

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

Injury No.: 08-037253

Employee: Robert L. Treadway
Employer: Pemiscot-Dunklin Electric Coop
Insurer: Missouri Electric Cooperatives
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 April 19, 2011. The award and decision of Administrative Law Judge Gary L. Robbins, issued April 19, 2011, 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 15th day of March 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

DISSENTING OPINION FILED
Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Robert L. Treadway

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 (ALJ) should be modified and employee should be awarded permanent total disability benefits against the Second Injury Fund.

There is no dispute that employee suffered an accident that arose out of and in the course of his employment on May 8, 2008. The primary issue is whether employee's May 8, 2008, injury combined with his preexisting disabilities to result in Second Injury Fund liability.

Section 287.220 RSMo¹ creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there has been previous disability." In order to trigger liability of the Second Injury Fund, employee must show the presence of an actual and measurable disability at the time the work injury is sustained and that work-related injury is of such seriousness as to constitute a hindrance or obstacle to employment or reemployment. *E. W. v. Kansas City, Missouri, School District*, 89 S.W.3d 527, 537 (Mo.App. W.D. 2002), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

In evaluating cases involving preexisting disabilities, the employer's liability must first be considered in isolation before determining Second Injury Fund liability. *Kizior v. Trans World Airlines*, 5 S.W.3d 195 (Mo. App. W.D. 1999), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). In *Kizior*, the Court set out a step-by-step test for determining Second Injury Fund liability:

Section 287.220.1 contains four distinct steps in calculating the compensation due an employee, and from what source, in cases involving permanent disability: (1) the employer's liability is considered in isolation – 'the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability'; (2) Next, the degree or percentage of the employee's disability attributable to all injuries existing at the time of the accident is considered; (3) The degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the combined disability; and (4) The balance becomes the responsibility of the Second Injury Fund.

Kizior, 5 S.W.3d at 200.

In this case, employee testified to numerous ongoing complaints, which he attributes to his work injury. Employee stated that his back hurts every day and that the pain is constant and worse with exertion. He also continues to have complaints in his left leg,

¹ Statutory references are to the Revised Statutes of Missouri 2007 unless otherwise indicated.

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which includes numbness on the top of his thigh and a knot in his left calf. Employee is limited in his abilities to complete household chores and lawn care tasks. Employee can only sit or stand comfortably for 15-20 minutes at a time.

Prior to the work-related accident employee was diagnosed with emphysema. His emphysema caused him problems with shortness of breath whenever he would exert himself. Employee has smoked at least a pack of cigarettes a day for the past thirty years.

Employee also testified to a past history of depression. Employee stated that before his accident his depression would affect him at work. There were times when he would simply feel overwhelmed, such that he would have to pull his truck over onto a small dirt road and lay down to "let it pass." Employee has continued problems with his depression in that since the accident he has had to increase his medications of Lexapro and Trazodone.

Dr. Bowen testified that it is his opinion employee has a permanent partial disability of 5% of the body as a whole due to his work-related back injury. Dr. Bowen used the AMA guidelines for impairment in reaching this 5% rating. Dr. Bowen placed permanent restrictions on employee of sedentary work only, with no lifting greater than 10 pounds. With regard to employee's ability to return to work, Dr. Bowen testified that "his ability to return to work are (sic) probably not existent, but I'm not sure they're from an organic cause with his lower back." Dr. Bowen stated that he believes employee's pain "is real to him." Dr. Bowen stated that he did not have records of employee's past history of depression and anxiety, and he did not "talk extensively" with the employee about his past history.

Dr. Lichtenfeld opined that as a result of the May 8, 2008, lower back injury employee sustained 15% permanent partial disability of the body as a whole. Dr. Lichtenfeld recommended that employee avoid twisting, bending, stooping, and working in awkward positions. Dr. Lichtenfeld also recommended that employee avoid working with his arms outstretched and overhead, and prolonged sitting and standing. With regard to employee's preexisting disabilities, Dr. Lichtenfeld opined that employee suffers from 25% permanent partial disability of the body as a whole due to his emphysema. Dr. Lichtenfeld also opined that employee's primary injury combines with his preexisting disabilities to create a greater overall disability than the simple arithmetic sum of the separate disabilities.

Dr. Stillings testified that the work accident resulted in a Mood Disorder and a Pain Disorder, for which he attributed permanent partial disability of the body as a whole of 20% and 15%, respectively. With regard to employee's preexisting disabilities, Dr. Stillings opined that employee is 7.5% permanently partially disabled of the body as a whole due to a Depressive Disorder and 7.5% permanently partially disabled of the body as a whole due to his Maladaptive Personality Traits. Dr. Stillings opined that employee's preexisting psychiatric problems combined with his work-related psychiatric problems to create a greater overall disability than the simple arithmetic sum of the separate disabilities. Dr. Stillings stated that from a psychiatric standpoint employee is permanently and totally disabled from gainful employment.

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Vocational rehabilitation expert, Mr. Lalk, evaluated employee. Mr. Lalk noted that the restrictions of both Dr. Bowen and Dr. Lichtenfeld limit the employee to a sedentary level of exertion. He further noted the extensive psychiatric limitations based on Dr. Stillings' opinions. Mr. Lalk concluded that employee does not have either the experience or the training which would allow him to work in a skilled, sedentary position. Mr. Lalk opined that employee is not able to secure or maintain employment in the open labor market and is not able to compete for any position.

Vocational rehabilitation expert, Ms. Blaine, also evaluated employee. Ms. Blaine opined that employee could return to work if he worked within the framework of sedentary to light levels of work. Ms. Blaine stated that it was not feasible for employee to go back to the type of work he had done before, but she felt that he could consider jobs such as unarmed security, light delivery or a shuttle driver. On the other hand, Ms. Blaine stated that if she took the opinions of Dr. Stillings into consideration, she does not believe employee would be able to return to any employment.

Both Dr. Lichtenfeld and Dr. Stillings opined that employee's primary injuries combine with his preexisting disabilities to result in greater overall disability than the simple arithmetic sum of the separate disabilities. When considering employee's psychiatric condition, none of the experts believe that employee is able to compete in the open labor market.

Permanent and total disability is defined by § 287.020.6 RSMo as the "inability to return to any employment"

The test for permanent total disability is whether, given the employee's situation and condition he or she is competent to compete in the open labor market. The pivotal question is whether any employer would reasonably be expected to employ the employee in that person's present condition, reasonably expecting the employee to perform the work for which he or she is hired.

Gordon v. Tri-State Motor Transit Company, 908 S.W.2d 849, 853 (Mo.App. 1995) (citations omitted).

Based on the totality of the evidence, I believe employee is permanently and totally disabled as a result of his primary injuries combining with his preexisting disabilities. As such, I would modify the award of the administrative law judge merely awarding employee permanent partial disability benefits against employer and award employee permanent total disability benefits against the Second Injury Fund.

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

Curtis E. Chick, Jr., Member

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Robert L. Treadway Injury No. 08-037253
Dependents: N/A
Employer: Pemiscot-Dunklin Electric Coop
Additional Party: Second Injury Fund
Insurer: Missouri Electric Cooperatives
Hearing Date: January 25, 2011 Checked by: GLR/rf

SUMMARY OF FINDINGS

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease? May 8, 2008.
5. State location where accident occurred or occupational disease contracted: Pemiscot County, Missouri.
6. Was above employee in employ of above employers at time of alleged accident or occupational disease? Yes.
7. Did the employers receive proper notice? Yes.
8. Did the accidents or occupational diseases arise out of and in the course of the employment? Yes.
9. Were the claims for compensation filed within time required by law? Yes.
10. Were the employers insured by above insurers? Yes.
11. Describe work employee was doing and how accident happened or occupational disease contracted: The employee injured his back when he slipped and fell.

