

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

Injury No.: 03-054540

Employee: David M. Porting
Employer: Contractors and Municipal Sweeping (Settled)
Insurer: TIG Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 1, 2009, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Grant C. Gorman, issued December 1, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 17th day of June 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: David M. Porting

Injury No. 03-054540

Dependents: None

Employer: Contractors and Municipal Sweeping (Settled)

Additional Party: Second Injury Fund

Insurer: TIG Insurance Company (Settled)

Hearing Date: August 26, 2009

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

Checked by: GCG/ln

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
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: March 1, 2003
5. State location where accident occurred or occupational disease was contracted: St. Charles County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant developed a blister which became infected.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right big toe
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: Not applicable
16. Value necessary medical aid paid to date by employer/insurer? Not applicable

Employee: David M. Porting

Injury No. 03-054540

- 17. Value necessary medical aid not furnished by employer/insurer? Not applicable
- 18. Employee's average weekly wages: Sufficient to qualify for maximum rates of compensation.
- 19. Weekly compensation rate: \$649.82 TTD/\$340.12 PPD
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: \$0

22. Second Injury Fund liability: No

The Claim against the Second Injury Fund is denied.

TOTAL: \$0

23. Future requirements awarded: None

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

James Logan

Employee: David M. Porting

Injury No. 03-054540

FINDINGS OF FACT and RULINGS OF LAW:

Employee: David M. Porting

Injury No: 03-054540

Dependents: None

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Contractors and Municipal Sweeping (Settled)

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

Additional Party Second Injury Fund

Insurer: TIG Insurance Company (Settled)

Checked by: GCG/ln

PRELIMINARY STATEMENT

A hearing was held before the undersigned ALJ in the above referenced case on August 26, 2009 in the St. Charles office of the Division of Worker's Compensation. Claimant was present, and represented by James Logan. The cases against Employer and Insurer were previously settled. The Second Injury Fund (SIF) is a party and is represented by Assistant Attorney General Laura Wagener. The hearing in this case was held in conjunction with Injury No. 03-124837.

Claimant and SIF entered into the following stipulations: Claimant sustained an accidental injury arising out of and in the course of employment on March 1, 2003; venue is proper in St. Charles County, Missouri; Employer received proper notice of injury; the Claim was filed in a timely manner; Claimant's average weekly wage was above the statutory maximum rate, resulting in applicable rates of compensation of \$649.32 for total disability and \$340.12 for permanent partial disability (PPD); and Claimant reached maximum medical improvement (MMI) on June 10, 2003.

The following issues are presented for determination: Nature and extent of disability from the primary work injury; and liability of Second Injury Fund for permanent total or permanent partial disability.

SUMMARY OF THE EVIDENCE

Only evidence necessary to support this award will be summarized. Any objections not expressly ruled on during the hearing or in this award are now overruled. The exhibits offered by the parties were received into evidence without objection. Certain exhibits offered into evidence may contain handwritten markings, underlining and/or highlighting on portions of the documents. Any such markings on the exhibits were present at the time they were offered by the parties. Further, any such notes, markings and/or highlights had no impact on any ruling in this case.

Claimant testified at hearing. Claimant testified he began working for Employer operating a street sweeper in 1995. Prior to 1995, he was employed as a delivery driver.

Employee: David M. Porting

Injury No. 03-054540

Sometime prior to March 2003, Claimant developed a blister on his right big toe from the rubbing of his work boots. He indicates he had a callus on the toe for a period of time before the blister developed. Eventually the condition became painful and Claimant sought medical treatment.

Claimant's treatment history is summarized from his testimony and the medical records and reports. Mr. Porting sought treatment at Barnes Jewish Hospital on March 27, 2003, for a complaint of a toe callous that wasn't healing. An x-ray showed mild osteoarthritis at the interphalangeal joint of the first toe, but no fractures or dislocations. Claimant was assessed with abscess/cellulitis of the right foot. Mr. Porting was then admitted to the hospital due to cellulitis. On March 28, 2003, he underwent an MRI of the right great toe which revealed osteomyelitis of the distal phalanx of the right great toe and osteoarthritis of the right first metatarsal phalangeal joint.

Claimant required long-term course of antibiotics due to his osteomyelitis. He underwent Hohn catheter placement on March 30, 2003. Claimant was discharged from the hospital on April 4, 2003, with the diagnosis of osteomyelitis of the ankle/foot, ulcer of the foot, unspecified cellulitis and abscess of the toe. He was released with instructions to continue taking medications.

Claimant was released back to work with no restrictions on June 10, 2003. He testified that after he was released from care, his diabetes, which was problematic during treatment, was brought back under control. He further testified he was able to go back to work and had no ongoing physical difficulties from the March 2003 injury.

