

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

Injury No.: 02-091416

Employee: Thomas Poss
Employer: Lohr Distributing Co., Inc.
Insurer: Lumbermens Mutual Casualty Co.
Additional Party: Treasurer of Missouri as Custodian
of the Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have heard oral argument, reviewed the evidence and briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the July 7, 2009, 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.

Preliminary Matters

The administrative law judge heard this matter to consider 1) medical causation as relating to employee's alleged cervical spine and right knee injuries; 2) liability for past medical expenses; 3) liability for future medical care; 4) liability for temporary total disability; and 5) liability of employer and Second Injury Fund for permanent total disability or permanent partial disability benefits.

The administrative law judge found that employee's alleged cervical spine and right knee injuries were medically causally related to the August 14, 2002, work-related injury. Therefore, the administrative law judge found employer liable for all of employee's past medical expenses, future medical care, and temporary total disability benefits related to the same. The administrative law judge further concluded that employee is permanently and totally disabled solely as a result of the injuries employee sustained in the August 14, 2002, work accident. In light of said finding, the administrative law judge found employer liable for employee's permanent and total disability benefits and shall pay them as prescribed by law. The administrative law judge found that the Second Injury Fund has no liability regarding this claim.

The employer appealed to the Commission alleging the administrative law judge erred in awarding permanent total disability benefits against employer, awarding past medical expenses, awarding future medical care, and awarding temporary total disability benefits. Employer alleged that said awards were against the weight of the competent and substantial evidence.

Summary of Facts

The findings of fact and stipulations of the parties were accurately recounted in the award of the administrative law judge and are adopted by the Commission to the extent they are not inconsistent with the additional facts concerning employee's right knee listed below.

Employee: Thomas Poss

- 2 -

Employee first complained of right knee pain to Dr. Andrew Wayne December 1, 2004. Employee had already been seeing Dr. Wayne for his other conditions relating to the August 14, 2002, accident. Dr. Wayne noted that there was no swelling or discoloration over the knee. Employee had normal passive range of motion, but had mild tenderness over the medial jointline. Dr. Wayne attributed the right knee pain to compensatory gait pattern as opposed to any significant disorder with the right knee.

Employee continued to complain of right knee pain at visits with Dr. Wayne on December 21, 2004, and January 13, 2005. Dr. Wayne noted that he did not notice any significant objective abnormalities in the right knee and recommended that he periodically ice the knee and to elevate the knee if it gets swollen.

On March 8, 2005, employee alleged his “knee gave out” while walking down a curb and he went to St. Joseph Hospital of Kirkwood’s emergency room. Employee alleged that his knee often gave out due to his right knee condition and that it was related to his altered gait. However, the medical records at St. Joseph Hospital state that employee injured his right knee when he “turned too quickly” and that he sustained a “twisting injury” while stepping down.

While at the ER, they examined employee’s right knee which revealed moderate tenderness and mild swelling of the patella and limited ROM secondary to pain. An x-ray was taken of the right knee which showed no fracture, and mild degenerative joint disease. Dr. James Taylor recommended employee treat the injury with ice and gave him a knee immobilizer to wear until it was better.

Employee was next seen, regarding his right knee, by Dr. Wayne on August 26, 2005. Dr. Wayne summarized employee’s prior treatment with him regarding employee’s right knee. Dr. Wayne noted that he did not notice any significant objective abnormalities on examination and that he felt employee might have been experiencing some increased synovial fluid buildup but did not see any clinical evidence for internal derangement.

Dr. Wayne reviewed the notes from employee’s March 8, 2005, visit at St. Joseph Hospital and noted that the x-rays did not reveal any acute abnormalities.

Employee complained to Dr. Wayne that he has persistent type pain in the right knee as well as a pulling sensation, and he says that the knee feels “unstable at times when he walks.” However, employee denied any actual give way of the knee or any falls. Employee indicated that the pain has increased since the March 8, 2005, incident.