12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Back/body as a whole.
14. Nature and extent of any permanent disability: 10% permanent partial disability. See Award.
15. Compensation paid to date for temporary total disability: \$13,581.14.
16. Value necessary medical aid paid to date by employer-insurer: \$13,978.70.
17. Value necessary medical aid not furnished by employer-insurer: \$21,805.50.
18. Employee's average weekly wage: \$1,400.23.
19. Weekly compensation rate: \$742.72 per week for temporary total and permanent total disability. \$389.04 for permanent partial disability.
20. Method wages computation: By agreement.
21. Amount of compensation payable: See Award.
22. Second Injury Fund liability: None.
23. Future requirements awarded: See Award.

The Compensation awarded to the employee 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 employee: Dean L. Christianson.

FINDINGS OF FACT AND RULINGS OF LAW

On January 25, 2011, the employee, Robert L. Treadway, appeared in person and by his attorney, Dean L. Christianson, for a hearing for a final award. The employer-insurer was represented at the hearing by their attorney, Joseph M. Page. Assistant Attorney General Gregg N. Johnson represented the Second Injury Fund. The Court took judicial notice of all of the records contained within the files of the Division of Workers' Compensation. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a statement of the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

1. The employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by Missouri Electric Cooperatives.
2. On or about the date of the alleged accident or occupational disease the employee was an employee of Pemiscot-Dunklin Electric Coop and was working under the Workers' Compensation Act.
3. On or about May 8, 2008 the employee sustained an accident or occupational disease that arose out of and in the course of his employment.
4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage is \$1,400.23. His rate for temporary total disability and permanent total disability is \$742.72 per week. His rate for permanent partial disability is \$389.04 per week.
7. The parties agreed that the employer-insurer paid \$13,978.70 in medical aid.
8. The parties agreed that the employer-insurer paid \$13,581.14 in temporary disability benefits.
9. The parties stipulated that the employer-insurer will pay appropriate mileage.
10. The employee has no claim for additional temporary disability benefits.

ISSUES

1. Medical Causation. Whether the employee's injury was medically causally related to the accident or occupational disease?
2. Past Medical Bills. Whether the employee is entitled to reimbursement for past medical bills in the amount of \$21,805.50?
3. Future Medical Care. Whether Employee is entitled to an award of future medical care for his injury?
4. Liability of the employer-insurer for permanent total disability?
5. Liability of the employer-insurer for permanent partial disability?
6. Liability of the Second Injury Fund for permanent partial or permanent total disability?
7. Dependency. Whether the employee had dependents at the time of his injury?

EXHIBITS

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Deposition of Mark A. Lichtenfeld, M.D.
- B. Deposition of Wayne A. Stillings, M.D.
- C. Deposition of Timothy Lalk.
- D. Medical records of Malden Medical Center
- E. Medical records from Poplar Bluff Regional Medical Center #1.
- F. Medical records from Poplar Bluff Regional Medical Center #2.
- G. Medical records from Poplar Bluff Regional Medical Center #3.
- H. Medical records from Twin Rivers Occupational Medicine.
- I. Medical records from Rehab Services of Kennett.
- J. Medical records from Orthopaedic Associates.
- K. Medical records of Randall L. Stahly, D.O.
- L. Mileage report.
- M. Certificate of Marriage.
- N. Medical bills exhibit.
- O. Demand for medical care.

Employer-Insurer's Exhibits

- 1. Deposition of Robert L. Treadway.
- 2. Deposition of Michael Jarvis, PhD. M.D.
- 3. Deposition of June Blaine.
- 4. Deposition of Jimmie D. Bowen, M.D.
- 5. Treatment records.
- 6. Letter of attorney Joe Page of January 27, 2009

Second Injury Fund Exhibits

- 1. Deposition of Timothy Lalk.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:

STATEMENT OF THE FINDINGS OF FACT-

Robert L. Treadway, the employee, was the only witness to provide live testimony in this case. All other evidence was presented in the form of written reports, medical records or deposition testimony.

Personal and Job History

At trial, the employee testified that he is six feet tall and weighs 200 pounds. He stated he weighed 225 pounds at the time of the accident, though he has lost twenty-five pounds as he has not been eating, which he attributes to his depression. He currently takes a number of medications: a blood pressure medication (prescribed through Dr. Smith), Lexapro for depression (Dr. Smith), Lyrica for pain (Dr. Soeter), Zanaflex, a muscle relaxer (Dr. Soeter), Uroxatral for prostate problems (Dr. Hallman), and Trazodone for sleep (Dr. Smith).

The employee is currently married to Vickie Treadway, and he has had no other marriages. Neither the employee nor his wife has filed for separation or divorce. They have two children together. Angela is age twenty-seven and was not living at home at the time of the accident. She was married at the time and the employee was providing her with money though he was not declaring her as a dependent for income tax purposes. Zach is twenty-two years old and was dependent upon the employee, and living at home, at the time of the accident. He is still in college. The employee continues to support him. The employee used his wages for the benefit of all in his home, purchasing food, housing, clothing and utilities.

The employee attended high school and received a high school diploma. In the early 1980s he attended a local community college and earned approximately twenty hours in basic courses. He did not receive a certificate or degree. The only additional training he has had has been when the employer sent him to Jefferson City to receive training as a lineman, which was a period of only a few weeks. He is not able to type on the typewriter or a computer. He can only do a few things on a computer such as look at the news. He knows how to read e-mail, although he does not know how to write or send e-mail. He has never been in the military.

The employee testified that he is no longer working. He began working for the employer in 1991, and he last worked for them on May 12, 2008. His position at the time was "service foreman". He explained that a service foreman runs "connects" and "disconnects", and also installs and repairs electrical services. He testified that they basically do all of the work from the telephone pole to the house. He worked alone in this capacity. The employee testified that he did not return to his employment after his accident because he has restrictions placed upon him which prevent him from working. He has not worked anywhere since he left the employment of the employer.

Before working for the employer, the employee worked for City Light, Gas and Water as a lineman. This was from 1978 to 1991. In this job he performed all of the work as the lineman, including setting the poles, running the wires, and running the service from the poles to the houses. Before that job he worked for a cablevision company, installing wiring on electrical poles. He did this for approximately two years. Prior to this he was in high school, and he did not have jobs while he was in high school. He has not done any other work in his life.

Prior Medical History

In discussing his pre-existing conditions, the employee indicated that he has been diagnosed with emphysema. He stated that before the work accident he had problems with shortness of breath whenever he would exert himself. He said that exertion caused him to feel out of breath, weak and tired, including when he exerted himself at work. The employee has smoked at least a pack of cigarettes a day for the past thirty years and continues to smoke as of the trial date.

He also testified to a past history of depression. Prior to the accident he was taking medication through his primary care physician, Dr. Smith. This medication was Lexapro. Later on, and after the work-place accident, he began receiving Trazodone as well. He stated that before his accident his depression would affect him at work. There were times when he would simply feel overwhelmed, such that he would have to pull his truck over onto a small dirt road and lay down to "let it pass". This would take fifteen to thirty minutes and would happen at least two times per week.

The employee also has had past problems with his hearing. He said that since the 1990s he has had trouble hearing with his left ear such that he has to try to read lips. He also has to ask people to repeat themselves. This was evident at trial, as the employee would frequently turn his right ear to the questioner, and would ask that questions be repeated.

May 8, 2008 Accident

The employee was injured on May 8, 2008 when he was disconnecting electric service from a house and slipped on wet grass, thereby twisting and falling in an awkward manner across a landscape timber. He struck his lower back and felt severe lower back pain. He did continue working, though he indicated he could not do 90% of the duties he was required to perform. He simply took it easy for the rest of the day. He also did not seek medical care that day as he had hoped he would get better.