On July 24, 2003, Claimant was injured while attempting to adjust the deck of the street sweeper he was operating. The chain holding the rear skid slipped off a bolt which was holding it up, and the skid dropped onto his right second toe.¹

Claimant returned to Dr. Polish, an infectious disease specialist, on July 29, 2003, and it was noted his foot had healed and was doing much better until being struck with the metal plate. He was treated with Bactrim DS and was sent for an x-ray of the foot, which revealed osteoarthritis of the MTP, interphalangeal joint and sesamoid-metatarsal joint of the great toe. The film also showed bunionectomy defect, but there was no fracture demonstrated of the first or second toe. Mr. Porting then sought treatment at Barnes Jewish Hospital Emergency Room on August 7, 2003, for a complaint of right second toe pain. An x-ray of the right foot revealed soft tissue swelling, distal aspects 2nd toe right foot without underlying bony destruction; bunionectomy defect right foot; osteoarthritis of the metatarsal phalangeal joint and interphalangeal joint of the great toe of the right foot; osteoarthritic changes of the mid foot and dorsal soft tissue swelling is noted of the right foot.

Mr. Porting was then admitted to Barnes Jewish Hospital due to an abscess or possible osteomyelitis of the second toe. He underwent an MRI of the lower extremity the next day which reported: Right second toe ulcer with associated new focus of osteomyelitis involving the distal

¹ The injury described here is the subject of Injury No. 03-124837, the hearing for which was held in conjunction with the instant case.

Employee: David M. Porting

Injury No. 03-054540

phalanx with second toe. There is no non viable bone and no abscess; improving osteomyelitis of the great toe distal phalanx; and progressive tearing of the flexor hallucis longus tendon which shows now a high grade partial rupture at the level of the sesamoids.

On August 9, 2003, Claimant underwent a Hohn catheter placement and he was discharged from the hospital the next day to continue on intravenous Ceftriaxone. Claimant was admitted to Barnes Jewish Hospital again on August 24, 2003, due to right neck pain and fever. An x-ray of the chest showed the lungs were well expanded and clear bilaterally without infiltrates, nodules or effusions. The film revealed no pneumothorax or edema, but there was a mildly tortuous aorta. Cardiac silhouettes were normal and the right internal jugular Hohn catheter was seen with its distal tip overlying the superior vena cava.

Claimant was discharged from the hospital on September 3, 2003, with the diagnosis of right upper extremity septic thrombophlebitis with right upper extremity deep venous thrombosis, coagulase-negative staphylococcus bacteremia related to the Hohn, right upper extremity deep venous thrombosis, and chronic pain syndrome. His discharge medications included intravenous Vancomycin, Lovenox, and Flagyl. Claimant returned to Dr. Polish on September 30, 2003, and was advised to continue his antibiotics for right foot osteomyelitis. It was also suggested he continue the Lovenox and Coumadin for his right upper extremity deep venous thrombosis. On October 16, 2003, Claimant underwent a left upper extremity venography and single lumen PICC line placement due to his PICC line breaking apart after getting caught in a laundry basket. He then continued to follow up with Dr. Polish and on November 18, 2003, and it was noted his osteomyelitis had healed. His Hohn catheter was then removed and he was scheduled for PICC line removal on November 21, 2003.

Claimant testified after his toe healed, he was released from care, but never returned to work for Employer. He testified he was advised by Dr. Polish that he should not return to heavy work while he was still taking blood thinners. Claimant has not returned to work since being released in November, 2003.

Claimant testified regarding his preexisting back and neck injuries. In 1991, he injured his back, and he reinjured it in 1993. He ultimately had to have a fusion at L5-S1. During his physical therapy, he injured his neck, which required surgery. In 1994 he had a fusion at C6-7. Claimant testified after his back injury he was limited in how much he could lift and his range of motion was reduced. He indicated he also has pain in his back. He also experiences pain in his neck and has limited range of motion. He testified the pain and limitations caused by his low back are worse than the pain and limitations in his neck.

Claimant testified he was diagnosed with diabetes in 1993. He originally took oral medication to control the diabetes. He indicated he began taking insulin by shot in 2003 while undergoing treatment for the March 2003 infection. He testified he continues to take insulin injections twice a day. Claimant testified during cross examination that the numbness and pain in his hands developed after the July 2003 work injury.

Dr. Louis Polish testified by deposition taken on October 26, 2004. Dr. Polish testified he treated Claimant for the infections of March 2003 and July 2003. He indicated that it is easier

Employee: David M. Porting

Injury No. 03-054540

for diabetics to develop infections and more difficult for them to fight off infections once developed. Dr. Polish testified it is easier to treat infections if the blood sugar is kept below 200. He testified Claimant's blood sugar readings were occasionally over 200, but were mostly between 180 and 78. Dr. Polish testified he recommended that Claimant not return to heavy work while he was on Coumadin, which is a blood thinner. He indicated that physicians normally recommend a six month course of treatment with Coumadin, but it can be longer.

Dr. Robert Poetz testified by deposition on July 13, 2006 on behalf of Claimant. Dr. Poetz preformed a medical evaluation of Claimant. Dr. Poetz examined Claimant, reviewed medical records regarding the work injuries and preexisting conditions, and performed a physical examination. Dr. Poetz made diagnoses and gave opinions regarding Claimant's permanent partial disability as follows:

1. Spondylolisthesis; Status post lumbar fusion L5-S1, 1991 – 45% permanent partial disability to the body as a whole as measured at the lumbar spine
2. Herniated nucleus pulposus C6-7; Status cervical fusion, 1994 – 40% permanent partial disability to the body as a whole as measured at the cervical spine
3. Fractured ribs left 7th, 8th and 9th, 1997 – 25% permanent partial disability to the body as a whole as measured at the left rib cage
4. Diabetes Mellitus, pre-existing – 30% permanent partial disability to the body as a whole due to diabetes mellitus
5. Hypertension, pre-existing – 20% permanent partial disability to the body as a whole due to hypertension
6. Depression, pre-existing – 10% permanent partial disability to the body as a whole due to depression
7. Asthma, pre-existing – 10% permanent partial disability to the body as a whole due to asthma
8. Right foot degenerative joint disease, pre-existing – 5% permanent partial disability to the lower right extremity as measured at the right foot

Employee: David M. Porting

Injury No. 03-054540

9. Right foot cellulitis with osteomyelitis of distal phalanx of right great toe, 3/1/03 –
30% permanent partial disability to the lower right extremity as measured at the right foot directly resultant from the 3/1/03 work-related injury

10. Right second toe contusion with soft tissue swelling osteomyelitis and cellulitis, 7/24/03 –
35% permanent partial disability to the lower right extremity as measured at the right foot directly resultant from the 7/24/03 work-related injury

11. Right, upper extremity septic thrombophlebitis with right upper extremity DVT, and coagulase-negative staphylococcus bacterium related to Hohn catheter, 7/24/03 –
40% permanent partial disability to the body as a whole as measured at the chest directly resultant from the 7/24/03 work-related injury

Dr. Poetz further went on to opine that the combination of the present and prior disabilities results in a total which exceeds the simple sum by 20%. It is also Dr. Poetz's opinion that Mr. Porting is permanently and totally disabled as a result of the combination of his March 1, 2003 and July 24, 2003 work-related injuries and his pre-existing injuries and conditions. Claimant is, and will be, permanently and totally unemployable in the open labor market.

Mr. Timothy Lalk, a vocational rehabilitation counselor, testified by deposition on September 29, 2006 on behalf of Claimant. Mr. Lalk testified his report was generated on February 16, 2005. Mr. Lalk interviewed Claimant and reviewed medical records provided to him. He opined Claimant is not able to secure and maintain employment in the open labor market and is not able to compete for any position. Mr. Lalk further testified this was because in order to control his symptoms, he needs to move around, as needed, and at the same time, he needs an opportunity to sit and rest, when needed. He also indicated Claimant would not be able to function in most unskilled, entry-level positions in the sedentary category because he is unable to perform repetitive activities with his hands.

During cross examination, Mr. Lalk indicated he did not have medical records prior to 2002, nor did he have any records after 2004. He testified that he relied on the summaries contained in the medical reports he did have regarding preexisting conditions. Mr. Lalk testified Claimant reported increased pain in his back after he stopped taking pain medications in 2004, and the onset of the peripheral neuropathy in Claimant's hands due to diabetes was subsequent to the injuries of March and July 24, 2003.

Employee: David M. Porting

Injury No. 03-054540

FINDINGS OF FACT AND RULINGS OF LAW

Based on the competent and substantial evidence presented, including the testimony of Claimant, my personal observations, and all other evidence and exhibits received into evidence, I find:

Under Missouri law, it is well-settled that the claimant bears the burden of proving all the essential elements of a workers' compensation claim, including the causal connection between the accident and the injury. **Grime v. Altec Indus.**, 83 S.W.3d 581, 583 (Mo.App. W.D.2002); see also **Davies v. Carter Carburetor**, 429 S.W.2d 738, 749 (Mo.1968); **McCoy v. Simpson**, 346 Mo. 72, 139 S.W.2d 950, 952 (1940). While the claimant is not required to prove the elements of his claim on the basis of "absolute certainty," he must at least establish the existence of those elements by "reasonable probability." **Sanderson v. Porta-Fab Corp.**, 989 S.W.2d 599, 603 (Mo.App. E.D.1999) (citing **Cook v. Sunnen Prods. Corp.**, 937 S.W.2d 221, 223 (Mo.App. E.D.1996)).

The quantum of proof regarding the nature and extent of disability is reasonable certainty. The employee must prove the nature and extent of any disability by a reasonable degree of certainty. **Downing v. Willamette Industries, Inc.**, 895 S.W.2d 650, 655 (Mo. App. 1995); **Griggs v. A. B. Chance Company**, 503 S.W.2d 697, 703 (Mo. App. 1973).