Conclusions of Law

In *McGraff v. Satellite Sprinkler Systems*, 877 S.W.2d 704 (Mo. App. 1994), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003), the court stated that “[m]edical causation ... must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause.” *Id.* at 708. Even if supported by scientific medical evidence, “[a] medical expert’s opinion must [also] be supported by facts and reasons proven by competent evidence that will give the opinion sufficient probative force to be substantial evidence.” *Silman v. Williams Montgomery & Assoc.*, 891 S.W.2d 173, 176

Employee: Thomas Poss

- 3 -

(Mo. App. 1995), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

In this case, all of the medical evidence suggests that employee had an altered gait as a result of the problems caused to his left lower extremity from the work-related accident. However, the medical records from the March 8, 2005, incident do not show that this subsequent "twisting" injury to his right knee was caused by the work-related injury. Employee did not state that his knee "gave out" or that it was a result of his altered gait until he was questioned on the issue at the hearing. This testimony is contrary to the emergency room records. Employee stated that his right knee was worse after the March 8, 2005, incident, but has not sought any treatment for his right knee since the initial emergency room visit.

For the foregoing reasons, we find employer is not liable for the St. Joseph Hospital medical expenses relating to employee's alleged March 8, 2005, right knee injury, or any future medical care relating to employee's right knee.

Award

We modify the award of the administrative law judge with respect to her award of past medical expenses relating specifically to employee's alleged March 8, 2005, right knee injury and any future medical care relating to employee's right knee. Employee is denied both past medical expenses relating specifically to employee's alleged March 8, 2005, right knee injury and any future medical care relating to employee's right knee. In all other respects, we affirm the award.

The award and decision of Administrative Law Judge Linda J. Wenman issued July 7, 2009, is attached hereto and incorporated herein to the extent it is 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.

Given at Jefferson City, State of Missouri, this 26th day of January 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

CONCURRING OPINION FILED

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

Employee: Thomas Poss

CONCURRING OPINION

I submit this concurring opinion to disclose the fact that I was previously employed as a partner in the law firm of Evans and Dixon. While I was a partner, the instant case was assigned to the law firm for defense purposes. I had no actual knowledge of this case as a partner with Evans and Dixon. However, recognizing that there may exist the appearance of impropriety because of my previous status with the law firm of Evans and Dixon, I had no involvement or participation in the decision in this case until a stalemate was reached between the other two members of the Commission. As a result, pursuant to the rule of necessity, I am compelled to participate in this case because there is no other mechanism in place to resolve the issues in the claim. *Barker v. Secretary of State's Office*, 752 S.W.2d 437 (Mo. App. 1988).

Having reviewed the evidence and considered the whole record, I join in and adopt the modification of the award of the administrative law judge denying past medical expenses and future medical care relative to employee's right knee.

William F. Ringer, Chairman

Employee: Thomas Poss

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be affirmed. Therefore, I adopt the decision of the administrative law judge, in its entirety, as my decision in this matter.

Because the Commission majority has decided otherwise, I respectfully dissent.

John J. Hickey, Member

AWARD

Employee: Thomas Poss

Injury No.: 02-091416

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Lohr Distributing Co., Inc.

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

Additional Party: Second Injury Fund

Insurer: Lumbermens Mutual Casualty Co.

Hearing Date: April 2, 2009

Checked by: LJW

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: August 14, 2002
5. State location where accident occurred or occupational disease was contracted: St. Louis City
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: Employee developed sharp low back pain while stacking cases of beer onto a pallet.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Lumbar spine, left leg, psychiatric and right knee.
14. Nature and extent of any permanent disability: Permanent and total disability from Employer
15. Compensation paid to-date for temporary disability: \$144,235.25 covering two periods: 8/14/02 – 4/7/05, and 6/12/06 – 5/5/08.
16. Value necessary medical aid paid to date by employer/insurer? \$302,369.29

Employee: Thomas Poss

Injury No.: 02-091416

- 17. Value necessary medical aid not furnished by employer/insurer? \$3,448.25
- 18. Employee's average weekly wages: \$929.64
- 19. Weekly compensation rate: \$619.76 / \$340.12
- 20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:	\$3,448.25
61 2/7 th weeks of temporary total disability (or temporary partial disability)	\$37,982.43
Credit for disability advancements	(\$20,500.00)
Permanent total disability benefits from Employer beginning May 5, 2008, for Claimant's lifetime	To be determined

22. Second Injury Fund liability: No

TOTAL:	\$20,930.68*
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23. Future requirements awarded: Pursuant to award

*Payable now, in addition to ongoing PTD benefits starting May 5, 2008

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Thomas Poss	Injury No.: 02-091416
Dependents:	N/A	Before the
Employer:	Lohr Distributing Company Inc.	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
		Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
Insurer:	Lumbermens Mutual Casualty Company	Checked by: LJW

PRELIMINARIES

A hearing for final award was held regarding the above referenced Workers' Compensation claim by the undersigned Administrative Law Judge on April 2, 2009. The parties were provided an opportunity to file a post-trial brief, and the briefs were received on April 30, 2009. Attorney Dean Christianson represented Thomas Poss (Claimant). Lohr Distributing Company, Inc., (Employer) is insured by Lumbermens Mutual Casualty Company, and is represented by Attorney James Thoenen. Assistant Attorney General Carol Barnard represented the Second Injury Fund (SIF).

Prior to the start of the hearing, the parties identified the following issues for disposition in this case: medical causation as relates to Claimant's alleged cervical spine and right knee injuries; liability for past medical expenses; liability of Employer and SIF for permanent total disability (PTD) or permanent partial disability (PPD) benefits; future medical care; and liability of Employer for past temporary total disability (TTD) benefits. The parties stipulated Employer is entitled to a credit of \$20,500.00 for reimbursement of advances made prior to hearing.

Claimant offered Exhibits A-RR, and Employer offered Exhibits 1-3. The exhibits were admitted into the record. Any markings contained within any exhibit were present when received, and the markings did not influence the evidentiary weight given the exhibit. Any objections not expressly ruled on in this award are overruled.

FINDINGS OF FACT

All evidence presented has been reviewed. Only testimony and evidence necessary to support this award will be reviewed and summarized.

1. Claimant is forty-eight years old, has a 9th grade education, and obtained a GED at age forty-two. Claimant has worked as a truck driver, in food preparation, as a paint packer, and as a bottler for Pepsi. As of 2006, Claimant no longer holds a valid commercial driver's license.

2. In 1995, Claimant began working for Employer as a delivery driver. Claimant's job duties included loading and un-loading cases of beer. To complete his deliveries Claimant utilized fork-lifts and loaded cases of beer onto pallet jacks. Claimant delivered between 320 and 700 cases of beer per day, and delivered 80 barrels of beer per day.
3. Claimant's significant medical history prior to August 14, 2002 includes: a psychiatric history; injuries to his low back, with only the 1988 injury resulting in a settlement of 7.5% BAW PPD; a 1991 injury to his right hand that resulted in a settlement of 50% PPD of the right thumb, 5% PPD of the right elbow, and 5% BAW referable to psychiatric; and a 1997 injury to his left shoulder resulting in a settlement of 32.5% PPD referable to his left shoulder.
4. On August 14, 2002, Claimant was filling a warehouse order and stacking cases of beer onto a forklift pallet, when he developed a sudden onset of low back pain. Claimant notified his supervisor, and waited 1 ½ hours before attempting to resume his work. Claimant's pain progressed, and he began to experience pain radiating into his right leg. Employer authorized medical treatment, and Claimant ultimately came under the care of Dr. Boland, a neurosurgeon.
5. Dr. Boland initially examined Claimant on September 17, 2002. Dr. Boland reviewed Claimant's August 22, 2002 lumbar MRI, and noted it demonstrated severe degenerative disc disease at L4-5 with collapse of the disc space, anterior and posterior spurring, dehydration of the disc, with bilateral neuroforaminal stenosis, and disc dehydration at L5-S1. Dr. Boland ordered conservative treatment. Initially, Claimant improved with conservative treatment, but following a return to work during November 2002, Claimant aggravated his low back injury and a repeat lumbar MRI during February 2003 demonstrated a foraminal disc herniation at L5-S1, which Dr. Boland determined was previously present on the August 2002 MRI. Dr. Boland recommended surgical intervention.
6. On February 20, 2003, Claimant underwent a L5-S1 right lateral extraforaminal discectomy and bilateral lateral fusion with hardware; and a L4-5 posterior interbody fusion with hardware along with use of iliac bone grafts. Upon awakening from anesthesia, Claimant complained of severe neck pain that Dr. Boland related to positioning during a lengthy surgery.
7. During May 2003, Claimant complained of pain extending from his left knee down to his toes with associated extreme sensitivity to light touch. A left lower extremity (LLE) EMG was obtained demonstrating LLE peroneal nerve entrapment, which Dr. Boland related to bed rest following Claimant's lumbar fusion. Eventually, Claimant was referred to Dr. Krettek for a second opinion regarding further treatment. Claimant was also referred for psychiatric care due to depressive symptoms, and physical/aquatic post-operative therapy was started.
8. Following surgery, Claimant's right leg radicular pain improved, but Claimant continued to experience low back pain, and a CT/myelogram was obtained in October 2003. During the procedure Claimant received a sedative, and fell off the x-ray table striking his head. The CT/myelogram was conclusive for solid fusion at L4-5, but inconclusive regarding fusion status at L5-S1. During November 2003, Claimant underwent a surgical lumbar re-exploration and hardware removal after solid fusions were found at L4-5 and L5-S1.

