

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

Injury No.: 04-016663

Employee: Gary Short
Dependent: Martha R. Short
Employer: Missouri Baptist Medical Center
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. 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 § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 7, 2012. The award and decision of Administrative Law Judge Edwin J. Kohner, issued February 7, 2012, 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 28th day of June 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

DISSENTING OPINION FILED
James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Gary Short

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based upon 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 modified.

Employee had significant preexisting disabilities, including diabetic polyneuropathy. At the time of the work injury, employee already had limited control of his left leg and ambulated with crutches. While at work, employee caught a crutch on the strap of a purse that was on the floor causing him to fall and break his right hip. Employee underwent hip replacement surgery.

The administrative law judge concluded that employee is permanently and totally disabled considering only the effects of the hip fracture and replacement. I disagree.

The administrative law judge's conclusion relies heavily on the opinions of Dr. Poetz. Dr. Poetz believes employee's depression and sciatica are causally related to his work injury. Those opinions are belied by the other evidence in the record. Employee's depression resulted from the loss of his job, which was not related to his work injury. Dr. Poetz found no evidence of sciatica when he examined employee. Dr. Poetz did not diagnose any structural problem with employee's lumbar spine nor did he adequately explain how the work injury caused the sciatica. Nonetheless, Dr. Poetz offered his opinion that employee has a 20% permanent partial disability of the body as a whole referable to the lumbar spine due to sciatica. I am not persuaded by Dr. Poetz's opinion because he factored in depression and sciatica that are not shown to be related to the work injury.

To the extent that Mr. Weimholt relied upon Dr. Poetz's opinions that the depression and sciatica were caused by the work accident in reaching his conclusion that employee was permanently and totally disabled as a result of the work injury considered alone, his opinion is also unpersuasive.

I find most persuasive the opinion of Dr. Johnston. Dr. Johnston performed employee's total hip replacement and provided his subsequent care. Dr. Johnston was in the best position to determine if employee's sciatica was related to the work injury and he could not connect it with employee's work injury.

According to Mr. Weimholt, it was employee's ambulation restrictions upon which Mr. Weimholt primarily relied in reaching his conclusion that employee is permanently and totally disabled. Before the work injury, employee's mobility was significantly hampered by his inability to control his left leg and his difficulty in assessing the position of his lower extremities while ambulating. After his hip replacement surgery, employee developed weakness in his right leg due to a combination of post-surgical weakness and weakness attributable to his diabetic polyneuropathy. Dr. Johnston opined that the diabetic polyneuropathy is the source of employee's inability to sense the position of his lower extremities and the primary driver of employee's ambulation problems.

Employee: Gary Short

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Because I find most persuasive Dr. Johnston's opinion that employee's polyneuropathy is the primary source of employee's mobility problems, I conclude that employee's permanent total disability was caused by the effects of his hip fracture in combination with his many preexisting disabilities, most notably, his diabetic neuropathy.

I would modify the administrative law judge's award. I would award permanent partial disability from employer to employee. I would award permanent total disability from the Second Injury Fund to employee.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

James G. Avery, Jr., Member

AWARD

Employee:	Gary Short	Injury No.:	04-016663
Dependents:	Martha R. Short		Before the
Employer:	Missouri Baptist Medical Center		Division of Workers'
Additional Party:	Second Injury Fund		Compensation
Insurer:	Self Insured		Department of Labor and Industrial
Hearing Date:	January 9, 2012		Relations of Missouri
			Jefferson City, Missouri
		Checked by:	EJK/lsn

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: February 12, 2004
5. State location where accident occurred or occupational disease was contracted: Franklin 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? Self insured
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
The claimant, a medical laboratory technician, suffered a fractured hip when he tripped on a purse strap on the floor and fell while walking on the employer's premises.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Right hip
14. Nature and extent of any permanent disability: Permanent total disability
15. Compensation paid to-date for temporary disability: \$9,992.52
16. Value necessary medical aid paid to date by employer/insurer: \$52,704.24

- 17. Value necessary medical aid not furnished by employer/insurer? None to date
- 18. Employee's average weekly wages: \$813.35
- 19. Weekly compensation rate: \$542.23/\$347.05
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

16 3/7 weeks of temporary total disability (subject to a credit of \$9,992.52 previously paid)	(\$1,084.56)
Permanent total disability benefits from Employer beginning May 18, 2006, for Claimant's lifetime	Indeterminate

- 22. Second Injury Fund liability: No

TOTAL: Indeterminate

- 23. Future requirements awarded: See Additional Finding of Fact and Rulings of Law

Said payments to begin as of May 18, 2006, 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: Ronald D. Edelman, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Gary Short

Injury No.: 04-016663

Dependents: Martha R. Short

Before the
**Division of Workers'
Compensation**

Employer: Missouri Baptist Medical Center

Department of Labor and Industrial

Additional Party: Second Injury Fund

Relations of Missouri

Insurer: Self Insured

Jefferson City, Missouri

Checked by: EJK/lsn

This workers' compensation case raises several issues arising out of an alleged work related injury in which the claimant, a medical laboratory technician, suffered a fractured hip when he tripped on a purse strap on the floor and fell while walking on the employer's premises. The issues for determination are (1) Future medical care, (2) Temporary Disability, (3) Permanent disability, (4) Second Injury Fund liability, and (5) Dependency. The evidence compels an award for the claimant for future medical care, permanent total disability benefits, and a finding that his spouse was his dependent at the time of the occurrence and as of the hearing in this case.