Permanent Partial Disability of Primary Injury

Claimant settled the injury claim of March 2003 with employer for 20% of the right foot at the 155 week level. The SIF is not bound by this settlement. Dr. Poetz rated the PPD for this injury at 30% of the foot. However, there is no credible evidence of any permanent disability of the great toe. Claimant did not testify at trial regarding any problems he had with his great toe or his foot after he completed treatment. In fact, he indicated he had no ongoing physical problems when he returned to work on June 10, 2003. Further, he was released to return to work with no medical restrictions on the right foot.

Dr. Poetz, in his report or testimony, did not provide any basis for his rating regarding Claimant's right foot as a result of the March 2003 injury. He did not indicate any pain, loss of strength or decreased range of motion attributable to the injury. His opinion regarding disability as a result of the March 2003 injury is not credible. "A medical expert's opinion must have in support of it reasons and facts supported by competent evidence which will give the opinion sufficient probative force to be substantial evidence." (citations omitted) **Pippin v. St. Joe Minerals Corp.**, 799 S.W.2d 898, 904 (Mo.App. 1990).

Claimant has failed to prove it is reasonably certain that he suffered any permanent disability as a result of the March 2003 injury.

Liability of the Second Injury Fund

Claimant returned to work without any restrictions after the March 2003 injury. Mr. Lalk indicated Claimant told him the pain and numbness in his hands, the increase in pain in his back

Employee: David M. Porting

Injury No. 03-054540

and neck, and the development of pain in his hip, all occurred sometime after the July 24, 2003 foot injury. Claimant failed to prove he is entitled to any disability from the SIF. With respect to total disability, he failed to prove any PPD resulting from the primary injury; he returned to work full time after the primary injury; and the increased pain in his neck and back, and the pain and numbness in his hands and feet had not developed at the time of the primary injury. Claimant has failed to prove it is reasonably certain that he is permanently and totally disabled as a result of the primary injury in conjunction with the preexisting disabilities.

Claimant has failed to prove he is entitled to a permanent partial award from the SIF as his primary injury did not meet the statutory threshold.

The Claim against the Second Injury Fund is denied.

Made by: /s/ Grant C. Gorman
Grant C. Gorman
Administrative Law Judge
Division of Workers' Compensation

This award is dated and attested to this 1st day of December, 2009.

/s/ Naomi Pearson
Naomi Pearson
Division of Workers' Compensation

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

Injury No.: 03-124837

Employee: David M. Porting
Employer: Contractors and Municipal Sweeping (Settled)
Insurer: TIG Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 1, 2009. The award and decision of Administrative Law Judge Grant C. Gorman, issued December 1, 2009, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this _____ day of June 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: David M. Porting

Injury No. 03-124837

Dependents: None

Employer: Contractors and Municipal Sweeping (Settled)

Additional Party: Second Injury Fund

Insurer: TIG Insurance Company (Settled)

Hearing Date: August 26, 2009

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

Checked by: GCG/ln

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: July 24, 2003
5. State location where accident occurred or occupational disease was contracted: St. Charles County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant's right 2nd toe was crushed and developed infection.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right lower extremity at the foot.
14. Nature and extent of any permanent disability: 30% of the right lower extremity at the 155 week level.
15. Compensation paid to-date for temporary disability: Not applicable
16. Value necessary medical aid paid to date by employer/insurer? Not applicable

Employee: David M. Porting

Injury No. 03-124837

- 17. Value necessary medical aid not furnished by employer/insurer? Not applicable
- 18. Employee's average weekly wages: Sufficient to qualify for maximum rates of compensation
- 19. Weekly compensation rate: \$662.55 TTD/\$347.05 PPD
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: \$0 (previously settled)

22. Second Injury Fund liability: Yes

63.5 weeks of permanent partial disability from Second Injury Fund	\$22,037.68
--	-------------

TOTAL:	\$22,037.68
--------	-------------

23. Future requirements awarded: None

Said payments to begin as of the date of this award and to be payable and be subject to modification and review as provided by law.

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

James Logan

Employee: David M. Porting

Injury No. 03-124837

FINDINGS OF FACT and RULINGS OF LAW:

Employee: David M. Porting

Injury No: 03-124837

Dependents: None

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Contractors and Municipal Sweeping (Settled)

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

Additional Party Second Injury Fund

Insurer: TIG Insurance Company (Settled)

Checked by: GCG/ln

PRELIMINARY STATEMENT

A hearing was held before the undersigned ALJ in the above referenced case on August 26, 2009 in the St. Charles office of the Division of Worker's Compensation. Claimant was present, and represented by James Logan. The cases against Employer and Insurer were previously settled. The Second Injury Fund (SIF) is a party and is represented by Assistant Attorney General Laura Wagener. The hearing in this case was held in conjunction with Injury No. 03-054540.