9. Following hardware removal, Claimant continued to experience severe LLE symptoms, and on February 6, 2004, Claimant underwent left peroneal nerve exploration and decompression without significant improvement. During October 2004, Claimant underwent an additional more extensive LLE peroneal nerve decompression performed by Dr. Mackinnon, Washington University, again, without significant improvement. Dr. Mackinnon later suggested implantation of a spinal cord stimulator to block Claimant's LLE nerve pain, but the stimulator was unable to be placed due to spinal scar tissue. As of hearing Claimant's LLE symptoms have not abated, and Claimant remains in pain management due to his level of symptoms.

10. As of August 30, 2004, Dr. Boland found Claimant to be at maximum medical improvement (MMI) from a surgical standpoint, but opined Claimant's remaining option was pain management. Between August 30, 2004 and February 23, 2006, Claimant received authorized medical treatment from a series of pain management specialists and physiatrists. Claimant currently receives pain management treatment from Dr. Swarm.

11. During December 2004, Claimant complained of right knee pain to his then authorized treating physician, Dr. Wayne. Dr. Wayne opined Claimant's right knee pain was the result of a compensatory gait pattern due to the ongoing LLE difficulty. Dr. Wayne provided conservative care. During March 2005, Claimant experienced increased right knee pain after stepping off a curb. Claimant sought treatment at a local emergency room, and was supplied with a knee immobilizer.

12. On February 23, 2006, Claimant was once again referred to Dr. Boland due to complaints of neck, right shoulder and right upper extremity pain. A MRI of Claimant's cervical spine demonstrated cervical spinal stenosis at C5-6 and C6-7, and Dr. Boland recommended conservative treatment. Dr. Boland opined Claimant's cervical symptoms were not related to his work injury or any treatment that had flowed from Claimant's injury. Claimant later underwent two cervical spine surgeries.

13. During March 2006, due to Claimant's continuing lumbar spine complaints, Dr. Boland ordered another MRI of Claimant's lumbar spine. The MRI demonstrated solid fusions at L4-5 and L5-S1, but severe degeneration of the facet joints at L3-4 that produced spondylolisthesis L3 on L4 causing spinal stenosis. Dr. Boland opined the facet joint degeneration was the result of pressure exerted by the previous spinal fusions. On June 13, 2006, Claimant underwent an L3-4 lumbar fusion with bone graft and hardware placement.