At the hearing, the claimant testified in person appearing in a battery powered wheelchair and offered a deposition of Robert P. Poetz, D.O., and Gary Weimholt, public records from the Missouri Division of Workers' Compensation, correspondence from the claimant's attorney, and voluminous medical records. The Employer offered depositions of the claimant and Richard Johnston, M.D. The Second Injury Fund offered no evidence beyond cross-examination of witnesses offered by other parties.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident was alleged to have occurred in Missouri. Any markings on the exhibits were present when offered into evidence.

SUMMARY OF FACTS

On February 12, 2004, this then fifty-three year old hospital medical technician sustained a compensable work injury in which he tripped on an object and fell while he was walking on the employer's floor. Due to a pre-existing diabetic neuropathy in his left leg the claimant used arm crutches or Canadian crutches to ambulate. As he was walking in the lab, he caught the tip of his crutch on a co-worker's purse strap and fell on his right side. He had immediate pain in his right

hip, knee, and ankle. As a result of the fall, he was diagnosed with a fracture of his right femoral neck and underwent a right total hip replacement. He now has a prosthetic hip joint. This case is complicated due to the severity of the injury and the extensive pre-existing debilitating conditions. The facts of the accident will be presented followed by the details of the claimant's pre-existing conditions and a summary of expert medical opinion evidence.

After the 2004 accident, the claimant went to the hospital emergency room and received x-rays and pain medication. He followed up with Dr. Eljaiek on February 16, 2004, who treated the condition for two months, provided pain medication, and kept the claimant off work. A fracture had not yet been diagnosed. The claimant testified that he was unable to even get in and out of bed. The claimant purchased a hospital type bed that could be elevated to permit access based on a therapist's recommendation.

On March 29, 2004, the claimant consulted Dr. Gragnani who reported that the claimant was unable to walk or stand on his right leg. An MRI on the same date confirmed a fracture to the femoral neck, and Dr. Gragnani referred the claimant to Dr. Johnston, an orthopedic surgeon. See Exhibit F.

On the same date, March 29, 2004, Dr. Johnston examined the claimant and performed a right total hip replacement on March 31, 2004. See Exhibit G. The claimant underwent physical and occupational therapy as an in-patient and was discharged on April 21, 2004. See Exhibit E. The claimant testified the principal focus of physical and occupational therapy was to restore his ability to walk. At the time of discharge he was using a wheelchair and a walker. He testified that he then purchased a van in order to be able to transport his wheelchair. He remained off work and under the care of Dr. Johnston. See Exhibit G.

On May 24, 2004, Dr. Johnston noted that the claimant was able to ambulate with his walker but not able to return to the forearm crutches. See Exhibit G. The patient related he had lost strength in both of his legs due to his immobilization. On physical exam the doctor noted significant weakness in both legs. He ordered outpatient therapy for eight weeks, for strengthening, gait training, and stairs. He kept the claimant off work until June 7, 2004, and opined that the claimant could then return to sit-down work but may move about as needed in a walker or wheelchair. See Exhibit G. On July 19, 2004, Dr. Johnston noted improved range of motion in the right hip but found weak flexion and abduction. He noted it seemed to be somewhat of a "global problem given his severe diabetic neuropathy". See Exhibit G. On September 13, 2004, Dr. Johnston noted that the claimant was "doing well but he is not back to his baseline where he was before the injury. He has continued weakness, continued trouble getting around. He has some problems with leg spasms at night, especially in his hamstrings." See Exhibit G. Dr. Johnston examined the claimant on March 7, 2005, and found that he was doing well with no pain. He reported:

He continues to have significant weakness in the right leg. This is a combination of the results of the fracture and his underlying severe diabetic peripheral

neuropathy. He walks with a walker. He does more of a swing through on the right side than a full weight bearing gait. He has good hip motion. He has significant weakness in abduction and internal rotation and flexion on the right side. He is slightly better on the left side globally. Right total hip replacement doing well with underlying severe weakness due to diabetic neuropathy and post-surgery weakness. See Exhibit G.

The claimant returned to Dr. Johnston on September 19, 2005, with increased pain and spasm in the right posterior hip. See Exhibit G. Dr. Johnston found no pain with motion in the hip and decreased strength due to his chronic diabetic neuropathy. He also found pain and some spasm with attempted straight leg raising particularly in the sciatic notch. His assessment was right sciatica. See Exhibit G. Dr. Johnston ordered a short course of physical therapy and medication. On February 27, 2006, Dr. Johnston examined the claimant and reported that the claimant returned "for follow-up of his right sciatica. He has had some recent exacerbation. This started when he had a slip and fall when he was trying to maneuver himself with his walker in and out of a chair." He ordered physical therapy and assessed right sciatica exacerbation. Dr. Johnston examined the claimant on April 10, 2006 and May 15, 2006, and continued physical therapy at each of these visits. The claimant returned to Dr. Johnston one final time on June 12, 2006 for right sciatica, and Dr. Johnston recommended continued home exercise program and returned the claimant to "Full duty within his limits". See Exhibit G.

The claimant testified that after his hip replacement surgery and release, he was no longer able to ambulate with the use of his crutches. He used a walker to ambulate after his return to work in June 2004. He no longer walked the floors of the hospital to do blood draws on a regular basis. Although this had been an essential and significant part of his job duties, his employer hired a secretary/phlebotomist to assist with blood draws and other work. He testified that his mobility was significantly degraded over his pre-injury condition and that he uses a wheelchair for any extended walking. He purchased and continues to use a power wheelchair. He testified he has significant pain in the right hip area and has difficulty sleeping. He is no longer able to do yard work and is no longer able to stand unassisted by assistive devices for long periods as he was before the injury. He gave up his woodworking because he could not stand and use his tools. It is difficult for him to get dressed in the morning. See claimant deposition, pages 33-34. He testified that he could stand only about ten minutes after the hip surgery. See claimant deposition, page 53. He could only sit for about 2 hours after the surgery, then would need to change position and stand up. See claimant deposition, pages 52-53. He testified that he wakes up every two hours due to leg pain. See claimant deposition, pages 55-56. Although he returned to work after the hip replacement surgery, the employer made substantial accommodations over and above those that had previously been made for the claimant. He testified that his underlying diabetes has been stable since before the accident and there has not been any new or different medical management.

At work, he received excellent evaluations both before and after his accident in 2004. In May 2006, his employer terminated his employment for a mistake on a report sent out over his

initials. The claimant testified that he felt the reason was that his medical and physical condition represented a "liability" for the Employer and they were determined to get rid of him.

It is noted that the termination of his employment is contemporaneous with the renewed medical treatment from Dr. Johnston from February through June of 2006 due to his back complaints which was being billed to and paid for by Employer as a workers' compensation benefit.

Pre-existing Conditions

The claimant was 53 years of age on the date of injury. He and his wife, Martha R. Short (Date of Birth June 7, 1948), have been continuously married since December 30, 1972. They were married at the time of the accident. His children are over the age of eighteen. He graduated from Clinton High School in Clinton Illinois in 1968 and briefly worked and attended some college after high school. He completed vocational training in the field of medical laboratory technician in 1971-72 and received certification in that field. The training qualified him to perform blood testing, work as an x-ray technician and perform EKG testing. These opportunities were present in hospital settings and in some private laboratories. The claimant was employed from 1972 through May 19, 2006 as a laboratory technician primarily in hospital settings performing x-rays, blood draws, analysis of blood draws, and EKG testing. His primary duties were to draw blood from patients, properly identify the samples, and then conduct laboratory analysis of the samples. The lab work required him to determine what tests were to be done. He set up the laboratory equipment and reagents required. He would place the samples in the equipment and run the necessary tests. He would maintain and test the equipment as required. He would obtain the results and report them. He did the paperwork to properly record and report the results.

The claimant testified that from hire date through the date of his injury he would walk the floors of the hospital to go to patient rooms or the emergency rooms to do blood draws. He would spend 6 ½ to 7 hours a day in the lab. He testified that prior to the 2004 injury typically he would stand at the machines to do his work. He did not require crutches while standing. However, he used them for about five years before the injury to walk through the hospital to do the blood draws. He was required to start using crutches due to diabetic neuropathy in his left leg. He did not have neuropathy in his right leg. He could walk short distances without his crutches. Typically he would walk around in the lab without using them.

The claimant's pre-existing disabilities are the result of or secondary to his diabetic condition. The claimant was diagnosed with Type I or juvenile diabetes in 1964 at age fourteen and has been under the care of a physician and insulin dependent since then. He testified that in his teenage years and as a young man he was unaware of any specific physical limitations on his physical activity. He testified that as a young man there were activities including vocational activities or careers that he could not consider such as construction or other physically demanding jobs or things which required him to work in the heat. During the early part of his career up until the early 1980's, he had no difficulty ambulating or other restrictions on his ability

to work as a lab technician. He was able to participate in most recreational activities as desired and able to perform activities of daily living without difficulty.

In November 1985, the claimant suffered a heart attack and underwent cardiac catheterization which was positive for coronary artery disease and coronary bypass surgery was recommended. Dr. Clarence Weldon performed a triple bypass coronary artery surgery with grafts, and he was discharged back to the care of Dr. Weiss and Dr. Skor on November 20, 1985. See Exhibit J. Dr. Demorlis' records document ongoing monitoring of his cardiac condition through the 1980's including episodes of tachycardia as well as ongoing monitoring of his diabetic condition. See Exhibit O. He sought treatment for cardiac problems with Dr. Hess and Dr. Groll prior to and after the work-related accident on February 12, 2004. He was followed by Dr. Hess in 2002. He had a history of myocardial infarction in 1992. In 2003, he was diagnosed with an impression of severe ischemic cardiomyopathy, decompensated congestive heart failure, moderate to severe mitral regurgitation by echo and mild aortic valve insufficiency. The medical history reflected coronary artery bypass graft in 1985, history of myocardial infarctions in 1985 and 1992, and concentric left ventricular hypertrophy. See Exhibit K. In June 2003, Dr. Groll examined the claimant for symptoms consistent with congestive heart failure and reported that the claimant was "not very active due to his diabetic neuropathy". See Exhibit L.

The claimant testified that in 1999 he was placed on an insulin pump by his physicians and that he felt his diabetic condition was more stable and in fact improved generally. He testified that he developed diabetic neuropathy in his left leg and had difficulty walking as a result. For the five years before the 2004 work incident he began to use "Canadian crutches" to walk for any extended distance. As noted, he would use them to walk through the hospital in the course of his job to do blood draws or go to other departments. He testified he would use them to walk in the Wal-Mart or grocery store. These are canes with a handgrip and a brace above the grip which goes around the forearm of the user. He testified during this period his left foot would sometimes drag and the toes would go down and he would have to lift and deliberately place his left foot. He had no similar problems in his right leg. He did not need to use the crutches simply to stand.

During this five year period prior to the 2004 work-related accident, he was able to drive his car, a small sport type vehicle, and did not have trouble with ingress and egress to and from the vehicle. He would do some yard work. He enjoyed wood working and would stand and operate his tools and equipment for extended periods. He testified that after he began to use the crutches he was unable to move as quickly through the hospital when he was required to leave the lab. He did not own a wheelchair before the 2004 work-related accident. Only on rare occasions had he used a wheelchair such as on the occasion of visiting a zoo with extensive grounds and hills to traverse.

Dr. Johnston

Dr. Johnston rated the claimant's permanent partial disability at 20% of the right hip for the femoral neck fracture and hip replacement. On June 27, 2006, Dr. Johnston opined,

The last time I saw Mr. Short earlier in June 2006 it was determined that he was at the point of maximum medical improvement from exacerbation of sciatica. Mr. Short's treatment in this last episode has been due to slip and fall mentioned in his 2-27-06 report and not due to his initial work injury of the femoral neck fracture. In my opinion, Mr. Short has reached the point of maximum medical improvement from both his slip and fall injury of 2006 and his total hip replacement of 2004. ... He will need routine follow-up of the total hip replacement every three years for physical exam and x-ray checks. See Dr. Johnston deposition, Exhibit B.

Dr. Johnston testified that the 2004 accident caused the femoral neck fracture and right hip injury and treatment. All of the treatment to the right hip, including the surgery and follow-up were caused by the fall. See Dr. Johnston deposition, pages 19-21. Dr. Johnston testified that his active treatment for the hip ended on March 7, 2005. See Dr. Johnston deposition, page 12. He testified that on September 19, 2005, he saw the claimant for hip and buttock area pain in the back side of the hip radiating from the buttocks into the posterior hip and diagnosed "sciatica." His treatment plan for sciatica was anti-inflammatory medicines. On February 27, 2006, Dr. Johnston examined the claimant for a "flare-up of the sciatica again. He had started—slipped and had a fall in trying to maneuver himself with his walker out of a chair, and developed pain again into the buttocks." Dr. Johnston noted that the hip replacement seemed to be doing well at that time. He testified that the visits on April 10, 2006 and May 15, 2006 were to evaluate sciatica. Physical therapy was ordered. On June 12, 2006, Dr. Johnston evaluated the claimant's sciatica. See Dr. Johnston deposition, pages 13-16.

Dr. Johnston testified that the hip replacement device was a prosthesis and that the underlying diabetic condition complicated the claimant's recovery. See Dr. Johnston deposition, pages 23-24. Dr. Johnston testified that the claimant had substantial mobility problems before the fracture and hip replacement due to his neuropathy. He testified that the claimant through his March 7, 2005 one year checkup for the hip replacement still had weakness and limits in his right hip. He testified that the claimant had significant weakness of the right leg. He testified that the claimant would not be expected to return to normal, meaning normal for the general population. He felt that this was due to the combination of the results of the fracture and the severe underlying diabetic neuropathy. Dr. Johnston testified that the combination of the results of the fracture and the underlying severe diabetic neuropathy combined to render Mr. Short significantly more disabled than if he had either one or the other. He noted that throughout this period claimant did not return to the use of crutches. See Dr. Johnston deposition, pages 24-28. Dr. Johnston testified that the claimant would have significant limitations on his physical ability to work as a result of the hip fracture as well as the pre-existing diabetic neuropathy. "He has

certainly restrictions on getting in and out and doing things. ... He certainly has mobility limitations.” Dr. Johnston testified that the claimant would have limits on lifting, bending, squatting, stooping, and these would be things he would not be able to do. He opined that he would be limited to light lifting. See Dr. Johnston deposition, pages 32-33. Dr. Johnston opined that it would be reasonable for claimant to see an orthopedic surgeon periodically to check the hip replacement. He stated that before dental work or an invasive procedure he should have antibiotics before and after which is standard for patients with a joint replacement. See Dr. Johnston deposition, page 34.

Dr. Poetz

On January 11, 2007, Dr. Poetz examined the claimant and reviewed extensive medical records and the claimant’s deposition. The claimant presented for examination in a motorized wheelchair as the result of the 2004 accident. Dr. Poetz testified that claimant will require other modification such as a van sufficient to carry the chair, a lift to get it into the van and ramps to avoid steps into the house as well as doorways and accessible bathrooms. See Dr. Poetz deposition, pages 26-29.

Dr. Poetz opined that the claimant’s primary physical disability before the 2004 accident related to his diabetes and resultant polyneuropathy due to difficulty with ambulation, balance, and control of his gait. He noted he had cardiovascular problems likely related to his diabetic condition. See Dr. Poetz deposition, pages 32-33. He noted the two prior heart attacks and several heart catheterizations and congestive heart failure as well as the triple coronary bypass surgery with grafts. Dr. Poetz’ assessment of pre-existing disability included a 20% permanent partial disability to the cervical spine as a result of an auto accident in 1987, a 50% permanent partial disability to the body as a whole due to pre-existing diabetes and polyneuropathy, and a 40% permanent partial disability to the cardiovascular system. Dr. Poetz testified that the pre-existing disabilities combined with and had a synergistic effect with the primary injury of February 12, 2004 resulting in greater disability than the simple sum of the primary and pre-existing conditions taken alone. See Dr. Poetz deposition, pages 10-12, 21, 22, 24, depo Ex 2, pages 3, 5, 8. Dr. Poetz diagnosed right femoral neck fracture and status post right total hip replacement with prosthesis, right sciatica, and depression as a result of the 2004 accident. He opined that the claimant suffered a 60% permanent partial disability to the right hip, a 20% permanent partial disability to the lumbar spine, and a 30% permanent partial disability due to depression as a result of the 2004 accident. See Dr. Poetz deposition, pages 20-21, deposition Exhibit 2, pages 5, 8.

Dr. Poetz testified that the primary injury and pre-existing injuries combined to create a greater disability than the sum of the individual specific disabilities. He opined that the claimant was permanently and totally disabled due in part to the combination of the pre-existing disabilities and the primary injury and resultant disabilities from that injury. He also opined that considering the last injury alone and its residuals the claimant would be permanently and totally disabled disregarding all pre-existing disabilities and limitations. See Dr. Poetz deposition,

pages 23, 24, depo Ex 2 p 7, 8. Dr. Poetz also completed a work restriction form as part of his evaluation showing limitations on the claimant's physical activities to a level well below either a sedentary or light duty level and which permits only 0-2 hours per day of standing or sitting. See Dr. Poetz deposition, Deposition Exhibit 2, addendum Work Restriction Evaluation Form.

Gary Weimholt

Gary Weimholt, vocational expert, evaluated the claimant 9/12/2007 and issued his report December 11, 2007, and opined that under the restrictions of Dr. Poetz virtually any work would be ruled out. It was his opinion that the claimant's post injury work duties were reduced over his pre-injury requirements. This represented an accommodation by his then current employer for the conditions resulting from the 2004 accident in addition to the accommodations previously made by the employer. He performed a labor market analysis to determine employment opportunities that may exist in the labor market for individuals with claimant's experience, background, and education. He opined that the claimant had a total loss of access to the open competitive labor market and was totally vocationally disabled from employment. He opined that no employer would hire him for any position in view of his physical limitations and restrictions. He found these restrictions to be the result of the pre-existing disabilities and limitations as well as the residuals of the primary injury which reduced his mobility to an even greater extent than the prior limitations. He opined that once he lost the job he had with this employer with the accommodations, he was unable to access the labor market or convince a new or different employer to hire him. See Weimholt deposition, pages 11-22, deposition exhibit B, page 12. Mr. Weimholt opined that in view of his ability to perform the essential functions of his job before the February 2004 accident and his inability to perform all of the essential functions of his job after his recovery from that accident that it would be accurate to say that the last accident in and of itself rendered him totally disabled. See Weimholt deposition, pages 12-14. Mr. Weimholt testified that given his prior limitations, lack of mobility, cardiac and diabetic condition that many occupations would have been unavailable to the claimant prior to the 2004 accident. See Weimholt deposition, page 36.

FUTURE MEDICAL CARE

The Workers' Compensation Act requires employers "to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment[.]" § 287.120.1. This compensation often includes an allowance for future medical expenses, which is governed by Section 287.140.1. Rana v. Landstar TLC, 46 S.W.3d 614, 622 (Mo.App.2001). Section 287.140.1 states:

In addition to all other compensation paid to the employee under this section, 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.

Section 287.140.1 places on the claimant the burden of proving entitlement to benefits for future medical expenses. Rana, 46 S.W.3d at 622. The claimant satisfies this burden, however, merely by establishing a reasonable probability that he will need future medical treatment. Smith v. Tiger Coaches, Inc., 73 S.W.3d 756, 764 (Mo.App.2002). Nonetheless, to be awarded future medical benefits, the claimant must show that the medical care “flow [s] from the accident.” Crowell v. Hawkins, 68 S.W.3d 432, 437 (Mo.App.2001) [quoting Landers v. Chrysler Corp. 963 S.W.2d 275, 283 (Mo.App.1997)].

While an employer may not be ordered to provide future medical treatment for non-work related injuries, an employer may be ordered to provide for future medical care that will provide treatment for non-work related injuries if evidence establishes to a reasonable degree of medical certainty that the need for treatment is caused by the work injury. Stevens v. Citizens Mem'l Healthcare Fund., 244 S.W.3d 234, 238 (Mo.App.2008). To receive an award of future medical benefits, a claimant need not show "conclusive evidence" of a need for future medical treatment. ABB Power T & D Co. v. Kempker, 236 S.W.3d 43, 52 (Mo.App. W.D. 2007). Instead, a claimant need only show a "reasonable probability" that, because of her work-related injury, future medical treatment will be necessary. Id. A claimant need not show evidence of the specific nature of the treatment required. Aldridge v. Southern Missouri Gas Co., 131 S.W.3d 876, 883 (Mo.App. S.D. 2004); Stevens v. Citizens Memorial Healthcare Foundation, 244 S.W.3d 234, 237 (Mo.App. S.D. 2008).

In determining whether medical treatment is “reasonably required” to cure or relieve a compensable injury, it is immaterial that the treatment may have been required because of the complication of pre-existing conditions, or that the treatment will benefit both the compensable injury and a pre-existing condition. Tillotson v. St. Joseph Med. Ctr., 347 S.W.3d 511, 519 (Mo.App. W.D 2011). Rather, once it is determined that there has been a compensable accident, a claimant need only prove that the need for treatment and medication flow from the work injury. Id. The fact that the medication or treatment may also benefit a non-compensable or earlier injury or condition is irrelevant. Id. Application of the prevailing factor test to determine whether medical treatment is required to treat a compensable injury is reversible error. Id. at 521.

Dr. Johnston, an orthopedic surgeon, treated the claimant from March 29, 2004, to June 12, 2006, performed the total hip replacement surgery, and he concluded that the claimant will need to see an orthopedic surgeon in the future for maintenance. About six months after Dr. Johnston stopped treating the claimant for the total hip replacement, the claimant returned with radiating pain in the back of the hip which Dr. Johnston diagnosed as sciatica, which he did not relate to the accidental injury or treatment for the accidental injury. After a subsequent flare-up of sciatica, he opined that the claimant reached maximum medical improvement for the sciatica in June 2006. On the bases of Dr. Johnston’s testimony and opinions, the claimant will require future medical treatment related to the hip fracture and total hip replacement. Based on the

evidence, the claimant is awarded future medical care to cure and relieve from the effects of the injury as provided in Section 287.140, RSMo 2000, as amended.

TEMPORARY DISABILITY

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

The claimant testified that he returned to work on June 7, 2004. The parties stipulated that temporary total disability benefits were paid through June 20, 2004. Therefore, the employer is entitled to be reimbursed for temporary total disability benefits paid for the two week period from June 7, 2004 through June 20, 2004, at the stipulated rate of \$542.23 per week, or \$1,084.56.

PERMANENT DISABILITY

Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. Sanders v. St. Clair Corp., 943 S.W.2d 12, 16 (Mo.App. S.D. 1997). A disability is "permanent" if "shown to be of indefinite duration in recovery or substantial improvement is not expected." Tiller v. 166 Auto Auction, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997). "Total disability" is defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. Section 287.020.7, RSMo 2000. The test for permanent total disability is whether, given the claimant's situation and condition, he or she is competent to compete in the open labor market. Sutton v. Masters Jackson Paving Co., 35 S.W.3d 879, 884 Mo.App. 2001). The question is whether an employer in the usual course of business would reasonably be expected to hire the claimant in the claimant's present physical condition, reasonably expecting the claimant to perform the work for which he or she is hired. Id.

The great weight of the evidence compels a finding that the claimant in this case is unemployable in the open labor market. The claimant had significant restrictions on his employability before the 2004 accident and had more restrictions and limitations on his employability as a result of the 2004 accident. The claimant's two forensic experts opined that the claimant was unemployable in the labor market and therefore permanently and totally disabled. The claimant held his prior position with this employer for two years with significant accommodations, but lost the position due to an error in a report that went out with the claimant's initials. The claimant applied for and received Social Security Disability benefits, and therefore, did not pursue other positions. Dr. Poetz diagnosed (1) right femoral neck fracture and status post right total hip replacement with prosthesis, (2) right sciatica, and (3) depression as a result of the 2004 accident. He opined that the claimant suffered a 60% permanent partial disability to the right hip, a 20% permanent partial disability to the lumbar spine, and a 30% permanent partial disability due to depression as a result of the 2004 accident. See Dr. Poetz deposition, pages 20-21, depo Ex 2, pages 5, 8. Dr. Poetz testified that the primary injury and pre-existing injuries combined to create a greater disability than the sum of the individual specific disabilities. He opined that the claimant was permanently and totally disabled due in part to the combination of the pre-existing disabilities and the primary injury and resultant disabilities from that injury. He also opined that considering the last injury alone and its residuals the claimant would be permanently and totally disabled disregarding all pre-existing disabilities and limitations. See Dr. Poetz deposition, pages 23, 24, depo Ex 2, p 7, 8.

Dr. Johnston rated the claimant's permanent partial disability at 20% of the right hip for the femoral neck fracture and hip replacement. He testified that the claimant would not be expected to return to normal, meaning normal for the general population. He felt that this was due to the combination of the results of the fracture and the severe underlying diabetic neuropathy. Dr. Johnston testified that the combination of the results of the fracture and the underlying severe diabetic neuropathy combined to render Mr. Short significantly more disabled than if he had either one or the other. He noted that throughout this period claimant did not return to the use of crutches. See Dr. Johnston deposition, pages 24-28. Dr. Johnston testified that the claimant would have significant limitations on his physical ability to work as a result of the hip fracture as well as the pre-existing diabetic neuropathy. "He has certainly restrictions on getting in and out and doing things. ... He certainly has mobility limitations." Dr. Johnston testified that the claimant would have limits on lifting, bending, squatting, stooping, and these would be things he would not be able to do. He opined that he would be limited to light lifting. See Dr. Johnston deposition, pages 32-33.

Given the forensic medical evaluations, the vocational evaluation, and the claimant's presentation at the hearing, it is clear that the claimant is permanently totally disabled, given the lack of any contrary forensic evidence. The more difficult question is whether the limitations and restrictions from the last accident alone result in permanent and total disability when combined with the claimant's age, education, and past relevant work history. This is important, because Section 287.220, RSMo 2000, provides as follows:

...if the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury or 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 employer at the time of the last injury is liable is less than the 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"...

"Section 287.220 creates the Second Injury Fund and sets forth when and in what amounts compensation shall be paid from the [F]und in "[a]ll cases of permanent disability where there has been previous disability." For the Fund to be liable for permanent, total disability benefits, the claimant must establish that: (1) he suffered from 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. Section 287.220.1. The Fund is liable for the permanent total disability only *after* the employer has paid the compensation due for the disability resulting from the later work-related injury. Section 287.220.1 ("After the compensation liability of the employer for the last injury, considered alone, has been determined ..., the degree or percentage of ... disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined..."). Thus, in deciding whether the Fund is liable, the first assessment is the degree of disability from *the last injury considered alone*. Any prior partial disabilities are irrelevant until the employer's liability for the last injury is determined. If the last injury in and of itself resulted in the employee's permanent, total disability, then the Fund has no liability, and the employer is responsible for the entire amount of compensation. ABB Power T & D Company v. William Kempker and Treasurer of the State of Missouri, 263 S.W.3d 43, 50 (Mo.App. W.D. 2007).

In the present case, the claimant testified at hearing that the pain in his right hip has never completely gone away. He continues to take Vicodin for pain and then lies down and stretches out the right leg, 3 or 4 times a week. He has problems sleeping at night and has decreased concentration during the daytime. He lays down for about an hour a day to control his hip pain.

Dr. Poetz testified that, even absent the claimant's preexisting injuries and medical conditions, the disabilities from the claimant's 2004 work-related accident alone permanently and totally disabled him. See Dr. Poetz deposition, page 23. These disabilities include the claimant's right hip, low back, and depression.

The defense challenged Dr. Poetz' conclusion that the claimant suffered depression from the 2004 accident. There is some issue as to when and why the claimant developed depression. There is an indication in the records that the claimant was taking Zoloft at the time of the primary injury. Claimant testified at hearing that he was treating for depression at the time of the primary injury. However in his deposition he stated he had stopped treating for depression years before

the primary injury, and he testified that his depression did not interfere with his work before February 2004. See claimant deposition, page 58.

No forensic medical expert offered an opinion that the claimant had any pre-existing permanent partial disability due to depression. Dr. Poetz, the sole expert to offer any opinion as to the claimant's depression, testified that the 2004 work injury caused depression, and he did not necessarily make the assumption that claimant didn't have depression before his February 2004 work injury. See Dr. Poetz deposition, pages 44, 45. The defense argues that Dr. Poetz is not qualified to evaluate the claimant's depression, however the defense offered no contrary forensic opinion evidence and did not state exactly why Dr. Poetz lacks medical qualifications in this area of medicine based on his curriculum vitae attached to his deposition. Certainly, a different evaluation would have been welcome, but lay tribunals cannot disregard forensic medical evidence based on lay experience or lay opinions. The defense argument that Dr. Poetz lacks foundation or credentials in this area is not persuasive. The evidentiary record reveals no basis, expert or lay, to find that the claimant suffered any permanent partial disability due to his prior depression treatment.

The defense also challenged Dr. Poetz' conclusion that the claimant suffered sciatica from the 2004 accident. The defense points to Dr. Johnston's testimony relating to sciatica, "He really had two episodes of sciatica. He had one in September of '05 and I think he got better from that, and then he had a slip and fall and that flared up again ..." See Dr. Johnston deposition, page 31. On the other hand, Dr. Johnston never opined whether the accident was the prevailing factor causing the sciatica or whether it was a pre-existing condition, or whether it is a permanent condition that is episodic.

Further, in regard to his alleged pre-existing permanent partial disability due to his heart and his neck, the claimant testified in his deposition that he did not have any physical problems performing his job duties due to either his neck or his heart. See claimant deposition, page 43, 44.

Mr. Weimholt testified that the work-related 2004 accident in and of itself rendered the claimant totally disabled from a vocational point of view. See Weimholt deposition, pages 12, 13. He agreed that based on the claimant's subjective complaints from the February 2004 work injury, including interrupted sleep, the need to lie down periodically, problems with concentration and the need to take Vicodin, along with the claimant's age, education and transferable skills and work experience, the claimant would be unemployable in the open labor market. See Weimholt deposition, pages 53-55. He also opined that based on Dr. Poetz' restrictions from the 2004 work injury alone would render the claimant unemployable in the open labor market regardless of any of his pre-existing disabilities. See Weimholt deposition, pages 56, 57.

The claimant's two experts, Dr. Poetz and Mr. Weimholt, while acknowledging the existence and extent of his pre-existing disabilities, both opined that the claimant would still be unemployable in the open labor market based on the primary injury alone. Therefore, the claimant's employer and its insurer bear liability for the claimant's permanent total disability, and the Second Injury Fund has no liability. In addition, the claimant and his spouse, Martha R. Short (Date of Birth June 7, 1948), have been continuously married since December 30, 1972.

They were married at the time of the accident and at the time of the hearing. The claimant's spouse qualifies as a dependent as that term is defined in Section 287.240, RSMo 2000.

SECOND INJURY FUND

"Section 287.220 creates the Second Injury Fund and sets forth when and in what amounts compensation shall be paid from the [F]und in '[a]ll cases of permanent disability where there has been previous disability.'" For the Fund to be liable for permanent, total disability benefits, the claimant must establish that: (1) he suffered from 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. Section 287.220.1. The Fund is liable for the permanent total disability only *after* the employer has paid the compensation due for the disability resulting from the later work-related injury. Section 287.220.1 ("After the compensation liability of the employer for the last injury, considered alone, has been determined ..., the degree or percentage of ... disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined..."). Thus, in deciding whether the Fund is liable, the first assessment is the degree of disability from *the last injury considered alone*. Any prior partial disabilities are irrelevant until the employer's liability for the last injury is determined. If the last injury in and of itself resulted in the employee's permanent, total disability, then the Fund has no liability, and the employer is responsible for the entire amount of compensation. ABB Power T & D Company v. William Kempker and Treasurer of the State of Missouri, 263 S.W.3d 43, 50 (Mo.App. W.D. 2007).

Based on the above findings, the Second Injury Fund bears no liability to the claimant, because the claimant's limitations and restrictions from the last injury alone when combined with the claimant's age, education, transferable skills, and past relevant work history resulted in the claimant's permanent total disability.

Made by: /s/ EDWIN J. KOHNER
EDWIN J. KOHNER
Administrative Law Judge
Division of Workers' Compensation