Claimant and SIF entered into the following stipulations: Claimant sustained an accidental injury arising out of and in the course of employment on July 24, 2003; venue is proper in St. Charles County, Missouri; Employer received proper notice of injury; the Claim was filed in a timely manner; and Claimant's average weekly wage was above the statutory maximum rate, resulting in applicable rates of compensation of \$662.55 for total disability and \$347.05 for permanent partial disability (PPD).

The following issues are presented for determination: Liability of Second Injury Fund for permanent total or permanent partial disability; and to determine the date which Claimant reached maximum medical improvement (MMI).

SUMMARY OF THE EVIDENCE

Only evidence necessary to support this award will be summarized. Any objections not expressly ruled on during the hearing or in this award are now overruled. The exhibits offered by the parties were received into evidence without objection. Certain exhibits offered into evidence may contain handwritten markings, underlining and/or highlighting on portions of the documents. Any such markings on the exhibits were present at the time they were offered by the parties. Further, any such notes, markings and/or highlights had no impact on any ruling in this case.

Claimant testified at hearing. Claimant testified he began working for Employer operating a street sweeper in 1995. Prior to 1995, he was employed as a delivery driver. Sometime prior to March 2003, Claimant developed a blister on his right big toe from the rubbing of his work boots. He indicates he had a callus on the toe for a period of time before the

Employee: David M. Porting

Injury No. 03-124837

blister developed. Eventually the condition became painful and Claimant sought medical treatment.¹

Claimant's treatment history is summarized from his testimony and the medical records and reports. Mr. Porting sought treatment at Barnes Jewish Hospital on March 27, 2003, for a complaint of a toe callus that wasn't healing. An x-ray showed mild osteoarthritis at the interphalangeal joint of the first toe, but no fractures or dislocations. Claimant was assessed with abscess/cellulitis of the right foot. Mr. Porting was then admitted to the hospital due to cellulitis. On March 28, 2003, he underwent an MRI of the right great toe which revealed osteomyelitis of the distal phalanx of the right great toe and osteoarthritis of the right first metatarsal phalangeal joint.

Claimant required long-term course of antibiotics due to his osteomyelitis. He underwent Hohn catheter placement on March 30, 2003. Claimant was discharged from the hospital on April 4, 2003, with the diagnosis of osteomyelitis of the ankle/foot, ulcer of the foot, unspecified cellulitis and abscess of the toe. He was released with instructions to continue taking medications.

Claimant was released back to work with no restrictions on June 10, 2003. He testified that after he was released from care, his diabetes, which was problematic during treatment, was brought back under control. He further testified he was able to go back to work and had no ongoing physical difficulties from the March 2003 injury.

On July 24, 2003, Claimant was injured while attempting to adjust the deck of the street sweeper he was operating. The chain holding the rear skid slipped off a bolt which was holding it up, and the skid dropped onto his right second toe.

Claimant returned to Dr. Polish, an infectious disease specialist, on July 29, 2003, and it was noted his foot had healed and was doing much better until being struck with the metal plate. He was treated with Bactrim DS and was sent for an x-ray of the foot, which revealed osteoarthritis of the MTP, interphalangeal joint and sesamoid-metatarsal joint of the great toe. The film also showed bunionectomy defect, but there was no fracture demonstrated of the first or second toe. Mr. Porting then sought treatment at Barnes Jewish Hospital Emergency Room on August 7, 2003, for a complaint of right second toe pain. An x-ray of the right foot revealed soft tissue swelling, distal aspects 2nd toe right foot without underlying bony destruction; bunionectomy defect right foot; osteoarthritis of the metatarsal phalangeal joint and interphalangeal joint of the great toe of the right foot; osteoarthritic changes of the mid foot and dorsal soft tissue swelling is noted of the right foot.

Mr. Porting was then admitted to Barnes Jewish Hospital due to an abscess or possible osteomyelitis of the second toe. He underwent an MRI of the lower extremity the next day which reported: Right second toe ulcer with associated new focus of osteomyelitis involving the distal phalanx with second toe. There is no non viable bone and no abscess; improving osteomyelitis

¹ The injury described here is the subject of Injury No. 03-054540, the hearing for which was held in conjunction with the instant case.

Employee: David M. Porting

Injury No. 03-124837

of the great toe distal phalanx; and progressive tearing of the flexor hallucis longus tendon which shows now a high grade partial rupture at the level of the sesamoids.

On August 9, 2003, Claimant underwent a Hohn catheter placement and he was discharged from the hospital the next day to continue on intravenous Ceftriaxone. Claimant was admitted to Barnes Jewish Hospital again on August 24, 2003, due to right neck pain and fever. An x-ray of the chest showed the lungs were well expanded and clear bilaterally without infiltrates, nodules or effusions. The film revealed no pneumothorax or edema, but there was a mildly tortuous aorta. Cardiac silhouettes were normal and the right internal jugular Hohn catheter was seen with its distal tip overlying the superior vena cava.

Claimant was discharged from the hospital on September 3, 2003, with the diagnosis of right upper extremity septic thrombophlebitis with right upper extremity deep venous thrombosis, coagulase-negative staphylococcus bacteremia related to the Hohn, right upper extremity deep venous thrombosis, and chronic pain syndrome. His discharge medications included intravenous Vancomycin, Lovenox, and Flagyl. Claimant returned to Dr. Polish on September 30, 2003, and was advised to continue his antibiotics for right foot osteomyelitis. It was also suggested he continue the Lovenox and Coumadin for his right upper extremity deep venous thrombosis. On October 16, 2003, Claimant underwent a left upper extremity venography and single lumen PICC line placement due to his PICC line breaking apart after getting caught in a laundry basket. He then continued to follow up with Dr. Polish and on November 18, 2003, and it was noted his osteomyelitis had healed. His Hohn catheter was then removed and he was scheduled for PICC line removal on November 21, 2003.

Claimant testified after his toe healed, he was released from care, but never returned to work for Employer. He testified he was advised by Dr. Polish that he should not return to heavy work while he was still taking blood thinners. Claimant has not returned to work since being released in November, 2003.

Claimant testified regarding his preexisting back and neck injuries. In 1991, he injured his back, and he reinjured it in 1993. He ultimately had to have a fusion at L5-S1. During his physical therapy, he injured his neck, which required surgery. In 1994 he had a fusion at C6-7. Claimant testified after his back injury he was limited in how much he could lift and his range of motion was reduced. He indicated he also has pain in his back. He also experiences pain in his neck and has limited range of motion. He testified the pain and limitations caused by his low back are worse than the pain and limitations in his neck.

Claimant testified he was diagnosed with diabetes in 1993. He originally took oral medication to control the diabetes. He indicated he began taking insulin by shot in 2003 while undergoing treatment for the March 2003 infection. He testified he continues to take insulin injections twice a day. Claimant testified during cross examination that the numbness and pain in his hands developed after the July 2003 work injury.

Dr. Louis Polish testified by deposition taken on October 26, 2004. Dr. Polish testified he treated Claimant for the infections of March 2003 and July 2003. He indicated that it is easier for diabetics to develop infections and more difficult for them to fight off infections once

Employee: David M. Porting

Injury No. 03-124837

developed. Dr. Polish testified it is easier to treat infections if the blood sugar is kept below 200. He testified Claimant's blood sugar readings were occasionally over 200, but were mostly between 180 and 78. Dr. Polish testified he recommended that Claimant not return to heavy work while he was on Coumadin, which is a blood thinner. He indicated that physicians normally recommend a six month course of treatment with Coumadin, but it can be longer.

Dr. Robert Poetz testified by deposition on July 13, 2006 on behalf of Claimant. Dr. Poetz performed a medical evaluation of Claimant. Dr. Poetz examined Claimant, reviewed medical records regarding the work injuries and preexisting conditions, and performed a physical examination. Dr. Poetz made diagnoses and gave opinions regarding Claimant's permanent partial disability as follows:

1. Spondylolisthesis; Status post lumbar fusion L5-S1, 1991 – 45% permanent partial disability to the body as a whole as measured at the lumbar spine
2. Herniated nucleus pulposus C6-7; Status cervical fusion, 1994 – 40% permanent partial disability to the body as a whole as measured at the cervical spine
3. Fractured ribs left 7th, 8th and 9th, 1997 – 25% permanent partial disability to the body as a whole as measured at the left rib cage
4. Diabetes Mellitus, pre-existing – 30% permanent partial disability to the body as a whole due to diabetes mellitus
5. Hypertension, pre-existing – 20% permanent partial disability to the body as a whole due to hypertension
6. Depression, pre-existing – 10% permanent partial disability to the body as a whole due to depression
7. Asthma, pre-existing – 10% permanent partial disability to the body as a whole due to asthma
8. Right foot degenerative joint disease, pre-existing – 5% permanent partial disability to the lower right extremity as measured at the right foot

Employee: David M. Porting

Injury No. 03-124837

9. Right foot cellulitis with osteomyelitis of distal phalanx of right great toe, 3/1/03 –
30% permanent partial disability to the lower right extremity as measured at the right foot directly resultant from the 3/1/03 work-related injury

10. Right second toe contusion with soft tissue swelling osteomyelitis and cellulitis, 7/24/03 –
35% permanent partial disability to the lower right extremity as measured at the right foot directly resultant from the 7/24/03 work-related injury

11. Right, upper extremity septic thrombophlebitis with right upper extremity DVT, and coagulase-negative staphylococcus bacterium related to Hohn catheter, 7/24/03 –
40% permanent partial disability to the body as a whole as measured at the chest directly resultant from the 7/24/03 work-related injury

Dr. Poetz opined that the combination of the present and prior disabilities results in a total which exceeds the simple sum by 20%. It is also Dr. Poetz' opinion that Mr. Porting is permanently and totally disabled as a result of the combination of his March 1, 2003 and July 24, 2003 work-related injuries and his pre-existing injuries and conditions. Claimant is, and will be, permanently and totally unemployable in the open labor market.

Mr. Timothy Lalk, a vocational rehabilitation counselor, testified by deposition on September 29, 2006 on behalf of Claimant. Mr. Lalk testified his report was generated on February 16, 2005. Mr. Lalk interviewed Claimant and reviewed medical records provided to him. He opined Claimant is not able to secure and maintain employment in the open labor market and is not able to compete for any position. Mr. Lalk further testified this was because in order to control his symptoms, he needs to move around, as needed, and at the same time, he needs an opportunity to sit and rest, when needed. He also indicated Claimant would not be able to function in most unskilled, entry-level positions in the sedentary category because he is unable to perform repetitive activities with his hands.

During cross examination, Mr. Lalk indicated he did not have medical records prior to 2002, nor did he have any records after 2004. He testified that he relied on the summaries contained in the medical reports he did have regarding preexisting conditions. Mr. Lalk testified Claimant reported increased pain in his back after he stopped taking pain medications in 2004, and the onset of the peripheral neuropathy in Claimant's hands due to diabetes was subsequent to the injuries of March and July 24, 2003.

Employee: David M. Porting

Injury No. 03-124837

FINDINGS OF FACT AND RULINGS OF LAW

Based on the competent and substantial evidence presented, including the testimony of Claimant, my personal observations, and all other evidence and exhibits received into evidence, I find:

Under Missouri law, it is well-settled that the claimant bears the burden of proving all the essential elements of a workers' compensation claim, including the causal connection between the accident and the injury. **Grime v. Altec Indus.**, 83 S.W.3d 581, 583 (Mo.App. W.D.2002); see also **Davies v. Carter Carburetor**, 429 S.W.2d 738, 749 (Mo.1968); **McCoy v. Simpson**, 346 Mo. 72, 139 S.W.2d 950, 952 (1940). While the claimant is not required to prove the elements of his claim on the basis of "absolute certainty," he must at least establish the existence of those elements by "reasonable probability." **Sanderson v. Porta-Fab Corp.**, 989 S.W.2d 599, 603 (Mo.App. E.D.1999) (citing **Cook v. Sunnen Prods. Corp.**, 937 S.W.2d 221, 223 (Mo.App. E.D.1996)).

The quantum of proof regarding the nature and extent of disability is reasonable certainty. The employee must prove the nature and extent of any disability by a reasonable degree of certainty. **Downing v. Willamette Industries, Inc.**, 895 S.W.2d 650, 655 (Mo. App. 1995); **Griggs v. A. B. Chance Company**, 503 S.W.2d 697, 703 (Mo. App. 1973).

Liability of the Second Injury Fund

Claimant's testimony regarding the work injuries and his condition is credible. Based on the testimony of Claimant and the credible medical evidence, I find Claimant suffered a 30% permanent partial disability to his right foot as a result of the July 24, 2003 work injury. At the time of the July 24, 2003 injury, his preexisting disability for the diabetes is 12.5% of the body as a whole. At the time of the July 24, 2003 injury, his preexisting disability for the low back is 30% of the body as a whole. At the time of the July 24, 2003 injury, his preexisting disability for the neck is 25% of the body as a whole. With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. **Banner Iron Works v. Mordis**, 663 S.W.2d 770, 773 (Mo.App. 1983).

Dr. Poetz, in his report and testimony, found a significant number of preexisting conditions which he rated for PPD. Of these conditions, Claimant only testified at the hearing regarding his low back, neck and diabetes. Therefore, there is not a sufficient factual basis to make findings regarding any of the preexisting conditions other than the low back, neck and diabetes. Dr. Poetz, in his report and testimony found Claimant had a PPD of 40% of the body at the chest related to the infection and blood clot as a result of the July 24, 2003 injury. However, the competent and substantial evidence indicate that those conditions had resolved, and Claimant did not testify regarding any pain or limitations pertaining to his chest. Therefore, there is not a sufficient factual basis to make findings regarding disability to the body at the chest as a result of this injury.

Employee: David M. Porting

Injury No. 03-124837

Permanent Total Disability

At the time of this injury, Claimant was working full time operating a street sweeper. In fact, according to his testimony, a normal day was 10-12 hours long. He was able to perform this work from 1995 until the injury of March 2003. After he completed treatment for the first infection, he returned to work full time without any medical restrictions, or any physical problems. All of that time he was working with the medical restrictions placed on him as a result of the back and neck surgeries. His diabetes was under control, and he did not have any pain or numbness in his hands or feet.

After the July 24, 2003 infection and blood clot which developed from the treatment for the infection, he was released back to work. The only restriction which was placed on him at that time was that he could not perform heavy work because he was still taking the blood thinning drug, Coumadin. Dr. Polish, the treating physician, testified it was not the condition of his foot that prevented him from returning to his former job with Employer, but the danger of an injury while taking Coumadin, and that once he ceased taking Coumadin, he could be released back to work in a heavy capacity with respect to his foot. Claimant testified at hearing regarding his current medications, and did not indicate he continued to take Coumadin.

The increased pain and stiffness in Claimant's low back and neck, and the onset of pain in his hip did not develop until after the primary injury. In fact, Claimant's vocational expert, Mr. Lalk, indicated in his report and testified Claimant reported to him that he did not notice the increased pain in his back and neck until he stopped taking narcotic pain medication in 2005. This is further evidenced by the fact that Claimant was working full time during the busiest time of the year for him when his foot was injured. There was no evidence presented that the injury to his foot increased his back and neck pain, or caused pain in his hip. The pain and numbness in his hands and feet that has been attributed to diabetic neuropathy developed sometime after the primary injury. Claimant's own testimony was that these symptoms did not commence until after the primary injury. There was no evidence presented that this condition was related to the injury of July 24, 2003.

The opinion of Dr. Poetz regarding permanent total disability is not credible for determining SIF liability. In his opinion, Dr. Poetz relies on preexisting conditions including depression, hypertension, fractured ribs, asthma, and the injury of March 2003, in addition to a primary injury to the body at the chest. None of these conditions have any factual basis to support a finding of permanent total disability. In addition, he considers the condition of Claimant's low back, neck and diabetes at the time of his evaluation in April 2005, which includes post accident deterioration of preexisting disabilities unrelated to the primary injury.

The opinion of Timothy Lalk regarding permanent total disability is not credible for determining SIF liability. In his opinion, Mr. Lalk takes into account the condition of Claimant's low back, neck, hip, hands and feet at the time of his vocational evaluation in January 2005, instead of his condition at the time of the injury. As previously discussed, his condition at that time reflects post accident deterioration of preexisting disabilities unrelated to the primary injury.

Employee: David M. Porting

Injury No. 03-124837

In determining the liability of the Second Injury Fund, the Commission should consider “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....” § 287.220.1, RSMo Supp.1992 (emphasis added). This language implies the Second Injury Fund is not liable for any progression of Claimant's pre-existing disabilities not caused by Claimant's last injury. **Lawrence v. Joplin R-VIII School Dist.**, 834 S.W.2d 789, 793 [4] (Mo.App.1992); *See also*, **Wilhite v. Hurd**, 411 S.W.2d 72, 76-77[1] (Mo.1967) (the worsening of claimant's vision in his left eye after he lost the vision in his right eye in work-related accident is not chargeable to the Second Injury Fund). **Frazier v. Treasurer of Missouri as Custodian of Second Injury Fund**, 869 S.W.2d 152, 155 (Mo.App. E.D. 1993).

Claimant has failed to prove that it is reasonably certain he is permanently and totally disabled as a result of a combination of the work injury of July 24, 2003 and his preexisting disabilities at the time of the injury.

Permanent Partial Disability

Section 287.220 RSMo. sets forth the statutory authority for the determination of Second Injury Fund liability. Assuming the employee is entitled to receive compensation on the basis of a combined disability, and the injuries under consideration meet the statutory threshold, the Administrative Law Judge is charged with making three determinations: 1) the degree of disability attributable to all injuries or conditions existing at the time the last injury was sustained; 2) the degree of disability which would have resulted from the last injury considered alone and of itself; and 3) the degree of disability which existed prior to the last injury. The sum of the second and third determinations is then subtracted from the first, with the balance representing the liability of the Second Injury Fund. *See*, **Conley v. Treasurer of Missouri**, 999 S.W.2d 269, 274 (Mo.App. E.D. 1999)

I find the degree of Claimant's disability that is attributable to all injuries existing at the time of the last injury is equivalent to 380 weeks of disability. The sum of the primary injury/disability (46.5 weeks or 30% of the right foot) and the preexisting disability (multiple injuries totaling 270 weeks) is 316.5 weeks. The Second Injury Fund is liable for 63.5 weeks (380 weeks – 316.5 weeks = 63.5 weeks), which totals \$22,037.68.

As Claimant is awarded permanent partial disability, the determination of the date he reached MMI is rendered moot. Attorney James Logan is entitled to a lien of 25% of all amounts recovered herein as and for necessary legal services provided to Claimant.

Employee: David M. Porting

Injury No. 03-124837

Made by: /s/ Grant C. Gorman
Grant C. Gorman
Administrative Law Judge
Division of Workers' Compensation

This award is dated and attested to this 1st day of December, 2009.

/s/ Naomi Pearson
Naomi Pearson
Division of Workers' Compensation