14. Dr. Boland found Claimant had reached MMI regarding his lumbar spine on March 5, 2008. Dr. Boland rated Claimant's lumbar spine disability at 60% BAW PPD due to his August 14, 2002 injury. Dr. Boland opined Claimant could work at a sedentary level with a ten pound lifting restriction, no repetitive bending or prolonged sitting or standing, and Claimant would need to change positions as needed to accommodate his pain. Dr. Boland also opined Claimant would require pain management for his lumbar spine and LLE into the future. Dr. Boland did not rate Claimant's LLE disability or psychiatric disability.

15. As of hearing, Claimant's LLE symptoms have not improved. Claimant testified putting on socks and shoes cause pain, and he continues to experience severe skin sensitivity. Claimant testified his lumbar spine feels "like it is in a vise." Claimant experiences constant lumbar pain,

and sitting and driving increase his pain. Claimant experiences relief when laying flat with a pillow between his legs. Claimant continues to experience right knee pain, and he continues to experience increased depressive symptoms causing him to feel worthless and hopeless due to his medical condition. Claimant further testified he is only able to sleep for two to three hours at a time with medication due to his multiple body symptoms. Claimant's current medications include: Valium; oxycodone; Neurontin; methocarbamol; baclofen; diclofenac sodium; Effexor; Ambien CR; carisoprodol; and hydrocodone.

16. On July 2, 2008, Dr. Volarich examined Claimant at his request. Upon examination, Dr. Volarich noted Claimant presented as: depressed, sad, and with a flat affect; Claimant's LLE demonstrated extreme hypersensitivity and hyperesthesia from his knee to the sole of his foot with decreased reflexes; and loss of range of motion in his cervical and lumbar spine. Dr. Volarich's diagnoses regarding the August 14, 2002 injury included: left leg peroneal neuropathy with neuropathic pain; failed back syndrome with severe lumbar radicular syndrome; and major depression. Dr. Volarich found Claimant to be at MMI, and rated the primary injury at 75% BAW PPD referable to Claimant's lumbar spine and his left peroneal nerve injury, and 15% PPD referable to Claimant's right knee. Dr. Volarich deferred to a psychiatrist regarding Claimant's psychiatric disability from this injury. Dr. Volarich also rated Claimant's preexisting injuries, but opined Claimant was PTD due to his August 14, 2002 injury standing alone.

17. Dr. Bassett is a board certified psychiatrist who examined Claimant at his request on July 25, 2008. Dr. Bassett noted Claimant had experienced significant depressive symptoms at least one, if not two other times in his life. Dr. Bassett's diagnoses included a diagnosis of major depressive disorder, recurrent, severe, and with psychotic features. Dr. Bassett opined Claimant's August 14, 2002 injury was a substantial factor in contributing to the recurrent depressive disorder, and people who have this disorder are at a 50-70% chance at recurrence. Claimant's Global Assessment of Functioning (GAF) was measured at 41-50, considered in the range of serious symptoms. Dr. Bassett noted Claimant's profile demonstrated symptom magnification, but testified the magnification wasn't meant to manipulate, rather, it indicated his level of distress. Dr. Bassett found Claimant to be at MMI from a psychiatric viewpoint. Dr. Bassett also found Claimant to be in need of ongoing psychiatric care, a portion of which was related to the August 14, 2002 injury. Dr. Bassett rated Claimant's overall psychiatric disability at 20% BAW PPD. Dr. Bassett assigned 2% BAW PPD psychiatric disability referable to Claimant's lumbar spine perceived loss of function; and 2% BAW PPD psychiatric disability referable to Claimant's LLE.

18. Dr. Stillings is a board certified psychiatrist who was an authorized treating psychiatrist for Claimant during 2003-2004 treating a temporary mood disorder. Claimant was discharged from Dr. Stillings care in approximately May or June 2004. Dr. Stillings last examined Claimant during October 2008. Between June 2004 and October 2008, Claimant was referred, but did not seek or receive psychiatric care. During the October 2008 examination, Dr. Stillings retested Claimant's MMPI and SIMS profile. Dr. Stillings testified Claimant had exaggerated and over-reported his subjective symptoms. Dr. Stillings determined Claimant's GAF to be 75, which demonstrated no significant psychiatric symptoms, and the GAF demonstrated Claimant was functioning fairly well emotionally. Dr. Stillings opined Claimant did not have a current active psychiatric disorder related to the August 14, 2002 injury, Claimant had had a temporary mood disorder related to the injury that is resolved, and Dr. Stillings rated the resolved disorder at 1%

BAW PPD. Dr. Stillings opined Claimant is in need of further psychiatric treatment due to psychiatric conditions that preexisted his August 14, 2002 injury.