The employee stated that his accident occurred on a Thursday, and that he first sought medical care on the next Monday. His supervisor advised him to see the company physician and he was sent to the Occupational Medicine Clinic where he came under the care of a nurse practitioner named, Boland. He was diagnosed with a left hip contusion, sacroiliac dysfunction, lumbosacral strain and sciatica. His treatment took the form of medications, physical therapy (for approximately three months), and an MRI scan. After this he was referred to Dr. Bowen for further treatment. This was again authorized through his employer. The employee saw Dr. Bowen on three occasions and underwent examinations and medication treatment. Dr. Bowen referred him to Dr. Soeter, a pain management expert, for injections. He was also sent for a functional capacity evaluation/FCE. After the third visit with Dr. Bowen, he was discharged. He has not been sent anywhere else for medical care by his employer or their insurance company.

After being discharged by Dr. Bowen, the employee sought medical care on his own through his primary care physician, Dr. Smith. However, she advised the employee that she did not handle pain management treatment and she therefore referred him back to Dr. Soeter. When the

employee returned to Dr. Soeter, he began a course of pain management treatment which continues to this day. This has included three to four injections of steroids and botox. He has also received trigger-point injections and underwent two surgical procedures to burn the nerves in his lower back. Currently, he is receiving treatment from Dr. Soeter in the form of pain medication and muscle relaxers. He states that this treatment does help him, and that Dr. Soeter's treatment in general has helped him to slowly be able to do more things.

The employee has also continued receiving "psychiatric treatment" through his personal physician, Dr. Smith. She has increased his anti-depressant medication and added a medication to help his sleep. She has also discussed the possibility of referring him to a psychiatrist.

The employee testified that he has continuing problems from the work accident. His back hurts everyday and is constant and worse with exertion. He hurts even if he stays at home and he characterized the pain as a sharp, stabbing pain. He said that this is in the lower back, slightly below the beltline. He tries to do things such as mow his lawn, though he can only do this for short periods of time and it increases his complaints. He continues to have complaints in his left leg which includes numbness on the top of his thigh. Every couple of weeks he gets a knot in his left calf. He does not have symptoms to his foot. He also stated that he has continued problems with his depression. Since the accident he has had to increase his medication, both Lexapro and Trazodone. He said that his depression has worsened because of things such as the fact that he cannot work or pay his bills. He states that this affects him every day and some days he simply sits home without lights or the television on. He does not have crying spells, but states he only leaves the house four or five times per week. Sometimes he will simply go to Wal-Mart and pick something up, though this can only be for very short visits. He also has to plan his trips because of his medications. He cannot drive whenever he takes his Zanaflex as it impairs him. But if he does not take his Zanaflex, then he has muscle spasms and has difficulty walking into the store.

The employee said that he tries to do things around the home though it is very painful to try to mop or sweep. He does do some laundry though he is unable to pull heavier things out of the washer such as jeans. He will pull a chair up to the dryer to try to pull things out and fold them. He mows his lawn, though this takes several days and causes an increase in his symptoms. He can drive but he cannot sit for more than a while. It took him a while to get to the hearing, as he had to stop between his home in Kennett and Cape Girardeau. He says that he takes his Trazodone and 60% of the time he can sleep through the night. The other 40% he gets up because he is hurting. He then takes additional pain medication and tries to occupy his self until the medication takes effect. He can stand approximately 15 to 20 minutes in a comfortable fashion. He can sit 15 to 20 minutes and he can walk 100 feet before he starts hurting. Whenever he exceeds these limits he has an increase in his symptoms. He says that he relieves his symptoms by lying down throughout the day. This occurs every day and he felt it occurred half a dozen times throughout the day, lasting 15 to 30 minutes each time. He does not perform any hobbies at this time as he has had to give up his hunting and fishing. He used to play golf four to five times per week, but also has not done that since the accident.

The employee identified Exhibit N as being his medical bills for treatment received since the discharge by Dr. Bowen.

Testimony of Rating/Evaluation Medical Providers

Dr. Bowen

Dr. Bowen testified by deposition on October 4, 2010. He is a physician board certified in physical medicine and rehabilitation. He first saw the employee on August 7, 2008 for treatment purposes. Dr. Bowen obtained a history from the employee that he included in his report of August 8, 2007. Dr. Bowen reported that the employee told him that he believed that the accident was on May 8th or 9th. The report indicates that "... he actually slipped on some wet grass that was very high. He started to fall back against his truck which had some steel, he said, that he wanted to avoid so he pushed away twisting his trunk and his back and then landing down on his left side of his back and left hip onto a landscape timber". The employee complained to him of low back pain which ran down his left leg. The leg symptoms were described as a tingling and numbness. On examination the employee had significant lost range of motion, and the remainder of the examination was significant for nonorganic signs. Dr. Bowen explained that this means to him that something above or beyond the organic process is going on with the injury, which in turn tells him that the employee would be a poor surgical candidate. He indicated that an MRI of the lumbar spine showed degenerative disc disease, as well as a Tarlov cyst. He felt the cyst was non-symptomatic.

Dr. Bowen testified that he prescribed a medication called Neurontin. He said that the employee received more benefit from this medication than from others. However, he still complained of a great deal of pain. He also ordered a course of physical therapy and traction, and the employee would receive short term relief of symptoms, which always returned. Dr. Bowen stated that he then ordered a series of facet injections at a pain clinic. However, he said that these did not provide the employee with relief. In his follow-up examination Dr. Bowen said that he had difficulty in arriving at a precise diagnosis of the employee's injury, and he therefore settled simply on a diagnosis of "back pain". He then ordered electrical studies of the employee's back and legs, which he said did not produce an explanation for nerve related complaints.

Dr. Bowen then ordered a FCE, which the employee underwent. It showed that the employee complained of a high degree of pain, and again, it indicated that the employee had complaints of pain in areas which the doctor did not feel could be caused by a low back injury. On the other hand, the FCE validity scales were normal, which the doctor explained meant that he was putting forth consistent effort. He said that it was the opinion of the evaluator, and himself, that the employee put forth valid and consistent effort. He said that they both concluded the employee was reliable. The FCE stated that the employee was only capable of less than sedentary work. It recommended that he lift less than 10 pounds. Dr. Bowen issued a report indicating that the employee may perform sedentary work "lifting 10 pounds maximum and occasionally lifting and carrying such articles as docket, ledgers and small tools."

Dr. Bowen last evaluated the employee on September 18, 2008. The employee continued to have back and leg pain at that time. Dr. Bowen then stated that the employee had reached a state of maximum medical improvement, which he said means "I don't have anything left to offer him to make him better as far as I was concerned". He provided a rating of disability, which was based

upon the AMA guidelines of 5% impairment. He stated that he does not believe the employee is able to return to work, but he also said that he is not sure if this is from an organic injury to his back, and that he believes that there is **“something else going on”**. He said that the validity testing, known as Waddell’s testing, recommends that patients with non-organic signs require more detailed psychological testing. However, he did not order such testing, nor did he see the psychiatric reports or records of any other physicians. He concluded, however, that he believed the employee, and believes that the employee’s pain “is real to him”.

Dr. Soeter provided pain management treatment to the employee after Dr. Bowen released him, including injections. The employee testified that this treatment did not provide any real or long lasting relief.

Dr. Lichtenfeld

Dr. Lichtenfeld testified by deposition on January 8, 2010. He is a physician who evaluated the employee on one occasion at the request of the employee’s attorney. He reviewed the medical records in this matter and examined the employee physically. He noted that the employee complained of morning wheezing along with shortness of breath with walking up one flight of steps or with working in summer heat. With regard to his back, he complained of pain over the left side of the lumbar spine which is deep, sharp and constant. He also complained of numbness and tingling over the front of the left thigh and the back of the left calf. His pain was said to increase with standing or sitting more than ten to fifteen minutes, walking one quarter of a mile or ten minutes, or twisting and bending. He complained that he could only lift ten to twelve pounds without exacerbating his pain. He described his back pain as a 5-6 out of 10, and said that it awakens him from sleep every night and keeps him awake for up to an hour.

Dr. Lichtenfeld’s examination included pulmonary function testing. He found that the employee has evidence of a lung condition which is partially restrictive and consistent with obstructive pulmonary disease such as emphysema.

Dr. Lichtenfeld then concluded that the employee had several diagnoses from the work accident: 1) left thigh and hip contusion, resolved; 2) chronic lumbosacral spine strain; 3) left radicular symptoms; and 4) incitation, exacerbation and acceleration of pre-existing degenerative changes in the lumbar spine. He did not believe that the employee’s Tarlov cyst was due to the work injury. He explained his diagnosis for exacerbation of pre-existing degenerative changes, saying that the body reacts to trauma to the back or a joint by sending inflammatory cells, and as the body heals some of the residuals of these “mediators” are left behind, which causes ongoing chronic low grade inflammation which hastens the development of degenerative arthritis. He estimated the employee’s permanent disability at 15% of the body from these diagnoses, and recommended that restrictions be placed on the employee as follows: avoid twisting, bending, stooping, and working at awkward positions. Avoid working with arms outstretched and overhead; and avoid prolonged sitting and standing. He recommended further treatment of a home exercise program and the discontinuation of any medications which were not helpful to him. He also recommended occasional physical therapy and/or traction. Dr. Lichtenfeld also testified that due to his history of tobacco use and evidence of emphysema the employee has 25%

permanent partial disability of the person as a whole. This disability combines and concurs with disability caused by the accident on May 8, 2008 to form an overall disability that is greater than the simple sum of disabilities combines. In addition, they create a significant obstacle and/or hindrance to the employee obtaining employment and/ or re-employment.

Dr. Stillings

Dr. Stillings testified by deposition on January 5, 2010. He is a board certified psychiatrist and Assistant Professor of Clinical Psychiatry at the Washington University School of Medicine. The doctor evaluated the employee on June 22, 2009 at the request of the employee's counsel. He also reviewed some medical records and administered computerized psychiatric testing. In addition to complaints regarding his physical injuries, the employee complained to Dr. Stillings of "a lot of depression, anxiety, uncertain of what's going to happen". He complained of chronic low moods, loss of interest and pleasure in life, poor concentration, confused thinking, fatigue, and feelings of hopelessness, worthlessness and uselessness.

Dr. Stillings noted that the employee had previously seen his primary care physician in 2006 for depression and anxiety. At that time, he was prescribed two different medications, Lunesta and Lexapro. Following the workplace accident, the employee was also prescribed Trazodone for insomnia. However, the employee reported that he still spends most of his time at home. The employee said that he does not take his pain medications if he plans on driving, and that he tries to perform some household duties, but he is limited by back pain.

On examination, Dr. Stillings found that the employee was alert and cooperative. He frequently changed positions in his chair, though the doctor did not feel there were signs of excessive pain behavior or symptom magnification. The employee showed psychological distress when discussing the work injury, and his overall mood was "clinically depressed". The doctor felt that the employee "attempts to hide and minimize as best he can". He also felt that the employee's insight and judgment were intact, though his concentration was poor and his comprehension was fair.

The MMPI-2 testing revealed a valid profile with high points on the scales of depression, anxiety and schizophrenia, which indicates acute and chronic elements to a psychological adjustment. He is overwhelmed by anxiety, tension and depression, and he has difficulty concentrating and being decisive. There are episodes in his life when he feels intense, then disturbed, feelings and behavior from increased stress, which results in rapid behavioral deterioration. He worries excessively and is self-critical, tending to be pessimistic. He lacks basic social skills and is somewhat withdrawn. Overall, the testing indicated that "[p]eople with this profile are often diagnosed with an anxiety and/or a mood disorder with schizoid tendencies".

The MCMI-III testing suggested a diagnosis of major depression along with a long-standing diagnoses of schizoid, avoidant and passive-aggressive personality traits. It said that the employee is a person who dampens emotions and tries to reduce his anxieties and mistrust of others. He has a tendency to think poorly of himself and is hesitant to be sociable. Since he has few relationships he pursues activities alone. His self-image is weak, unmasculine and

ineffective. He may be moody, characterized by fear, anxiety and phobias. Since he is not particularly trustful of others he is not inclined to report his emotional problems. It said “[o]ne should not be surprised if his mood disharmony is hidden and reported most by concerned family members, rather than by the patient himself.” And “[c]linicians will have to devote extra efforts to establish comfort and rapport with him because requests for information may provoke fear and may be seen as a form of painful and embarrassing self-exposure”.

Following his examination, Dr. Stillings diagnosed these conditions: Depressive Disorder, NOS (pre-existing); Mood Disorder with a major depressive-like episode due to a general medical condition (5/8/08 work injury); Pain Disorder associated with both psychological factors and a general medical condition (5/8/08 work injury); Personality Disorder, NOS, with schizoid, avoidant, depressive and passive-aggressive personality traits (pre-existing). Dr. Stillings gave the employee a GAF score of 52 which translates to a high moderate level of emotional symptoms and impairment.

He stated that the work injury was the prevailing factor in causing the Mood Disorder and Pain Disorder, with resulting and respective disabilities of 20% and 15%. From a pre-existing standpoint he found disability of 7.5% due to the Depressive Disorder and 7.5% due to the Maladaptive personality traits. He said that there is a synergy between the pre-existing problems and the work problems such that the total disability is greater than the simple sum. He recommended ongoing psychiatric care based upon the workplace accident, and stated that from a psychiatric standpoint the employee is permanently and totally disabled from gainful employment.

Dr. Jarvis

Dr. Jarvis testified by deposition on June 30, 2010. He is a board certified psychiatrist and Professor of Clinical Psychiatry at the Washington University School of Medicine. The doctor evaluated the employee on June 1, 2010 at the request of the employer’s counsel. He also reviewed the medical records in the case, but did not administer any psychiatric testing as he did not feel they were worthwhile. The employee complained of a “rubbing” feeling in his lower back that feels like friction or something that wants to pop. He estimated his pain as a 6 or 7 on a scale of 1 to 10. He said that almost any activity increases his symptoms, including vacuuming and shaving. He said that he left leg is numb and he has no strength in his hand. He has days when he does not get out of bed, and at times he simply sits in his darkened den. He tends not to travel away from his home, and does not drive frequently due to his medications. He said that he had taken psychiatric medications from his family physician before the work injury, and that some of them had a positive effect on his mood. At one point in time he considered suicide, but decided that would not be appropriate because of religious reasons. He described his mood as being “pretty low”. His appetite is poor and he has lost weight. He feels his concentration and memory are poor. He feels hopeless and helpless because he cannot work around the house. He felt that he has seen things in his house such as dark shadows darting under the furniture, for which he sets mouse traps, though he has yet to catch anything.

The employee said that prior to the work accident he had episodes where he would pull his truck over to the side of the road and lay down in his truck until the episode passed. The episode would last from five to thirty minutes and felt like anxiety. Then he would go back to his business and “try to do my best”. This occurred approximately two or three times per week, depending on his work schedule. He felt that they still happened, but not as frequently. He also complained of symptoms of an obsessive-compulsive nature. Dr. Jarvis testified that the employee’s past psychiatric condition had no effect on his employment. When questioned about the episodes of pulling his truck off the road, the doctor said “I’m not really sure what they are. He wasn’t able to describe them well enough for me, other than to say they may have been an anxiety attack”. On the other hand, he acknowledged that when the employee advised his primary care physician of the episodes, she immediately scheduled heart testing. He finally concluded that if these situations were panic attacks, then they were “probably reflective of his depression”.

On examination, Dr. Jarvis found that the employee’s memory is intact, as was his concentration. He noted that the employee tended to turn his head toward the doctor while the doctor was speaking. Occasionally he would stand and stretch during the examination, and the periods of time between the standing episodes decreased as the examination grew longer. His speech was regular, and his thought was logical and sequential. He rated his mood as being a 6 to 7, with 10 being bad. The doctor felt the employee’s mood was stable, appropriate and euthymic. He did not perform testing such as the MMPI-2 or the MCMI-III because he does not believe that they provide useful information. He diagnosed the employee with major depression, mild, in remission; nicotine dependence; and history of claustrophobia. He stated that the major depression was a condition which pre-existed the accident at work. He did not feel that there was sufficient evidence which would establish that the employee’s psychiatric condition had worsened since the work injury. He said that Dr. Smith had prescribed Lexapro for the employee’s pre-existing anxiety, but the dosage was not increased until two years after the accident. He further indicated that Dr. Smith had mentioned referring the employee to a psychiatrist but had not seen fit to do so, and the employee has not sought any psychiatric assistance. He did not believe that adjustments in the employee’s medications were due to the work injury. He said that “Mr. Treadway is not very depressed”, and that his mental status is consistent with someone that has had remission of a mild depression.

He reported that the employee’s statements of staying at home in a darkened room are not consistent with his presentation on examination. He said that the employee is normal in his memory, concentration and affect. He said that there is no evidence the employee has a personality disorder, and that the back pain was due to either the employee’s age or to his emphysema rather than the work injury. He reported that there is no evidence that the employee had a personality disorder or obsessive compulsive disorder.

Dr. Jarvis reported that whatever limitation the employee has in his physical activity or in his sense of well being can be attributed to his smoking induced emphysema; he gets short of breath with any physical exertion. Dr. Jarvis indicated that the employee’s back pain may be consistent with his age or to the emphysema, but not due to the work related accident. He said that the employee has no psychiatric impairment or disability, and is capable of working other than for

his emphysema. He said that he does not believe the employee stays in his home because of issues related to depression; rather, he feels the employee does not leave home due to either emphysema or financial issues. He stated that the tobacco inflicted emphysema may be very physically limiting.

Testimony of Vocational Rehabilitation Counselors

Timothy Lalk

Mr. Lalk testified by deposition in this case on two occasions. Employee's Exhibit C is the deposition that was taken on January 25, 2010. Second Injury Fund Exhibit I is the deposition that was taken on January 7, 2011. Mr. Lalk prepared a report dated November 4, 2009.

Mr. Lalk is a certified vocational rehabilitation counselor. He evaluated the employee on October 29, 2009. He met with the employee and reviewed the medical records and reports in this matter. The employee advised him that he tries not to lift more than his 10 pound restriction. The employee said he can comfortably stand for four to five minutes before developing a worsening back pain. He walked two blocks to the office of Mr. Lalk, which took approximately thirteen minutes. He avoids stairs due to pain, and he has problems with balance due to medication. Bending, kneeling and squatting are difficult for him. He can sit for 20 to 30 minutes at a time, but he will also move about in his chair, fidgeting. He has shortness of breath with any physical exertion. He has difficulty driving and needs to take multiple breaks. His medication helps to control his pain. He lies down on four to five occasions throughout each day for a period of fifteen to thirty minutes each time. This helps him to manage his low back pain. Sometimes he has to get up during the night due to back pain. He is able to do some household chores, but no lifting of items such as heavy, wet clothing. He cannot vacuum or load the dishwasher. He reads a little, and does not leave the house to visit with people. People do not come to visit him.

Mr. Lalk performed vocational testing in the form of reading and arithmetic evaluations. On both tests he scored at the 8th grade level, and on comprehension testing he scored at the 10.7 grade level. He said that the arithmetic testing placed the employee at the 23rd percentile, and the 12th percentile with regard to reading, which means that he is well below average in both tests. Mr. Lalk stated that "[b]ased upon his performance and age I think it would be quite difficult for him to improve his academic performance to a level which would enable him to complete a post-secondary training program".

Mr. Lalk noted the employee's educational and work history. The employee's last position was as a service foreman. Prior to that he was a construction foreman, though his employer advised him he did a poor job of supervising other workers and that it would be best if he worked alone. Mr. Lalk felt that the employee had personality traits that make him hypersensitive to criticism, and that his lack of ability to supervise others is the best way to understand how his personality traits affect his ability to work.

Mr. Lalk noted restrictions from three different physicians. Dr. Bowen restricted the employee to sedentary work with no lifting greater than ten pounds. Dr. Stillings stated that the employee had a high-moderate level of psychiatric impairment and was permanently and totally disabled from gainful employment. Dr. Lichtenfeld restricted the employee to avoid twisting, bending, stooping and working in awkward positions; and avoid working with his arms outstretched or overhead. He also restricted prolonged sitting or standing. Mr. Lalk noted that the restrictions of both Dr. Bowen and Dr. Lichtenfeld limit the employee to a sedentary level of exertion.

Mr. Lalk explained that he takes both restrictions and limitations into consideration in evaluating a person's ability to compete for work. He said that "restrictions" are things that a doctor says a patient should not do, in order to protect the patient from further injury or from undoing medical treatment that has been provided. On the other hand, he said that "limitations" must be taken into consideration as well. He said that with any individual he needs "to find out what they're actually able to do", which is why he asks about symptoms. So if a person finds that certain type of work increases their symptoms, then he presumes that the person will not be able to do the work on a day-to-day basis, such that they should avoid that type of work. He said "as a professional I think that a person should not be required to work or perform activities that are going to exacerbate their conditions".

He then concluded that the employee does not have either the experience or the training which would allow him to work in a skilled, sedentary position. He said that this means the employee would have to seek work that is unskilled, entry-level work. If he can do this, then he could perform jobs such as an unarmed security guard or clerk at a rental store. On the other hand, the employee complained to Mr. Lalk, and to Dr. Stillings, of symptoms which increased with activity and required him to take additional medication and/or lie down during the day. He also has side-effects from his medication. Therefore, Mr. Lalk testified that it is his opinion that the employee is not able to either secure or maintain employment in the open labor market as he is not able to compete for any position. He said that there are no employers that would hire the employee based upon his limitations and symptoms as the employee does not appear to be able to perform even in a sedentary capacity.

June Blaine

Ms. Blaine testified by deposition on September 21, 2010. She is a certified vocational rehabilitation counselor. She evaluated the employee on March 11, 2010. She met with the employee and reviewed the medical records and reports in this matter. She did not have any medical records beyond May of 2008. She said the employee seemed forthright in the information he gave her, and he complained of pain in his low back on the left side which felt as if something were "rubbing". His symptoms are aggravated by increased activity which then requires him to change positions frequently. The employee told her that he limited his walking to ten minutes or less, after which he needs to sit down. His most comfortable position is lying down, which he does two or three times throughout the day. During her interview, the employee was "consistently up and down", and in fact when she first entered the room he was lying on her office floor after having been in his truck. The employee also reported difficulty with sleep with only getting a couple of hours at a time due to pain. As a result of this, he often sleeps during the

day. Most of the time he stays at home and attempts to help with household chores, but anything that is beyond a short amount of time causes him to sit or lay down. He does drive, but limits this due to the effects of his medication.

Ms. Blaine also administered the Wide Range Achievement Test which showed that the employee scored at the 10.7 grade level in reading, 9.7 grade level in comprehension, and 5.9 grade level in math computation.

Ms. Blaine stated that her review of the medical records shows a difference in physical restrictions between the physicians. She found that Dr. Bowen limited the employee to sedentary work with no lifting greater than 10 pounds, whereas Dr. Lichtenfeld said to avoid twisting, bending, stooping and working in awkward positions, or with arms outstretched or overhead. Dr. Lichtenfeld also said to avoid prolonged sitting and standing. Dr. Stillings said that the employee was permanently and totally disabled, whereas Dr. Jarvis did not find a psychiatric disability but found the employee's emphysema to be very physically limiting.

Ms. Blaine concluded that the employee is not able to return to his previous job, which was in the "medium" category. She said that the employee would have to focus in the sedentary to light level, which includes jobs such as unarmed security, light delivery, shuttle driver or retail supply. She therefore felt that the employee was capable of being employed, unless she took into consideration the opinion of Dr. Stillings that the employee was permanently and totally disabled. She indicated that if she solely considered the opinion of Dr. Stillings, she could not recommend that the employee return to employment.

RULINGS OF LAW

1. Medical Causation

The Court notes that the employer-insurer failed to address this issue in its proposed findings.

Under Section 287.140 RSMo., the employee is entitled to receive all medical treatment that is reasonably required to cure and relieve him from the effects of the May 8, 2008 accident. The employee bears the burden of proving that his injury was medically causally related to the accident. **Irving v. Missouri State Treasurer**, 35 S.W.3d 441, 445 (Mo. App. W.D. 2000). The burden of proof is on the claimant to prove not only that an accident occurred and that it resulted in an injury, but also that there is a medical causal relationship between the accident, the injuries, and the medical treatment for which he is seeking compensation. **Dolen v. Bandera's Café and Bar**, 800 S.W.2d 163 (Mo. App. E.D. 1990). The employee has the burden of proving that there is a medical causal relationship between the accident, the injuries and the medical treatment for which compensation is being sought. **Griggs v. A. B. Chance Company**, 503 S.W.2d 697 (Mo. App. 1973). In order to prove a medical causation relationship between the alleged accident and medical condition, the employee in cases such as this involving any significant medical complexity must offer competent medical testimony to satisfy his burden of proof. **Brundige v. Boehringer Ingelheim**, 812 S.W.2d 200 (Mo. App. 1991).

With regard to physical injuries there is no contention as to whether the employee sustained injury as a result of his workplace accident. All of the medical experts testified to the same. Dr. Bowen arrived at a rather generic diagnosis of “back pain” as related to the work accident, whereas Dr. Lichtenfeld was more specific. He diagnosed these conditions as being medically causally related to the accident: 1) left thigh and hip contusion, resolved; 2) chronic lumbosacral spine strain; 3) left radicular symptoms; and 4) incitation, exacerbation and acceleration of pre-existing degenerative changes in the lumbar spine. The employer’s original treater, Nurse Boland, diagnosed left hip contusion, sacroiliac dysfunction, lumbosacral strain and sciatica. Whether the diagnoses can be specifically delineated or not is less important than the fact that all doctors believe the accident at work caused injury to the employee’s lower back. It is therefore found that the preponderance of the evidence establishes that the employee sustained an injury to his lower back as a result of his accident at work on May 8, 2008 that required medical treatment.

The Court finds that the employee has met his burden of proof on the issue of medical causation.

2. Past Medical Bills

The Court notes that the employer-insurer failed to address this issue in its proposed findings

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).

The employee submitted Exhibit O, which shows that on January 22, 2009 a request was made upon the employer and insurer for further medical care. The employer-insurer submitted Exhibit 6, which shows that it refused to provide further medical care absent proof that such care was needed. The employee also submitted his Exhibit N, which is a copy of the medical bills he incurred for his back problems after being discharged by Dr. Bowen. The total of the bills is \$21,805.50.

A review of the opinions from the employer’s testifying physician, Dr. Bowen, shows that he is in agreement with the conclusion that employee needs ongoing medical care due to his work injury. Dr. Bowen stated that even though the employee had reached a state of “maximum medical improvement” he was still in need of ongoing medication in the form of Lortab. Obviously, a person cannot obtain a prescription medication without seeing a physician, which means that it was improper for the employer to refuse to provide the employee with medication and follow-up visits. At the very least, the employer could have approved ongoing prescriptions refills through the employee’s family physician, instead of denying further medical care when its own doctor had recommended it.

The employee did in fact continue his medical care, on his own through Dr. Smith. She saw the employee on October 22, 2008 and began a prescription of Neurontin and Hydrocodone, and she then referred him back to Dr. Soeter. It was Dr. Soeter who had previously treated the employee at the employer's request, performing trigger point injections as ordered by Dr. Bowen. The employee returned to see Dr. Soeter and complained that he still had a lot of pain which made it feel like his bones were grinding together. Dr. Soeter ordered an MRI scan, and recommended he continue his Lyrica, add Naprosyn, and undergo further injections. The MRI scan of the pelvis showed possible prostatitis, for which the employee was referred back to Dr. Smith, but subsequent evaluations by Dr. Soeter showed that a nerve conduction study was recommended, and further injections were performed, including trigger point injections. The doctor also performed median nerve branch blocks. The employee got some relief from this treatment, though not as much as the doctor had hoped. Still, the doctor continued the medication and the injections with some relief being found. On January 8, 2010 the doctor performed a right-sided radiofrequency ablation on the employee's lumbar spine. The employee later said that he did get some relief from this procedure, though he was having further problems on the left side of his lumbar spine. Therefore, an ablation was performed on the left side on January 28, 2010 with some relief. The employee also reported at the time that if he forgets to take his medication he can tell a significant difference in his pain level. Dr. Soeter's treatment continued up to the last entry in his records on August 9, 2010, at which time he continued the medications and advised the employee to return to the clinic in three months.

A comparison of the medical bills listed in Exhibit N, with the treatment records of Dr. Soeter and Dr. Smith, shows that the employee continued to receive medical care for his back injury beyond the date that Dr. Bowen had discharged him. Given the fact that Dr. Bowen recommended a continuation of medical care after his date of maximum medical improvement, and given the fact that the employee continued that care with Dr. Soeter, a physician previously chosen and approved by the employer, it is found that the medical treatment was reasonable and necessary to cure and/or relieve the effects of the employee's injury. Insofar as the employer refused to provide further care beyond the date of Dr. Bowen's maximum medical improvement, it is found that the employer is responsible for payment to the employee for \$21,805.50 in past medical bills. The employer-insurer had challenged medical bills on the issues of authorization, reasonableness, necessity and causal relationship. In light of the evidence and the Court's findings, the Court further finds that the employer-insurer's challenges on these issues lack merit and is denied.

3. Future Medical Care

The Court notes that the employer-insurer failed to address this issue in its proposed findings

Under Section 287.140.1 RSMo., "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".

Under Section 287.140 RSMo., the employer is given the right to select the authorized treating physician. Subsection 1 also provides that the employee has the right to select his own physician at his own expense. The employer, however, may waive its right to select the treating physician by failing or neglecting to provide necessary medical aid. **Emert v. Ford Motor Company**, 863 S.W.2d 629 (Mo.App. 1993); **Shores v. General Motors Corporation**, 842 S.W.2d 929 (Mo.App. 1992) and **Hendricks v. Motor Freight**, 520 S.W.2d 702, 710 (Mo.App. 1978).

The standard of proof for entitlement to an allowance for future medical aid cannot be met simply by offering testimony that it is “possible” that the claimant will need future medical treatment. **Modlin v. Sunmark, Inc.**, 699 S.W.2d 5, 7 (Mo.App. 1995). The cases establish, however, that it is not necessary for the claimant to present “conclusive evidence” of the need for future medical treatment. **Sifferman v. Sears Roebuck and Company**, 906 S.W.2d 823, 838 (Mo.App. 1995). To the contrary, numerous cases have made it clear that in order to meet their burden, claimants are required to show by a “reasonable probability” that they will need future medical treatment. **Dean v. St. Luke’s Hospital**, 936 S.W.2d 601 (Mo.App. 1997). In addition, employees must establish through competent medical evidence that the medical care requested, “flows from the accident” before the employer is responsible. **Landers v. Chrysler Corporation**, 963 S.W.2d 275 (Mo.App. 1997).

As indicated in the foregoing section, Dr. Bowen stated that the employee should continue with his medications.

Dr. Soeter’s records show that he continues to treat the employee with a variety of modalities such as medication, injections, therapy and radiofrequency ablation. The employee testified that the treatment does not eliminate his symptoms, but it does help him to manage his pain.

Dr. Lichtenfeld questioned whether the employee should continue with his medications, as the employee complained that they were not all that helpful to him.

Dr. Stillings testified that it is reasonably probable that the employee will need open-ended psychiatric treatment due to the workplace injury, primarily in the form of medication. Dr. Stillings testimony was not found to be as credible as the testimony of Dr. Jarvis.

It is found that sufficient credible evidence exists to establish that the employer-insurer is liable for providing future medical care to the employee to cure and/or relieve the effects of his back injury. The employer is therefore ordered to provide on-going treatment for the employee’s back which the Court envisions as pain management through medications. The Court does not find that the employee has presented evidence that requires the employer-insurer to provide future medical care for strictly psychiatric purposes.

4 - 6. Liability of the employer-insurer or the Second Injury Fund for either permanent partial or permanent total disability

Evidence was presented about the employee’s disabilities/conditions that existed prior to his accident on May 8, 2008.

Section 287.800 RSMo. requires that the workers' compensation law is to be strictly construed and that the evidence is to be weighed impartially without giving the benefit of doubt to any party. It is clear from examining the evidence in this case that there are two very polarized opinions which are supported by different experts necessitating a comparison, weighing and evaluation of the opposing expert positions. When you examine all of the treatment records in this case, it is clear that there is little "objective evidence" supporting the employee's injury. Generally speaking the film testing was negative. There is evidence that the employee has a pre-existing diagnosis of depression and emphysema. There is also evidence of inconsistencies that ultimately led Dr. Bowen to classify the employee's diagnosis as left-sided low back pain which he characterized as a non-answer.

There is evidence that supports the position that the employee will never return to his prior employment, but the exact reason for this is not clear and is disputed. There is also evidence that the employee is at least capable of sedentary employment. There is certainly evidence that the employee's inability to return to his prior employment is not the result of the work injury. The MRI's and nerve conduction studies came back as normal. The inconsistencies noted by Dr. Bowen throughout the employee's treatment with him have to be strongly considered. The employee has the burden of proof on the issue of the extent of his disability. The objective injury in this matter is mainly the lack of range of motion. While this may be viewed as minimal, it is an objective finding.

The employee worked essentially as an electrical lineman for over thirty years. He described the work as being hard manual labor. He testified that he had absolutely no problems with his back prior to May 8, 2008 and was able to perform all of the physical duties of his job. His back did not prevent him from performing any of the hard physical labor that a lineman routinely performs.

The employee testified that he smoked a pack of cigarettes a day for over thirty years. He continues to smoke. He testified that prior to the accident if he exerted himself he would notice that he was out of breath and tired. Other than the employee's testimony, no other evidence supports the conditions that the employee described. No co-employees or work records were presented to confirm the employee's position. Medical records only contain a reference that the employee smoked and should quit smoking.

The employee testified about a hearing loss. No testing results were presented indicating the extent of any hearing loss.

The employee testified about the depression and anxiety that he said existed prior to May 8, 2008. He also presented some office notes of Dr. Smith wherein she reported that the employee said he was depressed and indicated that he was prescribed medications such as Lexapro. No other documentation or evidence predating May 8, 2008 was presented that documented the existence or extent of the employee's anxiety or depression. No documentation was presented showing that the employee ever received any psychological counseling.

At his deposition, the employee initially testified that his depression and anxiety did not affect his ability to do his job. However, on questioning by his attorney he testified that he would have to lie down in his utility truck on average about one time a week for thirty minutes to one hour to deal with his depression. He could not specify what triggered these occasions other than concerns about college funds or activities or his job or his kids. Only the employee's testimony supports this matter. He testified that lying down in the truck had nothing to do with pain or back problems. He also testified that he never had to have help performing his job due to his depression or anxiety attacks.

The employee testified that he was taking Lexapro for his depression and anxiety prior to his accident. The records of Dr. Smith confirm that she prescribed Lexapro to the employee prior to May 8, 2008. The employee had never been treated by a psychologist or psychiatrist prior to his accident. In addition, the employee has never been treated by a psychologist or psychiatrist since his accident despite his testimony that the accident caused his depression and anxiety to become much more severe. The employee offered no work records or testimony from any witness documenting the extent of the employee's depression and anxiety problems prior to 2008. The records of Dr. Smith do not indicate that prior to 2008 the employee needed counseling or assistance for depression or that she specifically addressed such problems.

On May 8, 2008 the employee injured his back at work. He has seen a multitude of treating and rating doctors since that time. In addition, a lot of testing has been conducted trying to determine the extent of the damage to the employee's back.

The employee initially saw Nurse Boland and received conservative care for several months including an MRI scan. As of August 7, 2008 he then came under the care of Dr. Bowen. Dr. Bowen read the MRI as essentially negative except for some degenerative disc disease and a Tarlov cyst which was not related to the accident. Dr. Bowen ordered medications, physical therapy, traction, electrical studies and injections. Dr. Bowen testified that he had difficulty arriving at a diagnosis other than back pain due to the employee's large range of complaints. He further testified, "He demonstrates a completely inconsistent examination which looks like he embellishes his pain consistently". Dr. Bowen testified that he ran a bunch of tests and that the diagnosis of the employee was very difficult as no matter what he did with his back it seemed to bother him. Dr. Bowen testified that there were a lot of inconsistencies with the employee and his exam that didn't quite add up.

Dr. Bowen ordered a FCE which concluded that the employee was capable of doing sedentary work with a ten pound lifting restriction. He last saw the employee on September 18, 2008. Dr. Bowen reported that the employee demonstrated a completely inconsistent examination which looks like he embellishes his pain constantly. He reported that the employee was at MMI as the doctor had no more treatment options for him. He had concluded that the employee was not a surgical candidate and that due to the extent of the employee's complaints, something above or beyond the organic process was going on with the employee's back. Dr. Bowen indicated "I believe that his ability to return to work is probably not existent, but I'm not sure they're from an organic cause with his lower back". He further said, "I believe that there is something other than an injury to his back that's compelling him not to return to work. That's why the nonorganic

testing was done, and I believe that basically there's something else going on other than the injury to his back".

The testing that has been performed showed no evidence of injury that would be addressed by surgery. Testing was mostly negative. No treating doctor has recommended that the employee was a surgical candidate. The employee has never received any surgical intervention for his accident. According to the employee, all pain managements and or medications that he has undergone have been minimally helpful. At the time of the trial the only treatment that the employee was receiving was pain management and care from his family doctor, Dr. Smith.

Dr. Lichtenfeld evaluated the employee on January 8, 2008. The diagnosis he provided for the employee's back was chronic lumbosacral spine strain. Based on his diagnoses, he recommended a 15% permanent partial disability due to the accident and a 25% permanent partial disability for the employee's pre-existing condition of emphysema. He did not provide a specific opinion as to the employee's employability in the open labor market.

Psychiatric examinations were provided by Dr. Stillings and Dr. Jarvis. After his examination, Dr. Stillings did not feel that there were signs of excessive pain behavior or symptom magnification. He testified that the employee was clinically depressed. He diagnosed depressive and mood disorders both before and after the accident. He provided ratings for both the primary accident and the pre-existing disabilities. In addition, he concluded that the employee needed additional psychiatric care due to the workplace accident and testified that from a psychiatric standpoint the employee is permanently and totally disabled from gainful employment.

Dr. Jarvis testified that the employee's past psychiatric condition had no effect on his employment. He felt that the employee's mood was stable and appropriate. He diagnosed the employee as having a pre-existing condition of major depression, mild in remission, but did not feel that there was sufficient evidence that would establish that the employee's psychiatric condition had worsened since the work injury. He noted that Dr. Smith did not increase the Lexapro dosage until two years after the accident and testified that he did not think that the adjustment in the employee's medications was due to the work injury. In addition, he commented that Dr. Smith had not seen fit to refer the employee for psychiatric counseling.

Dr. Jarvis testified that the employee is not very depressed and that his mental status is consistent with someone that has had remission of a mild depression. He reported that the employee's statements of staying at home in a darkened room are not consistent with his presentation on examination. He said that the employee is normal in his memory, concentration and effect. He said that there is no evidence the employee has a personality disorder, and that the back pain was due to either the employee's age or to his emphysema rather than the work injury. He reported that there is no evidence that the employee had a personality disorder or obsessive compulsive disorder.

Dr. Jarvis reported that whatever limitation the employee had in his physical activity or sense of well being can be attributed to his smoking induced emphysema. He further indicated that the employee's back pain may be consistent with his age or to emphysema but is not due to the work

related accident. He testified that the employee has no psychiatric impairment or disability and is capable of working other than for emphysema.

Vocational evaluations were provided by Mr. Lalk and Ms. Blaine. Mr. Lalk summarized the restrictions that the various doctors placed on the employee's abilities to work. He noted that both Dr. Bowen and Lichtenfeld limited the employee to sedentary work. However, he pointed out that the opinion of Dr. Stillings was that the employee was not employable. Based on the limitations reported to himself and Dr. Stillings, Mr. Lalk concluded that the employee was unemployable in the open labor market.

The opinions of Ms. Blaine also summarized that:

- Dr. Bowen limited the employee to sedentary work with a ten pound lifting restriction.
- Dr. Lichtenfeld limited the employee to sedentary work with different restrictions.
- Dr. Stillings said the employee was permanently and totally disabled from a psychiatric standpoint.
- Dr. Jarvis did not find a psychiatric disability but found the employee's emphysema to be limiting.

She concluded that the employee was not able to return to his prior job. She then testified that the employee was capable of being employed unless she took in to consideration the opinion of Dr. Stillings.

The evidence and opinions in this case are conflicting and polarized. A thorough reading and comparing of the all the evidence and opinions in this case allows the fact finder to find and justify any position they want either supporting the employee or not supporting the employee. The employee has the burden of proof. As always, credibility of witnesses and credibility and reliability of medical of opinions has to be weighed in order to reach a final determination.

In this case, the Court finds the testimony and opinions of Dr. Bowen, and Dr. Jarvis to be more credible than the testimony and opinions of Dr. Stillings. The Court finds the vocational opinion of Ms. Blaine to be more credible than the final opinion of Mr. Lalk. Dr. Lichtenfeld did not provide an opinion about permanent total disability. The Court observed the employee at trial for close to four hours. His body motion indicated that he was at times uncomfortable. In the Court's opinion, his attitude and conduct appeared to be normal. He certainly did not exhibit any conduct that would describe the severe anxiety/depression that Dr. Stillings discussed.

The Court finds that the employee has not met his burden of proof to show that he is permanently and totally disabled from the last accident alone or from a combination of his pre-existing disabilities and conditions and those that are derived from the accident of May 8, 2008. The evidence in this case documents other non-related factors that may have some bearing on the employee's desire, will or ability to work.

While the Court acknowledges that the employee needs care for his back, the Court does not accept the employee's position as to the severity of the problems he claims with his back. The employee told Mr. Lalk that the primary problem that he was dealing with was his back pain. On

the physical side, there are no pre-existing problems that the employee had with his back that affected his work. After his accident, there is no objective evidence that would document the severity of complaints that the employee has made during the history of this case. Some experts in this case question whether the pain and disability that the employee equates to his back are in fact as he states and whether they are caused by the May 8, 2008 accident. Dr. Bowen's final diagnosis was back pain as he was at a loss to provide any other diagnosis. He indicated that no matter what he did to the employee's back, it bothered him. He said there were a lot of inconsistencies with the employee and his exam that did not add up. He felt that whatever problems the employee has with his back, they are nonorganic. Dr. Jarvis testified that the employee's back pain is not related to his work accident.

Dr. Lichtenfeld gave a rating of 25% permanent partial disability for the employee's emphysema but did not describe any specific restrictions. The employee smoked a pack of cigarettes a day for over thirty years and continued to smoke even up to the trial date. He testified that exertion at work caused him to feel out of breath, weak and tired. However he also reported that he had no restrictions prior to his accident. Other than his testimony, the employee offered no evidence to support his position. He reported to Mr. Lalk that his smoking problems have gotten worse as he claimed that now just performing chores which require him to walk through the house causes shortness of breath. The testimony of Jarvis in this area was more credible than all of the other "experts" that provided an opinion.

On the psychological side, the only pre-existing evidence supporting the employee's claim of depression are the limited references to depression in Dr. Smith's records and the prescription for Lexapro. There is no evidence confirming that the employee's depression was so significant that he has to lie down in his truck at work to deal with it. Dr. Stillings testified that the employee had depression and anxiety problems both before and after the accident. Again the only verification of this is derived from the employee. When you look at the divergence in the reports of Dr. Jarvis and Dr. Stillings, you would not think that they were talking about the same person. By the Court's observations of the employee at trial, from a psychological view, the person that Dr. Jarvis described was the one who appeared at trial.

Taken all this information together, the Court does not find that the employee's pre-existing disabilities or the disabilities that occurred from his work accident, either taken alone or in combination support the position that the employee is permanently and totally disabled and unemployable in the open labor market.

The Court finds that the employee has permanent partial disabilities as follows:

1. Pre-existing anxiety and depression - 5% permanent partial disability.
2. Pre-existing smoking disability - 0%.
3. 10% permanent partial disability to the employee's back and body as a whole due to his accident of May 8, 2008.
4. 0% permanent partial disability to his body as a whole due to the employee's depression and anxiety.
5. 0% permanent partial disability for smoking/emphysema.

In summary, as to disability, the Court finds:

1. That the employer-insurer has no liability for permanent total disability.
2. That the employer-insurer has liability of \$15,561.60 for permanent partial disability.
3. The Second Injury Fund has no liability for permanent total disability.
4. The Second Injury Fund has no liability for permanent partial disability.

The Court is aware that the employee has some present other health concerns, however those concerns are not the subject matter of his work related injury. He has continued to smoke after his accident. This activity has caused his smoking problems/emphysema to escalate and get worse.

The Court orders that the employer-insurer pay to the employee \$15,561.60 representing 10% permanent partial disability to the employee's body as a whole due to his accident of May 8, 2008.

7. Dependency

The Court notes that the employer-insurer failed to address this issue in its proposed findings

Under Section 287.240 RSMo, a dependent is defined as a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his wages at the time of the injury.

Under Section 287.240 RSMo, a wife upon a husband with whom she lives or who is legally liable for her support is conclusively presumed to be totally dependent for support.

The employee testified that on the date of his accident he was married to Vickie Treadway. He identified their certificate of marriage and established that she was dependent upon his income for things such as food, housing, utilities and clothing. At the same time, he testified that on the date of his accident his son, Zach Treadway, was dependent upon him for support. Zach Treadway was also in college.

Based upon the evidence presented, the Court finds that Vickie Treadway and Zach Treadway, were total dependents of the employee at the time of the employee's accident and injury.

ATTORNEY'S FEE

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

INTEREST

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

Date: _____ Made by:

Gary L. Robbins
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation