patrick LeCorps;
- I. Medical records and bills of Poplar Bluff Medical Partners;
- J. Medical records of Three Rivers Healthcare;
- K. Medical records of Brain & Neurospine Clinic;
- L. Medical records of Southeast Missouri Hospital;
- M. Medical records and bills of Poplar Bluff Neurology Center;
- N. Medical records of St. John's Clinic;
- O. Medical records and bills of St. John's Health Center;
- P. Records of Missouri Division of Workers' Compensation;
- Q. Correspondence Requesting/Denying Additional Treatment;
- R. Attorney Contract for James Pippin and Dependents; and
- S. Deposition of Dr. Scott Gibbs.

#### Employer's Exhibits

- 1. Medical records of Dr. John Wagner;
- 2. Deposition of Dr. John Wagner;
- 3. Medical records of Dr. Michael Jarvis; and
- 4. Deposition of Dr. Michael Jarvis.

#### **FINDINGS OF FACT:**

Based on the testimony of James K. Pippen ("Employee") and the medical records and reports admitted, I find as follows:

At the time of the hearing, Employee was 49 years old. After graduating high school in Doniphan, Employee attended a one year trade school to learn heating and cooling. His past employment history includes working in heating and cooling, farming, working construction, running heavy equipment, selling cars, selling insurance and driving a truck. Employee began working for Missouri Highway and Transportation Commission ("Employer") in 2000. On August 22, 2002 and January 23, 2003, Employee was divorced, but was supporting and living with his three children: Jacob Pippin, date of birth August 27, 1999; Zachary Pippin, date of birth May 2, 1996; and Brandy Henderson, date of birth August 27, 1987.

On August 22, 2002, Employee was lifting on his dump truck tailgate after the chain broke when he felt a pop and strain in his back and neck. Although Employee had prior back problems, Employee had a new pain that ran down into his leg. After reporting it to his supervisor, he was sent to Lamoreoux Chiropractic in Doniphan by his Employer. Dr. Lamoreoux provided treatment for Employee's low back, neck, and left shoulder (Employee's Exhibit G). Employer then sent Employee to Dr. LeCorps for treatment of his neck and back that included injections, physical therapy, pain medication, and anti-inflammatories (Employee's Exhibit H).

After treating with Dr. LeCorps, Employee was referred to Dr. Scott Gibbs who treated his back and neck. After treating Employee for several months, Dr. Gibbs opined that Employee

had neck pain likely related to mild cervical spondylosis at C5-C6, bilateral carpal tunnel syndrome confirmed by EMG/NCV studies, and back and right leg pain likely related to sacroiliac joint dysfunction (Employee's Exhibit K). At his deposition, Dr. Gibbs testified that he did not recommend surgery for Employee's back and neck due to risk factors, but did recommend surgery for his bilateral carpal tunnel. Dr. Gibbs further testified that Employee had prior "surgery but he had an intervening period of time wherein he was doing very well and not consistently seeing a physician for such back and leg pain. So I judge from that there is a strong temporal relationship between this event that he alleged and his onset of these pains, and therein I arrive at the conclusion that these pains in his neck and arm and his back and leg are related to this event" (Employee's Exhibit S).

On January 23, 2003, Employee was carrying sign posts and tripped over the downriggers on a backhoe. When he fell, Employee reached out and fell on both out-stretched hands which resulted in immediate pain in both hands. Employee reported it to Employer who declined to provide substantial treatment for it. Consequently, Employee received diagnosis and treatment at his own cost at Cox Medical Center, Poplar Bluff Neurology and St. John's Medical Center. On December 5, 2008, Employee had surgery on his right hand in December of 2008 by Dr. Woodbury. As a result of the surgery, Employee has a one inch solid white scar on the bottom of his right palm. The total cost of his bilateral carpal tunnel treatment was \$4,020.74 (Employee's Exhibits E & O).

Prior to his work injuries of August 22, 2002 and January 23, 2003, Employee had several pre-existing conditions. First, Employee had diabetes with associated diabetic lower extremity neuropathy and need to avoid sun due to medications. Second, Employee suffered a right medial collateral ligament injury as a result of running sprints in the Marines. As a result of that injury, Employee has knee popping, difficulty kneeling, and difficulty squatting. Finally, Employee was involved in a motor vehicle accident in 1992 and injured his low back. In 1994, Dr. Hufft performed a right L5-S1 laminectomy to repair Employee's low back (Employee's Exhibit F). Following the surgery, Employee recovered from his low back symptoms which allowed him to work without restrictions.

Employee has been evaluated several times a result of his work injuries of August 22, 2002 and January 23, 2003. On October 27, 2003, Dr. Matthew Gornet evaluated Employee and opined that Employee's work-related injury was a substantial factor in causing his C5-6 injury and L5-S1 injury, his disability, as well as his requirement for further treatment. Further, Dr. Gornet noted that he based his opinion on the fact that Employee was not seeking any substantial treatment for his back prior to the injury (Employee's Exhibit D).

On January 12, 2004, Employee was evaluated by Dr. John Wagner who opined that Employee's hand symptoms are on the basis of a diabetic neuropathy and not related to any work, Employee has some degenerative disc disease in the cervical spine with a diffusely bulging disc which are causing his complaints, Employee's bilateral numbness in his legs is a result of his degenerative lumbar spine, and Employee sustained a sprain injury with a 2.5% permanent partial disability as a result of his August 22, 2002 work injury (Employer's Exhibit 2).

On January 27, 2005, Dr. Raymond Cohen evaluated Employee and opined that as a result of the August 22, 2002 work-related injury Employee suffered an 1) aggravation of lumbar

degenerative spine disease at L5-S1, 2) lumbar myofascial pain disorder, 3) Cervical disc bulge at C5-C6, and 4) depression. Further, Dr. Cohen opined that as a result of the August 22, 2002 work-related injury Employee suffered a 15% permanent partial disability of the whole person at the level of the cervical spine and a 30% permanent partial disability of the whole person at the level of the lumbar spine. With regard to Employee's pre-existing injuries, Dr. Cohen opined that Employee had 1) diabetes mellitus with lower extremity peripheral neuropathy, 2) right knee internal derangement, and 3) prior lumbar surgery for disc herniation on the right at L5-S1. After noting that Dr. Hurley had previously rated Employee's depression, Dr. Cohen opined that Employee had a pre-existing 20% permanent partial disability of the whole person at the level of the lumbar spine, a pre-existing 20% permanent partial disability of the right knee, and a pre-existing 25% permanent partial disability of the whole person due to diabetes. With regard to his pre-existing conditions combining with the August 22, 2002 work-related injury, Dr. Cohen opined that they create a greater overall disability than their simple sum and that due to this combination of disabilities, Employee is permanently and totally disabled and not capable of gainful employment and that his pre-existing conditions or disabilities were a hindrance or obstacle to his employment or re-employment. Finally, Dr. Cohen noted that Employee was not at maximum medical improvement with regard to his hand injury of January 23, 2003, and needs an NCV (Employee's Exhibit B).

On March 18, 2010, Dr. Raymond Cohen evaluated Employee again and opined that as a result of the August 22, 2002 work-related injury Employee suffered an 1) aggravation of lumbar degenerative spine disease at L5-S1, 2) chronic lumbar myofascial pain disorder, 3) Cervical disc bulge at C5-C6, symptomatic, 4) cervical strain, and 5) depression. Dr. Cohen reiterated his pre-existing diagnoses, August 22, 2002 permanent partial disability ratings, and pre-existing permanent partial disability ratings. With regard to the January 23, 2003 work-related injury, Dr. Cohen opined that Employee suffered a 30% permanent partial disability of the right wrist and a 15% permanent partial disability of the left wrist. Further, Dr. Cohen opined that his work is a substantial factor in the injuries that occurred on August 22, 2002 and January 23, 2003, as well as the disabilities that he sustained. After noting that Employee was permanently and totally disabled, Dr. Cohen stated that he would defer to a licensed vocational expert with regard to whether there were any jobs available for him in the open labor market within his restrictions. At the time of his second deposition, Dr. Cohen testified that Employee would not be able to return to any work when considering the restrictions from the August 2002 accident, the aggravation of the lumbar spine, the cervical disc bulge and strain, the symptomatic at C5-6 from that August 22, 2002 injury, the pain from that August 22, 2002 injury and the depression from that injury and those restrictions, and then subsequent treatment for those injuries (Employee's Exhibit B).

On January 3, 2007, Dr. Wayne Stillings evaluated Employee and opined that the August 22, 2002 work-related injury was a substantial factor in causing Employee to suffer a mood disorder with an associated 40% permanent partial psychiatric disability and a pain disorder with a 25% permanent partial psychiatric disability. After noting that Employee had a pre-existing 10% permanent partial psychiatric disability due to a paranoid and avoidant personality trait, Dr. Stillings noted the January 23, 2003 work-related injury was a substantial factor in causing Employee to suffer a pain disorder with an associated 5% permanent partial psychiatric disability. Finally, Dr. Stillings opined that Employee will require future psychiatric treatment in

relation to the August 22, 2002 work injury which would consist of either individual or combination antidepressant treatment in addition to a sleep aid. After noting that Employee would also benefit from supportive psychotherapy and cognitive and behavioral strategies to deal with his pain, Dr. Stillings opined that Employee will need ongoing treatment to stabilize his psychiatric condition and prevent deterioration into a more severe depressive state (Employee's Exhibit A).

On October 5, 2007 and June 7, 2010, Mr. Wilbur Swearingin, a vocational rehabilitation expert, evaluated Employee and opined that Employee was permanently and totally disabled as a result of the August 22, 2002 work-related injury in combination with his pre-existing impairments without consideration of any additional disability resulting from the fall in January of 2003. At the time of his deposition, Mr. Swearingin testified that he believes that Employee would not be able to return to any work when looking just at the problems from the August 2002 accident, the aggravation of the lumbar spine, the cervical disc bulge and strain, pain and depression, and then subsequent surgery and treatment for those injuries (Employee's Exhibit C).

On November 13, 2009, Dr. Michael Jarvis examined Employee and opined that Employee has not sustained permanent psychological damage as a result of the work related incidents. Further, Dr. Jarvis noted that at the time he examined Employee that given the recent psychiatric treatment including medication, it is too early for Employee to be declared at maximum medical improvement. At his deposition, Dr. Jarvis testified that he agrees with Dr. Stillings on the surface of things, but not the causation. In addition to stating that work related psychiatric condition was neither substantial nor permanent, Dr. Jarvis testified that whatever contribution that his back injury has to his psychiatric issue will go away as soon as this thing is resolved (Employer's Exhibit 4).

At the time of the hearing, Employee continued to have problems with his low back and neck that included pain, locking neck, problems fishing, problems playing sports and difficulty with certain activities. Further, Employee testified that he continued to have problems with his hands that included decreased strength, numbness in palms, difficulty driving, decreased grip, and more problems with the right hand than the left hand. With regard to his depression, Employee testified that he had no issues prior to August 22, 2002, and now feels useless along with not wanting to talk to people. Employee testified that he attempted to perform work following his termination by Employer, but was unable to perform the necessary requirements of each job. With regard to his preexisting issues, Employee continues to have problems that include popping, giving out, pain and difficulty with activities. Finally, Employee noted that he has to lie down during the day and take hydrocodone and ibuprofen for his symptoms.

#### **APPLICABLE LAW:**

- Although the worker's compensation law must be liberally construed in favor of the employee, the burden is still on the claimant to prove all material elements of his claim. *Melvies v Morris*, 422 S.W.2d 335 (Mo. App.1968), and *Marcus v Steel Constructors, Inc.*, 434 S.W.2d 475 (Mo.App.1968). Therefore the employee has the burden of proving not only that he sustained an accident, which arose out of and in the course of his employment, but also that there is a medical causal relationship between his accident and

the injuries and the medical treatment for which he is seeking compensation. *Griggs v A. B. Chance Company*, 503 S.W.2d 697 (Mo.App.1973).

- Under the version of Section 287.020.2 RSMo. that was in effect at the time of the employee's accident, the term accident is defined to include only those injuries that are "clearly work related". Under this section an injury is "clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor".
- Under the version of Section 287.140.1 RSMo. that was in effect at the time of the employee's accident, "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).
- Temporary total disability benefits are intended to cover the healing period and are not warranted beyond the point in which the employee is capable of returning to work.

Temporary total disability benefits are not intended to compensate the employee after her condition has reached the point where further progress is not expected. *Brookman v Henry Transportation*, 924 S.W. 2d 286 (Mo.App.1996). See also *Williams v Pillsbury Company*, 694 S.W. 2d 488, 489 (Mo.App.1985). The pivotal question in determining whether an employee is totally disabled is whether any employer, in the usual course of business, would reasonably be expected to employ the claimant in her present physical condition. *Brookman Id.* at 290.

- The test for finding the Second Injury Fund liable for permanent partial disability benefits is set forth in Section 287.220.1 RSMo as follows:

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

- The test for finding the Second Injury Fund liable for permanent total disability is set forth in Section 287.220.1 RSMo., as follows:

If the previous disability or disabilities, whether from compensable injuries or otherwise, and the last injury together result in permanent total disability, the minimum standards under this subsection for a body as a whole injury or a major

extremity shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employee at the time of the last injury is liable is less than compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under Section 287.200 out of a special fund known as the "Second Injury Fund" hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in Section 287.414.

- Section 287.020.7 RSMo. provides as follows:  
The term "total disability" as used in this chapter shall mean the inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident.
- The phrase "the inability to return to any employment" has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration, in the manner that such duties are customarily performed by the average person engaged in such employment. *Kowalski v M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922(Mo.App.1992). The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. *Reiner v Treasurer of the State of Missouri*, 837 S.W.2d 363, 367(Mo.App.1992). Total disability means the "inability to return to any reasonable or normal employment". *Brown v Treasurer of the State of Missouri*, 795 S.W.2d 479, 483(Mo.App.1990). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Id.* The key is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person's physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Reiner* at 365. See also *Thornton v Haas Bakery*, 858 S.W.2d 831,834(Mo.App.1993).
- Under Missouri Workers' Compensation Law, when an Employee is entitled to compensation and death ensues, compensation ceases when the Employee dies from a cause other than his work injury, "unless there are surviving dependents at the time of death." Section 287.230(2) RSMo. *Schoemehl v. Treasurer of the State of Missouri*, 217 S.W.3d 900, (Mo. 2007). The word 'dependent' is defined to mean a relative by blood or marriage of a deceased Employee, who is actually dependent for support, in whole or in part, upon the Employee's wages at the time of the injury. Section 287.240(4) RSMo. "As such any "dependent" would have to be born and dependent at the time of the injury." *Schoemehl*, 217 S.W.3d at 902.
- Section 287.240 RSMo. provides that "[a] natural . . . or adopted child or children . . . under the age of eighteen years" will be ". . . conclusively presumed to be totally dependent for support upon a deceased Employee."

**RULINGS OF LAW:*****Issue 1. Future Medical Aid (Injury Number 02-087791)***

Employee is seeking an award ordering Employer to provide him with future medical aid to cure and relieve the effects of his work injury as a result of the August 22, 2002 injury. Employee primarily relies on the opinions of Dr. Raymond Cohen and Dr. Wayne Stillings in support of his position that he will require additional medical aid. Employer primarily relies on the opinions of Dr. John Wagner and Dr. Michael Jarvis in support of their position that they are not liable for future medical aid benefits. Dr. Wagner opined that “there is nothing in his history or physical exam that would make one believe” that his hand symptoms are at all related to any work injury but instead related to neuropathy from his diabetes. At the time of his evaluation, Dr. Wagner did not have the EMG study that clearly identifies Employee’s bilateral carpal tunnel and ignores Dr. Gibbs diagnoses of the bilateral carpal tunnel and states “I believe that this is work related” (Employee's Exhibits K & M). Further, Dr. Wagner fails to provide a reasonable explanation how his cervical injury is not work related when Employee’s previously asymptomatic neck is symptomatic now following the August 22, 2002 injury. The evidence is very clear that Employee was having no neck problems immediately prior to August 22, 2002. Consequently, I find the opinions of Dr. Wagner to be not credible. After noting that Employee was not at maximum medical improvement and was benefiting from treatment, Dr. Jarvis opined that Employee’s work related psychiatric issue was neither substantial nor permanent and will go away as soon as this thing is resolved. Dr. Jarvis clearly has made up his mind about Employee’s psychiatric condition without having the benefit of evaluating Employee after he has reached maximum medical improvement. Dr. Jarvis’ opinion is clearly in conflict with the weight of the evidence. Therefore, I find Dr. Jarvis’ opinion to not be credible. It is important to note that the Employer and the Second Injury Fund have failed to offer sufficient credible evidence to discredit the opinions of Dr. Cohen and Dr. Stillings along with the testimony of the Employee. In addition to finding the Employee credible, I find the opinions of Dr. Cohen and Dr. Stillings to be more credible than any conflicting ones.

Based on the evidence, I find 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 22, 2002 work injury. Therefore, Employer is ordered to provide all medical treatment and medication that is necessary to cure and relieve Employee from the effects of his aggravation of low back injury, cervical injury, and depression in accordance with the opinions of Dr. Cohen and Dr. Stillings for the remainder of Employee’s life.

***Issue 1. Medical Causation (Injury Number 03-017442) & Issue 3. Future Medical Aid (Injury Number 03-017442)***

In accordance with my above findings, Employee’s credible testimony, Dr. Cohen’s opinions, Dr. Stillings opinions, and the medical records establish that Employee’s injury to right wrist and left wrist was directly caused by his January 23, 2003 work-related accident. I therefore find that Employee’s work-related accident on January 23, 2003, was a substantial factor in causing the injuries to Employee’s bilateral wrists and the resulting medical treatment.

Additionally, all of the medical bills submitted by Employee under Employee Exhibits E, O, & M are medically causally related to Employee's January 23, 2003 work-related accident. With regard to additional medical treatment for his bilateral wrists, Dr. Cohen opined that Employee will require additional medical care which may include a nerve conduction study followed by a hand surgery consultation. Based on the evidence and my above findings, I find that Employee has met his burden of proof by offering substantial competent evidence to support an award of future medical care resulting from the January 23, 2003 work injury. Therefore, Employer is ordered to provide all medical treatment and medication that is necessary to cure and relieve Employee from the effects of his bilateral carpal tunnel in accordance with the opinions of Dr. Cohen for the remainder of Employee's life.

***Issue 2. Previously Incurred Medical Aid (Injury Number 03-017442)***

Based on the evidence and my above findings, I find that Employer is obligated to pay to Employee the sum of \$4,020.74 for previously incurred medical expenses. I find that these medical expenses were causally related to Employee's January 23, 2003 work-related accident, and were reasonable and necessary to cure and relieve Employee from the effects of his injury. Employer is therefore directed to pay to Employee the sum of \$4,020.74 for previously incurred medical expenses.

***Issue 4. Additional Temporary Total Disability (Injury Number 03-017442)***

Employee is requesting an award for temporary total disability from December 5, 2008 to January 16, 2009 in the amount of \$1,892.34. It is important to note that Employee has failed to offer a sufficient credible medical opinion that he was totally disabled and that no employer, in the usual course of business, would reasonably be expected to employ him in his physical condition. After a thorough review of all the evidence, I therefore find that Employee has failed to meet his burden of proof that he was temporarily and totally disabled during that period as a result of the January 23, 2003 work-related accident. Employer is not required to pay and Employee is not entitled to receive any temporary total disability benefits in this matter.

***Issue 2. Nature and Extent of Disability & Issue 3. Liability of the Fund (Injury Number 02-087791)***

Employee has alleged that either Employer or the Second Injury Fund is liable for permanent and total disability benefits as a result of the August 22, 2002 work-related accident. In addition to Dr. Cohen's opinions, Employee has offered the opinion of vocational expert Wilbur Swearingin. It is important to note that the Employer and the Second Injury Fund have failed to offer sufficient credible evidence to discredit the opinions of Mr. Swearingin. Therefore, I find the opinions of Wilbur Swearingin to be credible. Both Dr. Cohen and Mr. Swearingin basically opined that Employee would not be able to return to any work when considering the restrictions from the August 2002 accident, the aggravation of the lumbar spine, the cervical disc bulge and strain, the symptomatic at C5-6 from that August 22, 2002 injury, the pain from that August 22, 2002 injury and the depression from that injury and those restrictions, and then subsequent treatment for those injuries. Since the August 22, 2002 work-related

accident involved an aggravation of a pre-existing condition to Employee's low back, the restrictions and resulting medical condition would necessarily and automatically include that pre-existing condition. Therefore, Dr. Cohen's and Mr. Swearingin's opinions along with the medical report unequivocally support a finding of permanent and total disability as a result of a combination of Employee's August 22, 2002 work-related injury and his pre-existing conditions. Consequently, I find that the Employer is not liable for permanent total disability benefits as a result of Employee's August 22, 2002 work-related injury.

Although Employer is not liable for permanent total disability benefits, Employer is still liable for permanent partial disability. Based on this evidence, I find that Employee suffered a 20% permanent partial disability of his body as a whole at the 400 week level referable to his lumbar spine, a 7.5% permanent partial disability of his body as a whole at the 400 week level referable to his cervical spine, and a total of 30% permanent partial psychiatric disability of the body as a whole at the 400 week level related to the August 22, 2002 work-related injury. This equals 230 weeks of disability. Employer is therefore directed to pay to Employee the sum of \$310.77 per week for 230 weeks for a total award of permanent partial disability relating to the August 22, 2002 work-related injury of \$71,477.10. Based on the evidence and stipulation of the parties, I find that Employee reached his maximum level of medical improvement and the end of the healing period on December 4, 2003. Employer's permanent partial disability payments should therefore have commenced on December 5, 2003, and would have continued for 230 weeks through May 2, 2008.

Based on the evidence and my above findings, the Second Injury Fund is clearly liable for permanent total disability benefits. Employee's pre-existing injuries and the August 22, 2002 work-related accident clearly combined to make Employee permanently and totally disabled. With regard to Employee's pre-existing injuries, I find that Employee had a 15% permanent partial disability of his body as a whole at the 400 week level referable to his lumbar spine, a 15% permanent partial disability of his right knee at the 160 week level, a 17.5% permanent partial disability of his body as a whole at the 400 week level referable to his diabetes, and a 5% permanent partial psychiatric disability of the body as a whole at the 400 week level. These pre-existing conditions equal 174 weeks of disability. I further find that these preexisting disabilities were a hindrance or obstacle to Employee's employment or reemployment and that Employee's preexisting disabilities and his August 22, 2002 work-related disabilities combined synergistically causing Employee to be permanently and totally disabled.

Since Employee's permanent partial disability rate (\$310.77) is the same as the agreed rate of compensation for permanent total disability, the Second Injury Fund is liable for the full amount of the permanent total disability benefits commencing May 3, 2008. The Second Injury Fund is therefore directed to pay to Employee the sum of \$310.77 per week commencing on May 3, 2008, and said weekly benefits shall be payable during the continuance of such permanent total disability for the lifetime of Employee pursuant to Section 287.200.1, unless such payments are suspended during a time in which the employee is restored to his regular work or its equivalent as provided in Section 287.200.2.

***Issue 4. Dependency under Schoemehl (Injury Number 03-017442)***

On the date of Employee's August 22, 2002 work-related accident, Employee was single and unmarried with three children under the age of 18: Jacob Pippin, date of birth August 27, 1999; Zachary Pippin, date of birth May 2, 1996; and Brandy Henderson, date of birth August 27, 1987. I find that Jacob Pippin, Zachary Pippin, and Brandy Henderson were, at the time of the work injury on August 22, 2002, conclusively presumed total dependents of Employee.

***Issue 5. Nature and Extent of Disability & Issue 6. Liability of the Fund (Injury Number 03-017442)***

Based on the evidence and my above findings, I find that Employee, as a direct result of his January 23, 2003 work-related accident, has suffered a 20% permanent partial disability of his right wrist at the 175 week level (35 weeks) and a 10% permanent partial disability of his left wrist at the 175 week level (17.5 weeks). I further find that Employee is entitled to 2 weeks of disfigurement for the scarring to his right wrist. As a result of Employee's January 23, 2003 work-related accident, I order Employer to pay to Employee 54.5 weeks at a rate of \$310.77 for a grand total of \$16,936.97.

Based on my above findings, Employee has been awarded permanent total benefits against the Second Injury Fund from the August 22, 2002 claim. Therefore, I find that Employee is not entitled to any further benefits against the Second Injury Fund from the January 23, 2003 work-related accident. The remaining issue of dependency under Schoemehl from the January 23, 2003 work-related accident is moot and shall not be ruled upon.

**ATTORNEY'S FEE:**

Ronald Little and Sheila Blaylock, attorneys at law, are allowed a fee of costs plus 25% of all sums awarded under the provisions of this award for necessary legal services rendered to Employee. The amount of this attorneys' 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:

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Carl Strange  
Administrative Law Judge  
Division of Workers' Compensation