19. Timothy Lalk is a vocational rehabilitation counselor, who interviewed Claimant on June 18, 2008. After meeting with Claimant and reviewing his medical records and restrictions, Mr. Lalk concluded Claimant was not employable and could not successfully compete in the open labor market. Mr. Lalk concluded Claimant would not be able to perform the duties of jobs meeting Claimant's restrictions due to Claimant's daily need for narcotics and his need to frequently lie down during the day. Additionally, Mr. Lalk did not believe potential employers would consider hiring Claimant due to his presentation, and the potential risk Claimant presented for further injury if hired. Mr. Lalk found Claimant to be unemployable due to his low back and left leg disability alone.

20. Karen Kane-Thaler is a vocational consultant who reviewed Claimant's medical records, interviewed Claimant, and completed a labor market survey report at Employer's request on October 24, 2008. Taking into account Claimant's current physical abilities, his educational level, transferable skills, and Dr. Boland's restrictions, Ms. Thaler opined Claimant would be able to seek, accept, be hired, and maintain full time employment. Ms. Thaler identified potential employment available to Claimant as a wireless phone representative, auto sales, desk clerk, Wal-Mart greeter, parking cashier, and sales appointment setter as examples of jobs within Dr. Boland's restrictions. Ms. Thaler acknowledged potential employers would find it very difficult to offer employment to an individual who needs to lie down frequently during the day.

RULINGS OF LAW WITH SUPPLEMENTAL FINDINGS

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

Issues relating medical causation

To be medically causally related, the work must be a substantial factor in the cause of the resulting medical condition and disability. A causative factor may be substantial even if it is not the primary or most significant factor. *Cahall v. Cahall*, 963 S.W.2d 368, 372 (Mo.App. 1998) (overruled on other grounds). Further, there is no minimum percentage set out in the Workers' Compensation Law defining "substantial factor." *Id.* Whether employment is a substantial factor in causing the injury is a question of fact. *Sanderson v. Porta-Fab Corp.*, 989 S.W.2d 599, 603 (Mo.App. 1999) (overruled on other grounds). Determinations of this kind require the assistance of expert medical testimony. *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596 (Mo.banc 1994) (overruled on other grounds). The weight to be accorded an expert's testimony should be determined by the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. *Choate v. Lily Tulip, Inc.*, 809 S.W.2d 102 (Mo.App. 1991) (overruled on other grounds).

Employer does not dispute Claimant suffered a compensable work related accident on August 14, 2002, injuring his low back and as a result of treatment, his left leg. Employer does dispute whether Claimant's current cervical spine and right knee conditions are a result of that

injury. A thorough review of the medical record offered in evidence does not support Claimant's contention that his cervical spine condition and resulting treatment is related to the August 14, 2002 work injury. The medical record does document Claimant awoke after his initial lumbar surgery on February 20, 2003 complaining of neck pain, but between February 20, 2003 and late 2005, Claimant voiced no further complaints of neck pain although he had ample opportunity with numerous physicians and therapist to voice such complaints. I do not find Claimant's cervical condition to be medically causally related to the August 14, 2002 injury.

However, I do find Claimant's right knee complaints to be related to this injury. During December 2004, Dr. Wayne opined Claimant's right knee complaints were due to an altered gait pattern due to Claimant's left leg disability. While Dr. Wayne later opined Claimant's August 14, 2002 injury was not "the direct cause of Claimant's right knee complaints," the altered gait pattern arose as a direct result of authorized treatment due to that injury, and as such is medically causally related to the August 14, 2002 injury.

Issues related to past medical expenses

Section 287.140.1 RSMo. (2000), provides that an employer shall provide such medical, surgical, chiropractic, ambulance and hospital treatment as may be necessary to cure and relieve the effects of the work injury. Additionally, §287.140.3 RSMo., provides that all medical fees and charges under this section shall be fair and reasonable. A sufficient factual basis exists to award payment of medical expenses when medical bills and supporting medical records are introduced into evidence supported by testimony that the expenses were incurred in connection with treatment of a compensable injury. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo.banc 1989).

Employer paid for the medical treatment associated with Claimant's lumbar spine, psychiatric, and left leg injuries. Claimant seeks reimbursement of medical expenses to treat his cervical spine and right knee in the amount of \$80,479.37. An itemized listing of charges in the amount of \$80,479.37 was issued by the medical providers, supported by the appropriate medical records, and Claimant's testimony. Employer did not challenge the reasonableness or necessity of the treatment provided. Claimant's cervical spine condition is not compensable, and Employer is not liable for these expenses. Claimant's right knee condition is compensable, and a review of the medical bills submitted reflect charges of \$3,448.25 related to unpaid medical treatment sought for his right knee. The majority of these expenses are reflected in the March 2005 emergency room visit when Claimant testified his knee gave way while stepping off a curb. I find this testimony credible, and supported by the hospital emergency room chief complaint of "right knee blown out today" after turning too quickly. Accordingly, I find Employer liable for \$3,448.25 in medical expenses accrued by Claimant in an attempt to cure and relieve the effects of his work related injury.

Liability of the Employer or SIF for Permanent Total Disability

Claimant seeks permanent total disability benefits from Employer. Section 287.020.7 RSMo., defines "total disability" as the inability to return to any employment, and not merely the inability to return to employment in which the employee was engaged at the time of the last work related injury. See *Fletcher v. Second Injury Fund*, 922 S.W.2d 402 (Mo.App.1996)(overruled on other ground). The determinative test to apply when analyzing permanent total disability is whether a claimant is able to competently compete in the open labor market given claimant's condition and situation. *Messex v. Sachs Electric Co.*, 989 S.W.2d 206 (Mo.App. 1999)(overruled on other grounds). An employer must be reasonably expected to hire the claimant, given the claimant's current physical condition, and reasonably expect the claimant to successfully perform the work duties. *Shipp v. Treasurer of Mo.*, 99 S.W.3d 44 (Mo.App. 2003)(overruled on other grounds). Even though a claimant might be able to work for brief periods of time or on a part-time basis it does not establish that they are employable. *Grgic v. P&G Construction*, 904 S.W.2d 464, 466 (Mo.App.1995). As stated in *Hughey v. Chrysler Corp.*, 34 S.W.3d 845 (Mo. App. 2000), when determining whether an employer or SIF is responsible for PTD benefits, "the first determination is the degree of disability from the last injury," and "if a claimant's last injury in and of itself rendered the claimant permanently and totally disabled, then the Second Injury Fund has no liability and employer is responsible for the entire amount." *Id.* at 847.

Claimant alleges PTD due to the effects of his August 14, 2002 injury. While Claimant has preexisting disabilities, as a direct result of the August 14, 2002 injury Claimant has undergone three back surgeries, his lumbar spine is fused from L3-S1, he has developed left peroneal nerve neuropathy with associated neurogenic pain, right knee pain from an altered gait, and a renewed psychiatric disorder. As a result of these conditions Claimant requires pain management and daily narcotic usage. Dr. Volarich opined Claimant is PTD due to the last injury standing alone. As noted by Dr. Volarich "the severity of the 8/14/02 injury to the back and lower extremities far outweighs his preexisting disabilities which are minor in comparison." Mr. Lalk opined vocationally Claimant was PTD and unemployable in the open labor market considering only his low back and left leg disabilities. Mr. Lalk concluded Claimant could not compete or successfully maintain employment in the open labor market.

I find the opinions of Dr. Volarich and Mr. Lalk to be persuasive. I find Claimant is PTD due to the injuries he sustained in the August 14, 2002 work accident. Given Claimant's limitations, it would be unreasonable to expect any employer to hire Claimant, or to expect Claimant to successfully perform new work duties. Claimant is permanently and totally disabled due to his last work injury alone, and Employer shall pay PTD benefits as prescribed by law. As Employer is liable for PTD benefits, SIF has no liability regarding this injury.

Issues related to future medical care

Claimant requests future medical care from Employer in regard to his low back injury. Dr. Boland opined Claimant will require additional medical care regarding his lumbar fusion and LLE pain including pain management. It is not unreasonable to expect future medical needs regarding Claimant's right knee due to his altered gait. Claimant is not required to present evidence concerning the specific future medical treatment that will be necessary in order to

receive an award of future medical care. *Landers v. Chrysler Corp.*, 963 S.W.2d 275 (Mo.App. 1997) (overruled on other grounds). Future medical benefits may be awarded if a claimant shows by reasonable probability that there will be a need for additional medical care due to the work-related injury. *Id.* When future medical benefits are awarded, the medical care must flow from the accident in order to hold an employer liable. *Id.* Reasonable probability is based on reason and experience that inclines the mind to believe, but leaves room for doubt. *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 320 (Mo.App. 1986).

I find Claimant is entitled to receive future medical care from Employer. Employer is instructed to leave medical open regarding Claimant's low back injury, left leg condition, and right knee condition including, but not limited to, medical examinations and care by a board certified neurosurgeon or orthopedic surgeon specializing in spine disorders, pain management by a board certified pain management specialist, physical therapy, medications, medical equipment prescribed by the authorized physician, and surgical or diagnostic needs.

Further, I find Claimant is also entitled to receive future psychiatric care from Employer. Both psychiatrists found Claimant to be in need of future psychiatric care. While Dr. Stillings found Claimant's need for further psychiatric care related to his preexisting condition, I find the opinion of Dr. Bassett to be persuasive. Dr. Bassett opined Claimant's need for future psychiatric care flowed in part from the August 14, 2002 injury. When an employer is found to be partially responsible for future treatment, the employer may be ordered to provide medical and hospital treatment to cure and relieve the employee from the effects of the injury even though some of such treatment may also give relief from pain caused by a preexisting condition. *Hall v. Spot Martin*, 304 S.W.2d 844, 854-55 (Mo. 1957). Employer is instructed to leave medical open regarding Claimant's psychiatric needs, including but not limited to, care provided by a board certified psychiatrist, and any psychotherapy, medication, or diagnostic needs deemed necessary by the appointed psychiatrist.

Accordingly, Claimant is entitled to receive ongoing medical and psychiatric care as outlined above. Employer will retain the right to direct any future medical care if utilizing physicians who meet the qualifications as previously described.

Issues related to TTD benefits

TTD benefits are intended to cover a period of time from injury until such time as claimant can return to work. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641 (Mo.App. 1991) (overruled on other grounds). Employer paid TTD benefits for two periods, with the last TTD period ending on May 5, 2008. A gap in TTD benefits occurred on April 8, 2005 through June 11, 2006. Claimant testified he had been unable to work during that time period, or was under restrictions that Employer did not accommodate. In its post-trial brief, Employer appears to concede Claimant was TTD from August 14, 2002 until March 5, 2008. Accordingly, I find Employer liable for the TTD gap period of 61 2/7th weeks of unpaid TTD benefits, or \$37,982.43.

CONCLUSION

Claimant sustained a work related accident on August 14, 2002, that resulted in injury to his left leg, right knee, low back, and psyche. Claimant is found to be permanently and totally disabled as a result of the August 14, 2002 injury. Employer will pay \$3,448.25 in past medical benefits, \$37,982.43 in past TTD benefits, weekly PTD benefits beginning May 5, 2008, and will provide future medical/psychiatric care as outlined in this award. Employer is entitled to a credit on past benefits owed in the amount of \$20,500.00. SIF has no liability in this claim. Claimant's attorney is entitled to a 25% lien.

Date: _____

Made by: _____

LINDA J. WENMAN
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation