

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

Injury No.: 99-031872

Employee: Wilson F. Turner
Employer: Turner Excavating
Insurer: Missouri Employers Mutual Insurance Company
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 January 18, 2013. The award and decision of Administrative Law Judge L. Timothy Wilson, issued January 18, 2013, 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 10th day of July 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Wilson F. Turner

Injury No. 99-031872

Dependents: N/A

Employer: Turner Excavating

Insurer: Missouri Employers Mutual Insurance Company

Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund

Hearing Date: November 13, 2012

Checked by: LTW

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: January 1, 1999
5. State location where accident occurred or occupational disease was contracted: Greene County, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: While engaged in employment with the Employer, which included performing maintenance on various machines, Employee was standing on the tracks of one of his excavators. As he turned, he slipped, and fell toward the ground and ended up doing a split with his left foot in front of him and the right foot behind him. He fell with the full weight of his body on the perineal or groin area. As a consequence of this work incident Employee sustained injuries to his lumbar, thoracic and cervical spine, groin and mental health.
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: BAW (Lumbar Spine, Thoracic Spine, Cervical Spine, Groin Area, Mental Health)
14. Nature and extent of any permanent disability: Permanent Total Disability
15. Compensation paid to-date for temporary disability: \$95,975.42
16. Value necessary medical aid paid to date by employer/insurer? \$116,260.67

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$921.25
- 19. Weekly compensation rate: \$562.67 (TTD / PTD) / \$294.73 (PPD)
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Unpaid medical expenses: N/A

Future medical care: (See Award)

(Employee is entitled to future medical care from Employer and Insurer.)

Weeks of temporary total disability (or temporary partial disability): N/A

Weeks of permanent partial disability from Employer / Insurer: N/A

Weeks of disfigurement from Employer / Insurer: N/A

Permanent total disability benefits from Employer / Insurer: (See Award)

(Employee is entitled to permanent total disability benefits from Employer and Insurer beginning December 30, 2004, at the rate of \$562.67 per week, for Employee's lifetime.)

- 22. Second Injury Fund liability: No

TOTAL: \$562.67 PER WEEK, EFFECTIVE DECEMBER 30, 2004, AND CONTINUING FOR EMPLOYEE'S LIFETIME, PLUS FUTURE MEDICAL CARE

- 23. Future requirements awarded: Future medical and permanent total disability benefits

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

The compensation awarded to the claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Paul F. Reichert, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Wilson F. Turner

Injury No. 99-031872

Dependents: N/A

Employer: Turner Excavating

Insurer: Missouri Employers Mutual Insurance Company

Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund

The above-referenced workers' compensation claim was heard before the undersigned Administrative Law Judge on November 13, 2012. The parties were afforded an opportunity to submit briefs or proposed awards, resulting in the record being completed and submitted to the undersigned on or about December 17, 2012.

The employee appeared personally and through his attorney Paul Reichert, Esq. The employer and insurer appeared through their attorneys, Brandon C. Potter, Esq. and Raymond E. Whiteaker, Esq. The Second Injury Fund appeared through its attorneys, Cara Harris, Assistant Attorney General and Skyler Burks, Assistant Attorney General.

The parties entered into a stipulation of facts. The stipulation is as follows:

- (1) On or about January 1, 1999, Turner Excavating was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully insured by Missouri Employers Mutual Insurance Company.
- (2) On the alleged injury date of January 1, 1999, Wilson F. Turner was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.
- (3) On or about January 1, 1999, the employee, Wilson F. Turner, sustained an accident, which arose out of and in the course of his employment with the employer, Turner Excavating.
- (4) The above-referenced employment and accident occurred in Greene County, Missouri. The parties agree to venue lying in Greene County, Missouri. Venue is proper.
- (5) The employee notified the employer of his injury as required by Section 287.420, RSMo.

- (6) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.
- (7) At the time of the alleged accident of January 1, 1999, the employee's average weekly wage was \$921.25, which is sufficient to allow a compensation rate of \$562.67 for temporary total disability compensation / permanent total disability compensation, and a compensation rate of \$294.73 for permanent partial disability compensation.
- (8) Temporary total disability compensation has been provided to the employee in the amount of \$95,975.42, payable for the periods of January 2, 1999 to January 17, 1999, and October 9, 2001 to December 29, 2004.
- (9) The employer and insurer have provided medical treatment to the employee, having paid \$116,260.67 in medical expenses.
- (10) The employee reached maximum medical improvement on December 30, 2004, relative to the work injury of January 1, 1999.

The issues to be resolved by hearing include:

- (1) Whether the employee has sustained injuries that will require additional or future medical care in order to cure and relieve the employee from the effects of the injuries?
- (2) Whether the employee sustained any permanent disability as a consequence of the claimed accident of January 1, 1999; and, if so, what is the nature and extent of the disability?
- (3) Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for payment of additional permanent partial disability compensation or permanent total disability compensation?

EVIDENCE PRESENTED

The employee testified at the hearing in support of his claim. Also, the employee presented at the hearing of this case the testimony of four additional witnesses: Shane Bennoch, M.D., Dale A. Halfaker, Ph.D., Wilbur Swearingin, CRC and Sandra Kay Holt. In addition, the employee offered for admission the following exhibits:

Exhibit A.....CV of Shane Bennoch, M.D.
Exhibit B..... Deposition of Shane Bennoch, M.D.
Exhibit C..... Life Care Plan of Missouri, LLC dated August 21, 2012
Exhibit D..... Life Care Plan of Missouri, LLC dated November 5, 2012
Exhibit E.....CV of Dale Halfaker, Ph.D.
Exhibit F.....Functional Ability Statement
Exhibit G..... 1998 Income Tax Return

Exhibit H..... Report of Wilbur Swearingin, CRC
Exhibit I Medical Report of Norbert Belz, M.D.
Exhibit JCV of Wilbur Swearingin, CRC

The exhibits were received and admitted into evidence. (Exhibit I was not admitted as to the Second Injury Fund.)

The employer and insurer presented no witnesses at the hearing of this case; however the employer and insurer offered for admission the following exhibits:

Exhibit 1Deposition of Dale Halfaker, Ph.D.
Exhibit 2..... Deposition of Frank Turner dated May 12, 2004
Exhibit 3..... Psychological Evaluation
Exhibit 4..... Deposition of Ted Lennard, M.D.
Exhibit 5..... Medical Report of Thomas Corsolini, M.D.
Exhibit 6.....Deposition of Jeffrey Woodward, M.D.
Exhibit 7.....Deposition of Wilson Turner dated January 7, 2011

Exhibits 1, 2, 3, 4, 6, and 7 were received and admitted into evidence. (Exhibit 5 was denied admission. Exhibit 6 was not admitted as to the Second Injury Fund.)

The Second Injury Fund did not present any witnesses at the hearing. In addition, the Second Injury Fund offered for admission the following exhibits:

Exhibit I Deposition of James England, Jr.

The exhibit was received and admitted into evidence.

In addition, the parties identified several documents filed with the Division of Workers' Compensation, which were made part of a single exhibit identified as the Legal File. The undersigned took administrative or judicial notice of the documents contained in the Legal File, which include:

- Order & Notice of Hearing
- Request for Hearing-Final Award
- Answer of Second Injury Fund to Amended Claim for Compensation
- Answer of Employer/Insurer to Amended Claim for Compensation
- Amended Claim for Compensation
- Answer of Employer/Insurer to Claim for Compensation
- Claim for Compensation
- Report of Injury

All exhibits appear as the exhibits were received and admitted into evidence at the evidentiary hearing. There has been no alteration (including highlighting or underscoring) of any exhibit by the undersigned judge.

DISCUSSION

Background & Employment

The Claimant, Wilson Frank Turner, is 63 years of age, having been born on May 27, 1949. Mr. Turner resides in Strafford, Missouri with his friend, Sandra Kay Holt. Mr. Turner has no dependent children since all are emancipated.

Mr. Turner has a high school diploma but suffers from limited ability to read and write. In school, he achieved poor academic performance. In discussing this concern, Mr. Turner noted that he did not learn to read; rather, he was simply passed from grade to grade, given a high school diploma but without requiring basic academic skills. While in high school he attended a two year vocational technical training program at Graff Vocational Technical School in sheet metal work.

After graduation from high school, Mr. Turner participated in the apprenticeship program of the sheet metal workers' union, Local 36, which he completed. However, it took him 6 years to complete the normal 4 year apprenticeship program.

Mr. Turner received an honorable discharge after serving in the United States Marine Corps Reserve from 1968 until 1974. Upon completing the sheet metal apprenticeship program, he did not attempt to find full time employment as a sheet metal worker but instead started his own excavating business. For a period of approximately 20 years, he was self-employed doing business as Turner Excavating. He owned a track loader, back hoe, dump truck and low boy trailer on which he transported his equipment to residential construction sites in and around Strafford, Mo. The nature of his business was digging footings and excavating for new homes to be built on foundations with crawl spaces or to be built on slab foundations.

Mr. Turner only worked for a small group of contractors/builders in the Strafford, Missouri area. He was not required to give written bids or estimates. He would simply receive a verbal description of the job, and give a verbal estimate of the time it would take for the "dig out" and was thus compensated on an hourly basis. Mr. Turner did not prepare any written documents in connection with his excavation business, and his former wife prepared all billing statements for his services and submitted them to the small group of contractors for payment. Generally, in most instances, the job would be staked out and ready for excavation when he arrived at the job site, and it was only on rare occasions that he would assist the builder in staking out the building dimensions.

The nature of the excavating business engaged in by Turner Excavating required excavating equipment to be transported by a "low boy" from job site to job site. Notably, this commercial transportation requires the driver to possess a DOT approved commercial driver's license. In responding to this concern, Mr. Turner stated that he made repeated attempts to obtain a commercial driver's license but was never able to pass the written test, and never obtained this driver's license. Yet, he nonetheless transported the equipment, and continued to operate his business without a commercial driver's license.

According to Mr. Turner, he enjoyed working in the excavating business. And for a number of years, prior to January 1, 1999, the business was quite successful financially on an annual basis.

Prior Medical Conditions

Prior to sustaining the work injury of January 1, 1999, did not suffer from any physical medical condition, which caused him to present with certain permanent disability or otherwise served as a hindrance or obstacle to employment or potential employment. Yet, prior to January 1, 1999, Mr. Turner suffered from a learning disability associated with a reading disorder, which rendered him unable to read or write. This preexisting condition caused Mr. Turner to present with certain permanent disability, and constituted a hindrance or obstacle to employment or potential employment.

In diagnosing Mr. Turner with this preexisting condition, Dr. Halfaker testified that the nature of this reading disorder renders him unable effectively to read and write, which caused Mr. Turner to experience problems in his past employment, such as lacking the ability to write tickets and perform other pen and paper work. Additionally, Dr. Halfaker noted that Mr. Turner's intellectual functioning was in the average range, except for verbal comprehension which was low average. Dr. Halfaker further determined that Mr. Turner was functioning at the equivalent of 4th grade level educational development, which was mainly because of inadequate reading abilities.

According to Dr. Halfaker, Mr. Turner's diagnosed learning disability would negatively impact multiple employment positions, such as a courier delivery driver. In this regard, Dr. Halfaker notes, any courier delivery driver would need to be able to read and understand delivery directions and addresses, and then be able to comprehend and locate business addresses and names. Based upon his understanding of Mr. Turner's learning disability, Dr. Halfaker asserts that it would be near impossible for Mr. Turner to accomplish these tasks. Similarly, Mr. Swearingin, a vocational expert, opines that Mr. Turner's reading disability limits his base of employment.

Accident

While engaged in his employment with Turner Excavating, which included performing maintenance for the various machines, on January 1, 1999, the employee, Wilson F. Turner, was standing on the tracks of one of his excavators. As he turned, he slipped, and fell toward the ground and ended up doing a split with his left foot in front of him and the right foot behind him. He fell with the full weight of his body on the perineal or groin area. Mr. Turner experienced immediate onset of pain in his mid and lower back with some pain going into his right hip. Also, within a few hours, and causally related to this trauma, Mr. Turner experienced a penile erection that would not subside.

On the following day, January 2, 1999, Mr. Turner contacted his insurer and reported the incident. Further, in reporting this incident and describing the nature of his injury, he indicated to the insurer that he was in need of medical treatment. Subsequently, on January 2, 1999, the insurer directed Mr. Turner to Dr. Gil at the Urgent Care Center for medical care and treatment.

Medical Treatment

On January 2, 1999, Mr. Turner presented to Dr. Gil's Urgent Care and received minimal treatment and was advised to return home and rest. When the condition had not subsided by the evening of January 2, 1999, Mr. Turner went on his own to the emergency department of Cox Hospital in Springfield.

While in the emergency room the attending physician, Dr. Trinca, a urologist, took a history of the injury and noted that Mr. Turner presented with a sustained erection without sexual arousal for 36-48 hours. On examination Dr. Trinca found that the phallus was erect and rigid. Dr. Trinca was able to aspirate from the corpus cavernosum of the right about 8 cc's of very dark slaty-type blood consistent with a low flow state. Based on this examination, Dr. Trinca diagnosed Mr. Turner with priapism, and offered treatment that included injection of some dilute phenylephrine into the right corpus cavernosum. This procedure did not resolve the priapism.

Thereafter, Dr. Trinca attempted manual decompression over the course of 4 days; but after each procedure the priapism would reoccur. Dr. Trinca diagnosed the condition as high flow priapism as opposed to a low flow.

On January 5, 1999, Mr. Turner received a transfer to Barnes Jewish Hospital in St. Louis, Missouri, and came under the care of Taz Harmon, M.D. While at Barnes Jewish Hospital, Mr. Turner underwent a distal penile winter shunt surgery for treatment of the priapism. The first day after surgery it was determined the procedure was not successful, and Mr. Turner again experienced full erection. Upon the advice of Dr. Harmon, Mr. Turner agreed to let the carpal body fibrose completely, and he would return in approximately 2 months to be evaluated for a penile prosthesis.

On January 29, 1999, the insurer directed Mr. Turner to Thomas Corsolini, M.D., for his ongoing complaints of left buttocks and left leg pain. Dr. Corsolini's exam noted that Mr. Turner walked with a very mild antalgic limp on the left. He also noted that Mr. Turner's iliac crest heights were symmetrical and forward bending to 80 degrees, back bending to 20 degrees. And Dr. Corsolini noted that the straight leg raising was negative on the right, while the left leg raising test produced left buttock pain. Based on this examination, Dr. Corsolini diagnosed Mr. Turner with a possible herniated lumbar disc, sacral contusion or contusion of the sciatic nerve or possible piriformis syndrome. In light of this diagnosis and Mr. Turner's presenting symptomology, Dr. Corsolini recommended an MRI of Mr. Turner's lumbar spine.

An MRI of the lumbar spine was completed that demonstrated a small central bulging disc at L5-S1 with minimal degenerative disc disease at L4-L5 and L5-S1. Mr. Turner saw Dr. Corsolini again on February 8, 1999, and it was agreed that a course of physical therapy would be appropriate. After approximately 8 weeks of physical therapy, Mr. Turner was again seen by Dr. Corsolini on April 16, 1999 and reported some improvement with physical therapy and physical exercise. At that time, he was advised to return if his symptoms worsened.

On September 7, 1999, and as a referral, Mr. Turner presented to Robert Johnson, M.D., a urologist, practicing in Springfield, Missouri. Dr. Johnson noted that his exam was approximately 9 months after the injury, and that Mr. Turner was only able to obtain a 40 percent

erection with sexual dysfunction. Dr. Johnson diagnosed the condition as corporal fibrosis secondary to priapism. The treatment options he offered included penile implant surgery or trial of the use of a constriction band and Viagra. Mr. Turner and Dr. Johnson agreed to try conservative measures before resorting to implant surgery.

On May 6, 2003, Mr. Turner was again evaluated by Dr. Corsolini with complaints of chronic back pain and cessation of his excavation business that he had turned over to his son because of increasing back pain. Dr. Corsolini recommended a repeat MRI of the lumbar spine, which was completed on May 23, 2003. The MRI of the lumbar spine showed degenerative disc changes at L4-L5 with annular prominence in the inferior portion of the foramen on the left. Also, this diagnostic study revealed degenerative disc changes at L5-S1 with a central prominence of the osteo-annular complex.

On August 6, 2003, Mr. Turner was again seen by Dr. Corsolini, who reviewed the results of the MRI with Mr. Turner. Based on this examination and his review of the diagnostic studies, Dr. Corsolini determined that Mr. Turner presented with a bulging disc that was compatible with his intermittent pain complaints. Yet, Dr. Corsolini opined that a surgical consultation was not required, and that Mr. Turner should remain physically fit and active to minimize his intermittent pain. Dr. Corsolini determined at that time that Mr. Turner had reached MMI.

On or about December 18, 2003, Mr. Turner presented to Norbert Belz, M.D., for an independent medical examination of Mr. Turner. At this examination, Dr. Belz took a history from Mr. Turner, reviewed various medical records, and performed a physical examination of him. In light of his examination and evaluation of Mr. Turner, Dr. Belz opined that the work injury of January 1, 1999, caused Mr. Turner to suffer from multiple medical conditions, which included the following conditions:

1. Traumatic priapism
2. Occupational aggravation of cervical degenerative joint and disc disease
3. Occupational aggravation of lumbar sacral degenerative joint and disc disease with herniated nucleus pulpous. L4-5 to the left and left L5 radiculopathy
4. Occupational urinary urgency/frequency
5. Occupational depression

Dr. Belz also opined that Mr. Turner suffered from a pre-existing learning disability.

In addition, Dr. Belz opined that Mr. Turner was in need of additional medical care. In this regard, Dr. Belz noted that Mr. Turner required a cervical spine MRI to further evaluate the occupational aggravation of his cervical degenerative joint and disc disease. And because Mr. Turner was continuing to suffer from depression causally related to the injuries he sustained on January 1, 1999, Mr. Turner was in need of a psychological evaluation and counseling, including possible pharmaceutical therapy. Further, Dr. Belz noted that a psychological evaluation should include evaluation of pre-existing learning disability disorder.

Subsequently, based on the medical opinions and recommendations of Dr. Belz, Mr. Turner received a referral to Dale Halfaker, Ph.D., for further evaluation of his occupational depression.

On December 22, 2003, at the recommendation of Dr. Belz and by agreement with the employer and insurer, Mr. Turner submitted to a complete psychological evaluation with Dale Halfaker, Ph.D. Mr. Turner underwent a variety of testing modalities and psychological tests to obtain information about his psychological and emotional functioning. In light of this examination and evaluation, Dr. Halfaker propounded the following opinion:

Given the nature of this data set, he is thought to be firmly entrenched in a chronic pain syndrome with significant depressive features. It is also significant that he has lost his innate, native sexual responsivity and is unable to function without the aid of a vacuum device and Viagra. Dr. Corsolini was noted to opine that the impotence could be related to the injury that he sustained on January 1, 1999. The depressive features that have developed subsequent to his chronic pain and impotence appear to be consistent with a dysthymic disorder. Complicating the clinical picture is a pre-injury pattern of poor verbal functioning, especially with reading that suggests a strong likelihood of a pre-existing reading disorder. Additionally, there appeared to be some rather significant dependent personality traits.

In discussing Mr. Turner's depression, Dr. Halfaker opined that Mr. Turner's depression was due to his pain and problems with sexual difficulties. Also, Dr. Halfaker noted that Mr. Turner presented with episodes of increasing crying spells and temper, and opined that these symptoms had become worse secondary to Mr. Turner's depression causally related to the work injury of January 1, 1999. Dr. Halfaker further noted that Mr. Turner had lost interest in typical activities that he had enjoyed in the past.

Dr. Halfaker opined that the psychological testing performed was valid, accurate and reliable. It was his opinion that Mr. Turner's intellectual functioning was in the average range, except for verbal comprehension which was low average. He also determined that Mr. Turner was functioning at the equivalent of 4th grade level educational development, which was mainly because of inadequate reading abilities. Through Dr. Halfaker's recommendation, Mr. Turner received prescription medications in the nature of Paxil and Amitriptyline, which Dr. Halfaker felt proved Mr. Turner with some improvement. However, according to Mr. Turner, he could not tell a great deal of difference, and felt there was no improvement with the use of these medications.

On December 12, 2003 the insurer began to provide Mr. Turner with health care services through Jeffrey Woodward, M.D., a physician practicing in the area of physical medicine. Dr. Woodward provided additional diagnostic testing and conservative care, along with continued prescriptions for Paxil and Trazodone. According to Mr. Turner, these medications improved his mood and his sleep patterns.

Initially, the conservative measures offered to Mr. Turner relative to treatment of the corporal fibrosis secondary to priapism were helpful. Eventually, however, the conservative

measures proved not to be a satisfactory solution. Consequently, on June 21, 2004, and in consultation with his urologist, Robert Johnson, M.D., Mr. Turner received a referral to S.K. Wilson, M.D. for the surgical implantation of a penile prosthesis. On July 20, 2004, Dr. Wilson implanted an AMS 700 CXR penile prosthesis. Dr. Wilson's operative note indicates that Mr. Turner tolerated the procedure well; however, there was extensive scar tissue that made the procedure much more difficult than usual.

On January 16, 2006, Dr. Woodward performed a final impairment rating, and determined that as a consequence of the work injury of January 1, 1999, Mr. Turner had sustained a permanent partial impairment of 8 percent to the body as a whole referable to the work related spinal condition. Dr. Woodward further opined that as a consequence of the work injury of January 1, 1999, Mr. Turner had sustained a permanent partial impairment of 5 percent to the body as a whole referable to the work related psychological and neurological conditions.

Although Dr. Woodward had issued a final rating report, the insurer continued to provide Mr. Turner with additional medical care, which included additional psychological counseling through Libby Bennett, Psy.D. This care occurred during the period of October 24, 2006 to June 13, 2007, and was for depression from sexual dysfunction. Later, between September 19, 2008 and December 5, 2008, the insurer provided Mr. Turner with similar counseling through Donald McGeehee, Ph.D.

On January 6, 2009 Mr. Turner returned to the clinic for revision of the implant, which necessitated removal and the implanting of a second device. The revision was performed by John Delk, M.D., at the University of Arkansas Medical Sciences in Little Rock, Arkansas. In late 2009, problems developed with the second implant, and on January 12, 2010 Dr. Delk removed the implant, repaired a corporal defect and implanted a new AMS 700 CXR penile prosthesis. Thus far, the third implant surgery has been successful.

In spite of extensive health care services and psychological counseling, Mr. Turner continues to suffer chronic depression on a regular, routine basis, along with intermittent chronic low back pain.

Independent Medical Examinations

Shane L. Bennoch, M.D.

On September 13, 2006 Mr. Turner presented to Shane L. Bennoch, M.D. for an independent medical evaluation and examination. At this examination, Dr. Bennoch took a history from Mr. Turner, and reviewed medical treatment records from the January 1, 1999 injury. After completing his patient interview and history, examination and records review, Dr. Bennoch opined that as a consequence of the January 1, 1999 injury, Mr. Turner had sustained the following:

1. Slip and fall with injury to the genital area, neck, mid-and lower back.
2. Priapism
3. Aspiration of the corpus cavernosum with placement of a Winter Shunt x2
4. Distal penile shunt placement with surgical priapism

5. Sexual dysfunction
6. Severe depression
7. Degenerative disk disease, lumbar spine with radiculopathy with over-activity.
8. Thoracic spine pain, rule out disc versus costovertebral dislocation with persistent inflammation and paraspinal muscle spasm
9. Degenerative disk disease of the cervical spine with intermittent right radiculopathy

Dr. Bennoch opined that Mr. Turner had reached maximum medical improvement at least by the date of his exam, September 13, 2006. However, he opined that Mr. Turner had not achieved maximum medical improvement relative to the thoracic spine. According to Dr. Bennoch, the January 1, 1999 injury was the prevailing factor in causing Mr. Turner to suffer nine multiple injuries and resulting disabilities.

In considering the nature and extent of the permanent disability sustained by Mr. Turner, Dr. Bennoch propounded the following medical opinions:

1. There is a 25 percent permanent partial impairment to the body as a whole rated at the penis due to severe priapism with resulting fibrosis of the corpus cavernosum and penile implant. (The rating takes into account Mr. Turner has significant sexual dysfunction because of this injury.)
2. There is a 20 percent permanent partial impairment to the body as whole rated at the brain due to severe depression. (Dr. Bennoch apportions this disability. Dr. Bennoch opines that approximately 60 percent of this disability is due to the initial injury resulting in priapism, and the other 40 percent relates to the persistent low back and mid back pain that makes continuing to work very difficult.)
3. There is a 15 percent permanent partial impairment to the body as a whole rated at the lumbar spine due to multilevel degenerative disk disease with intermittent radiculopathy to the left hip, causally related to the work injury of January 1, 1999.
4. There is a 10 percent permanent partial impairment to the body as a whole rate at the cervical spine due to degenerative disk disease and intermittent radiculopathy to the right arm, causally related to the work injury of January 1, 1999.
5. There is a permanent partial impairment to the body as a whole rated at the thoracic spine, causally related to the work injury of January 1, 1999. (In rendering this assessment, Dr. Bennoch notes that he could not issue a rating without further diagnostic evaluation being, including possible therapeutic intervention.)

In addition, Dr. Bennoch opined that Mr. Turner presented with impairments that pre-existed the January 1, 1999 injury. According to Dr. Bennoch, these preexisting conditions constituted a hindrance to employment or re-employment and quantified those impairments as follows:

1. There is a 5 percent permanent partial impairment to the left upper extremity rated at the left elbow due to sensitivity to the left epicondyle with paresthesias in an ulnar nerve distribution.
2. There is a 15 percent permanent partial impairment to the body as a whole rated at the brain secondary to learning disabilities and difficult with basic reading.

On September 13, 2006 Dr. Bennoch opined that Mr. Turner had not reached maximum medical improvement, and was in need of an MRI of the thoracic spine to address Mr. Turner's ongoing complaints of mid and upper back pain. It was also his recommendation that Mr. Turner continued to need treatment from a psychologist skilled in sexual dysfunction therapy. Additionally, Dr. Bennoch opined that Mr. Turner is governed by permanent limitations and restrictions, which include:

- Mr. Turner can occasionally lift and carry 20 pounds.
- Mr. Turner can frequently lift and carry less than 10 pounds.
- Mr. Turner can stand and walk about 6 hours in an 8 hour work day.
- Mr. Turner must periodically alternate sitting and standing to relieve pain and discomfort.
- Mr. Turner's ability to push and pull with both his upper and lower extremities is limited to 40 pounds because of his degenerative disc disease to his cervical and lumbar spine because his increased pain with increased activity.
- Mr. Turner should never climb ramps, poles, ladders and scaffolding and should never be caused to balance on narrow, slippery moving services.
- Mr. Turner can occasionally climb stairs, kneel, crouch, crawl and stoop at the waist.

Dr. Bennoch testified at the hearing that these restrictions and limitations were assigned because of the effects of the January 1, 1999 injury, standing alone.

Finally, in considering the question of whether Mr. Turner is employable in the open and competitive labor market, Dr. Bennoch testified that a perspective employer for either a full time or part time position could not depend upon Mr. Turner to be at a specific place at a specific time because of his chronic pain syndrome and chronic depression. He attributes both conditions to be causally related to the January 1, 1999 injury, considered alone. In his opinion, Mr. Turner is unemployable in the open and competitive labor market because of the effects of the January 1, 1999 injury standing alone.

Ted A. Lennard, M.D.

On or about March 30, 2011, Mr. Turner presented to Ted A. Lennard, M.D., for an independent medical evaluation and examination at the request of the insurer. At the time of this

examination, Dr. Lennard took a history from Mr. Turner, reviewed medical treatment records, and performed a physical examination of him. In light of his examination and evaluation of Mr. Turner, Dr. Lennard opined that the January 1, 1999 accident was the prevailing factor in causing Mr. Turner to sustain multiple injuries, including the following conditions:

1. Lumbar spine pain (L4-S1 disc protrusion), underlying degenerative changes
2. Erectile Dysfunction (priapism)
3. Depression

According to Dr. Lennard, Mr. Turner was at maximum medical improvement, and did not require any additional treatment. In considering the nature and extent of the permanent disability caused by this work injury, Dr. Lennard opined that at the time of his examination of Mr. Turner on March 30, 2011, Mr. Turner presented with a permanent partial disability of 15 percent to the body as a whole, referable to the lumbar spine. In apportioning the disability attributable to the work injury from the preexisting disability, Dr. Lennard opined that 8 percent is attributable to the January 1, 1999 accident; 7 percent is attributable to the preexisting degenerative changes. Further, Dr. Lennard opined that Mr. Turner presented with additional permanent partial disability of 10 percent to the body as a whole, referable to the priapism causing erectile dysfunction.

In considering the issue of medical care, Dr. Lennard opined that Mr. Turner will require additional medical care in order to cure and relieve him from the effects of the work injury. Dr. Lennard views this medical care as future medical care, and in the nature of a penile implant with annual urological examinations indefinitely.

In regard to physical limitations, Dr. Lennard opined that Mr. Turner should avoid activities that require prolonged bending and lifting of greater than 40 pounds. Notably, Dr. Lennard attributes these restrictions to be the result of the combined degenerative changes and work related injury.

Psychological Evaluation

Dale Halfaker, Ph.D.

Dr. Halfaker, between December 22, 2003 and January 8, 2004, completed extensive psychological testing and provided treatment to Mr. Turner. In his January 18, 2004 report Dr. Halfaker diagnosed Mr. Turner with several conditions. These conditions are as follows:

1. Pain Disorder Associated with Both Psychological Factors and a General Medical Condition, Chronic
2. Dysthymic Disorder
3. Reading Disorder
4. Dependent Personality Traits

Dr. Halfaker last saw and performed a psychological evaluation of Mr. Turner on September 10, 2009. At that time, Dr. Halfaker propounded the following comments:

It is my impression that Mr. Turner experiences a pain disorder associated with both psychological factors and a general medical condition, chronic; a dysthymic disorder, a reading disorder; and significant dependent personality traits. He has received appropriate treatment for his problems and appears to be at maximum psychological improvement. It is my impression that the pain disorder associated with both psychological factors and a general medical condition, chronic and dysthymic disorder arose as emotional consequences to his injury of January 1, 1999 because of his pain, limitation, losses and impotence.

Dr. Halfaker testified at the final hearing, and was questioned whether Mr. Turner is employable in the open and competitive labor market. In responding to this question, Dr. Halfaker testified that Mr. Turner must be viewed as an unreliable person, which he attributes to Mr. Turner's chronic pain syndrome and chronic depression. The nature of this unreliability, according to Dr. Halfaker, renders Mr. Turner unemployable in the open and competitive labor market. In explaining this opinion, Dr. Halfaker notes that a perspective employer could not depend on Mr. Turner to be at a specific place at a specific time regardless if the work be part time or full time. On cross-examination, Dr. Halfaker was asked if his opinion of unemployability was based upon the effects of the last injury standing alone or the effects of the last injury in combination with Mr. Turner's pre-existing learning disability. Dr. Halfaker responded, opining that the conditions that render Mr. Turner unemployable are the result of the January 1, 1999 injury standing alone.

Finally, Dr. Halfaker testified that he reviewed the vocational report and deposition of James England, Jr. It was his opinion that Mr. England's recommendation that Mr. Turner could work as a security guard, courier delivery driver, small parts and products assembler/packer and parking lot cashier were unrealistic in light of Mr. Turner's depression, chronic pain syndrome and pre-existing learning disability. According to Dr. Halfaker, Mr. Turner's diagnosed learning disability would negatively impact all of these positions, particularly the courier delivery driver. It was Dr. Halfaker's opinion that any courier delivery driver would need to be able to read and understand delivery directions and addresses, and then be able to comprehend and locate business addresses and names. Based upon his understanding of Mr. Turner's learning disability, it would be near impossible for Mr. Turner to accomplish the work tasks proposed by Mr. England.

Vocational Evaluations & Opinions

Wilbur Swearingin, CRC

Wilbur Swearingin, CRC, performed a vocational rehabilitation evaluation of Wilson Turner on July 13, 2012. He prepared an evaluation report dated October 24, 2012. Mr. Swearingin testified that he reviewed the medical records as set forth on page 1 of his report. He testified that he had particularly relied upon the evaluations and limitations assigned by Drs. Bennoch and Lennard, as well as Dr. Halfaker. He testified that he had also given considerable weight to Dr. Halfaker's August 21, 2012 Functional Ability Statement-Mental.

Mr. Swearingin, relying upon the testing and evaluations of Dr. Halfaker that Mr. Turner had a learning disability, specific to reading and written language, which rendered him minimally literate and unable to communicate by written language. He found that his learning disabilities restricted his occupational base to those occupations requiring 4th to 6th grade academic skills or less. In this regard, according to Mr. Swearingin, Mr. Turner's learning disabilities eroded his occupational base to the point they were a vocational disability sufficient to constitute a hindrance or obstacle to future employment.

Mr. Swearingin testified that he had carefully reviewed James England's vocational reports and deposition. He disagreed with Mr. England's findings that Mr. Turner had the residual functional capacity to perform the occupations he outlined. Mr. Swearingin offered explanations for his disagreement.

First, he disagreed with Mr. England's finding that Mr. Turner could perform cost estimations and bids on excavations. Mr. Swearingin testified that this is unrealistic based upon Mr. Turner's learning disability and his severe deficiencies with reading and writing. He further testified that Mr. Turner did not have the ability to perform these tasks in the past, and all of his estimates and bids were on the basis of giving a verbal estimate of the time it would take to perform the excavation work at so much per hour.

Second, he disagreed that Mr. Turner could supervise the work of others performing excavations. He indicated that Mr. Turner did not have the ability to comprehend and interpret blueprints; and the type of excavation work Mr. Turner performed in the past did not lend itself to being accomplished by number of workers. As noted by Mr. Swearingin, Mr. Turner had always performed the excavation work alone based upon his verbal understanding of the work to be done.

Lastly, Mr. Swearingin testified that Mr. Turner's learning disability, chronic low back pain syndrome and depression would negatively impact his employability in all of the occupations proposed by Mr. England. In this regard, Mr. Swearingin made particular reference to the positions of courier delivery driver, small parts and products assembler/packer and parking lot cashier.

Finally, Mr. Swearingin testified that it was his professional opinion that Mr. Turner was permanently and totally disabled or unemployable in the open and competitive labor market. He attributes Mr. Turner's permanent total disability to Mr. Turner's depression and the resulting psychological work restrictions given by Dr. Halfaker, as well as Mr. Turner's physical impairments and work restrictions assigned by Drs. Lennard and Bennoch. Yet, it is Mr. Swearingin's ultimate opinion that Mr. Turner was neither placeable nor employable in the open labor market as a result of the limitations assigned from the January 1, 1999 injury, considered in isolation.

James England, Jr.

James England, Jr., CRC, provided a vocational rehabilitation report dated December 9, 2009. Mr. England had earlier seen and evaluated Mr. Turner on October 9, 2009. Mr. England

reviewed Mr. Turner's medical records, the independent medical evaluation reports of Dr. Shane Bennoch and Dr. Ted Lennard, as well as the psychological evaluation reports of Dr. Dale Halfaker.

Mr. England testified that assuming the restrictions assigned by Dr. Bennoch, Mr. Turner would be precluded from some work duties, although he would still possess the ability to do cost estimations and bids on excavating. And Mr. Turner could supervise the work of others. He also testified that Mr. Turner could provide a wide range of entry level work such as security guard, courier delivery driver, small parts and products assembler/packer and parking lot cashier.

Present Complaints

Mr. Turner testified that he attempts to remain active, and on days when he is not experiencing chronic low back pain he will attempt to mow his yard and perform other yard work. However, this work is performed at his pace, and does not involve a consistent or sustained activity. He testified that he suffers from disturbed sleep, only getting a few hours at a time before he is awoken by his chronic low back pain. He also experiences frustration because of his present physical limitations, and as a result becomes depressed. He testified that he would prefer to be working; however, he has good days and bad days, and no employer would be able to depend upon him to be at a full time or part time job on a regular, routine basis. He testified that the sexual dysfunction problem he experiences also adds to his chronic depression.

Sandra Kay Holt testified that she has lived with Mr. Turner in his home for the past 5 years. She observes that he has mood swings and appears depressed almost daily. On the rare occasions that they travel, she does most of the driving. She observed that he tries to remain active and tries to perform work around his home; however, he can only perform physical labor for short periods, and if he does too much he will then have a period of one day or more when he will need to recuperate.

Also, in clarifying or explaining certain testimony, Ms. Holt noted that she was aware of Mr. Turner's physical and emotional problems from the outset of their relationship. However, she explained, it had been only in the last 2 years that she became aware that Mr. Turner's physical and emotional problems were related to the January 1, 1999 work injury.

In addition, Ms. Holt testified that she has encouraged Mr. Turner to travel with her, and on occasions they have gone to casinos in the Midwest. According to Ms. Holt, these travels were done with the intention of taking Mr. Turner's mind off of his chronic pain and depression. She further testified that they have not traveled for the past several years because of the problems experienced by Mr. Turner.

FINDINGS AND CONCLUSIONS

The Workers' Compensation Law for the State of Missouri underwent substantial change on or about August 28, 2005. However, in light of the underlying Workers' Compensation case involving an accident of January 1, 1999, the legislative changes occurring in August 2005 enjoy only limited application to this case. The legislation in effect on January 1, 1999, which is

substantive in nature, and not procedural, governs substantively the adjudication of this case. Accordingly, in this context, several familiar principals bear reprise.

The fundamental purpose of The Workers' Compensation Law for the State of Missouri is to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment. The law is to be broadly and liberally interpreted and is intended to extend its benefits to the largest possible class. Any question as to the right of an employee to compensation must be resolved in favor of the injured employee. *Cherry v. Powdered Coatings*, 897 S.W. 2d 664 (Mo.App., E.D. 1995); *Wolfgeher v. Wagner Cartage Services, Inc.*, 646 S.W.2d 781, 783 (Mo.Banc 1983). Yet, a liberal construction cannot be applied in order to excuse an element lacking in the claim. *Johnson v. City of Kirksville*, 855 S.W.2d 396 (Mo.App., W.D. 1993).

The party claiming benefits under The Workers' Compensation Law for the State of Missouri bears the burden of proving all material elements of his or her claim. *Duncan v. Springfield R-12 School District*, 897 S.W.2d 108, 114 (Mo.App. S.D. 1995), citing *Meilves v. Morris*, 442 S.W.2d 335, 339 (Mo. 1968); *Bruflat v. Mister Guy, Inc.* 933 S.W.2d 829, 835 (Mo.App. W.D. 1996); and *Decker v. Square D Co.* 974 S.W.2d 667, 670 (Mo.App. W.D. 1998). Where several events, only one being compensable, contribute to the alleged disability, it is the claimant's burden to prove the nature and extent of disability attributable to the job-related injury.

Yet, the claimant need not establish the elements of the case on the basis of absolute certainty. It is sufficient if the claimant shows them to be a reasonable probability. "Probable", for the purpose of determining whether a worker's compensation claimant has shown the elements of a case by reasonable probability, means founded on reason and experience, which inclines the mind to believe but leaves room for doubt. See, *Cook v. St. Mary's Hospital*, 939 S.W.2d 934 (Mo.App., W.D. 1997); *White v. Henderson Implement Co.*, 879 S.W.2d 575,577 (Mo.App., W.D. 1994); and *Downing v. Williamette Industries, Inc.*, 895 S.W.2d 650 (Mo.App., W.D. 1995). All doubts must be resolved in favor of the employee and in favor of coverage. *Johnson v. City of Kirksville*, 855 S.W.2d 396, 398 (Mo.App. W.D. 1993).

Further, in considering the question of future medical care, Section 287.140, R.S.Mo. requires the employer to provide such medical treatment as is reasonably necessary to cure and relieve the affects of the employee's injury. See, *Landers v. Chrysler Corp.*, 963 S.W.2d 275 (Mo.App. E.D. 1997). In obtaining an award for temporary total disability or future medical care, the claimant need merely prove that the injury is causally related to work based upon reasonable probability, while an award for permanent disability requires reasonable certainty of the disability. *Downing v. Williamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo.App. W.D. 1995), citing *Griggs v. A. B. Chance Co.*, 503 S.W.2d 697 (Mo.App. 1973). Although medical causation not within common knowledge must be established through medical evidence, ultimately "[t]he importance of the expert testimony is to be determined from the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient." *McGrath v. Satellite Sprinkler Systems*, 877 S.W.2d 704, 708 (Mo.App. S.D. 1994).

It is not necessary that the employee conclusively prove that specific treatment is required to treat or diagnose a condition, but rather it is sufficient if "claimant showed 'by reasonable probability' that he was in need of additional medical treatment by reason of the accident."

Sifferman v. Sears, Roebuck & Co., 906 S.W.2d 823, 828 (Mo.App. 1995). It must be shown that the need for future medical care “flow[s] from the accident.” *Landers* at 283. The phrase “to cure and relieve has been construed to mean treatments that give comfort even though restoration to soundness is beyond avail.”

I. Accident & Injury

The evidence is supportive of a finding, and I find and conclude that the employee, Wilson F. Turner, sustained an injury by accident, which arose out of and in the course of his employment with the employer, Turner Excavating. Notably, while performing maintenance for the various machines on January 1, 1999, the employee was standing on the tracks of one of his excavators. As he turned, he slipped and fell toward the ground, and ended up doing a split with his left foot in front of him and the right foot behind him. He fell with the full weight of his body on the perineal or groin area. The employee experienced immediate onset of pain in his mid and lower back with some pain going into his right hip. Also, within a few hours, and causally related to this trauma, Mr. Turner experienced a penile erection that would not subside.

The parties offer differing but similar medical opinion regarding the nature of Mr. Turner’s injuries causally related to the January 1, 1999 incident. To the extent there are differences, I resolve the differences in favor of Dr. Bennoch and Dr. Halfaker who I find credible, reliable and worthy of belief. Accordingly, after consideration and review of the evidence, I find and conclude that the accident of January 1, 1999, caused Mr. Turner to sustain a serious injury to his lumbar, thoracic and cervical spine, groin and mental health. These injuries include the following medical conditions:

- Traumatic priapism, resulting in aspiration of the corpus cavernosum with placement of a Winter Shunt (x2), distal penile shunt placement with surgical priapism, occupational urinary urgency/frequency, and sexual dysfunction;
- Chronic low back pain, secondary to occupational aggravation of lumbar sacral degenerative joint and disc disease with herniated nucleolus pulpous at L4-L5 to the left and left L5 radiculopathy;
- Occupational aggravation of cervical degenerative joint and disc disease;
- Thoracic spine pain;
- Severe depression, secondary to pain disorder and dysthymic disorder.

II. Medical Care

Dr. Bennoch, Dr. Halfaker, Dr. Lennard and Dr. Woodward have all opined that Mr. Turner will require some level of health care services as a result of the January 1, 1999 injury. All of these experts have opined and testified that Mr. Turner will require ongoing psychological therapy and possibly medications as a result of the consequences of the penile injury, implant

and depression caused by this condition and chronic low back pain. In addition, there is evidence in the record to support the need for ongoing physical therapy, medications and diagnostic testing for Mr. Turner's injury to his cervical, thoracic and lumbar spine.

Based upon the complications and necessity for two revisions of Mr. Turner's penile implants, the employee should continue to be monitored by his local treating urologist, Robert Johnson, M.D. Such further and additional treatment for this condition shall be provided under the care and direction of Robert Johnson, M.D.

After consideration and review of the evidence, I find and conclude that as a consequence of the work injury of January 1, 1999, the employee will require additional or future medical care in order to cure and relieve him of the effects of this work injury. Therefore, the employer and insurer are ordered to provide the employee, Wilson Turner, with future medical and psychological care consistent with the opinions of Dr. Bennoch and Dr. Halfaker, which is reasonable, necessary and causally related to the January 1, 1999 accident.

III.

Nature & Extent of Permanent Disability & Liability of Second Injury Fund

The accident of January 1, 1999 caused Mr. Turner to sustain a serious injury to his lumbar, thoracic and cervical spine, groin and mental health. According to the testimony of Dr. Bennoch, who I find credible, reliable and worthy of belief, Mr. Turner sustained the occupational aggravation of lumbar sacral degenerative joint and disc disease with herniated nucleolus pulpous at L4-5 to the left, and left L5 radiculopathy. He has undergone conservative care, therapy and steroid injections for the treatment of this condition with little improvement of his chronic low back pain.

According to the testimony of Dr. Halfaker, who I find credible, reliable and worthy of belief, Mr. Turner continues to suffer severe depression secondary to his chronic low back pain syndrome and depression further attributable to the penile implant and sexual dysfunction. Mr. Turner did not seek or obtain other employment, and continues to remain off work, which he attributes to his chronic and severe pain and his depression. His primary objective on a daily basis is to attempt to remain active but to do nothing that will exacerbate his back pain which in turn exacerbates his depression. He has few good days, and many days when he is not able to function at all primarily because he has been too active the previous day.

Mr. Turner has learned that by restricting and limiting his activities he can conservatively manage his low back pain and depression without narcotic medications. Both he and his girlfriend, Sandra Kay Holt, provided testimony regarding his medical condition, including consideration of his chronic pain and depression. In this regard, I find both Mr. Turner and Ms. Holt credible, and accept as true their testimony.

In considering the nature and extent of Mr. Turner's overall disability, an initial inquiry requires consideration as to whether the injury of January 1, 1999, considered alone, renders Mr. Turner permanently and totally disabled. In this regard, the employer and insurer argue that Mr. Turner is not permanently and totally disabled; and if he is permanently and totally disabled, then

that disability is attributed to the January 1, 1999 injury in combination with his pre-existing learning, reading and writing disabilities.

Likewise the Second Injury Fund argues that Mr. Turner still possesses the ability to compete in the open and competitive labor market for gainful employment. However, they further argue that if Mr. Turner is permanently and totally disabled, that condition is as a result of the January 1, 1999 injury in isolation.

The employee offered evidence of permanent partial disability attributable to the January 1, 1999 injury from Dr. Bennoch, who opined that the incident, in isolation, caused Mr. Turner to sustain a permanent partial disability of 25 percent to the body as a whole attributable to the penile injury; a permanent partial disability of 20 percent to the body as a whole attributable to the depression; and a permanent partial disability of 15 percent to the body as a whole attributable to the lumbar spine; and a permanent partial disability of 10 percent to the body as a whole attributable to the cervical spine.

The employer and insurer offer evidence of permanent partial disability from Dr. Lennard, who opined that with reference to the low back Mr. Turner sustained a permanent partial disability of 8 percent to the body as a whole attributable to priapism causing erectile dysfunction. Dr. Lennard offered no opinion as to any degree of disability or impairment with reference to claimant's depression.

At the hearing, Dr. Bennoch testified that Mr. Turner is governed by permanent restrictions and limitations, which he causally relates to the January 1, 1999 injury. In considering the question of whether Mr. Turner is still employable in the open and competitive labor market, Dr. Bennoch testified that a perspective employer could not depend on Mr. Turner to be at a specific place at a specific time because of his chronic pain and depression regardless if the work be part time or full time. In his opinion, Mr. Turner is unemployable in the open and competitive labor market as a result of conditions attributable to the January 1, 1999 injury standing alone. He testified that when one adds the pre-existing learning disability, this only adds additional disability to an already totally disabled person.

In considering the same question, Mr. Turner's treating clinical psychologist, Dale Halfaker, Ph.D., gave similar testimony. Dr. Halfaker opined that a perspective employer could not depend upon Mr. Turner to be at a specific place at a specific time because of his chronic pain and depression syndromes that were attributable to the January 1, 1999 injury standing alone.

Wilbur Swearingin, CRC, testified that prior to January 1, 1999, Mr. Turner presented with impairments, learning disabilities and deficiencies in reading and writing, which were vocationally disabling and sufficient to constitute a hindrance or obstacle to employment. However, Mr. Swearingin testified that Mr. Turner was able to function vocationally, and quite successfully so, in spite of his learning disability as long as he could rely upon his physical ability for hard manual labor. Mr. Swearingin testified that it is his professional opinion Wilson Turner is permanently and totally disabled, which he attributes to the residuals caused by the work injury of January 1, 1999 in isolation. It was his ultimate opinion that Mr. Turner no

longer possesses the residual functional ability to perform work in the open and competitive labor market either on a full time or part time basis.

James England, CRC, provided testimony, and offered the vocational opinion that Mr. Turner continues to possess the residual functional capacity to perform a wide range of entry level positions. However, in accepting the testimony and opinions of Dr. Halfaker and Dr. Bennoch, I reject or otherwise do not accept Mr. England's testimony. Rather, I find that Mr. Swearingin more aptly applied the physical and emotional restrictions assigned by Dr. Bennoch and Dr. Halfaker, and thus resolve the differences in vocational opinion in favor of Mr. Swearingin.

Further, in considering this issue, I note that the employer and insurer, as well as the Second Injury Fund, assert that Mr. Turner is active, and during the years following his injury he engaged in a number of overnight traveling trips. Additionally, the employer and insurer, as well as the Second Injury Fund, assert that Ms. Holt indicated that she was not aware of Mr. Turner's work injury for approximately two years after meeting Mr. Turner. During these two years Mr. Turner did not tell her about any workers' compensation claim or inform her that he had any physical problems, and she did not see or know of him having any physical problems.

However, as I understand Ms. Holt's testimony, Ms. Holt was aware of Mr. Turner's physical and emotional problems from the outset of their relationship. In explaining her testimony, she noted that while she was aware of Mr. Turner's physical and emotional problems, it was only in the last two years that she became aware that these medical conditions were related to the January 1, 1999 work injury. Additionally, Ms. Holt testified that she encouraged Mr. Turner to travel with her, and on occasions they traveled to casinos in the Midwest. According to Ms. Holt, these travels were done with the intention of taking Mr. Turner's mind off of his chronic pain and depression. She further testified that they have not traveled for the past several years because of the worsening of the problems experienced by Mr. Turner.

Accordingly, after consideration and review of all of the evidence, I find and conclude that as a consequence of the January 1, 1999 accident and the injuries resulting from this incident, considered alone and in isolation, Mr. Turner suffers chronic pain and depression. The nature and severity of these conditions render him unemployable in the open and competitive labor market. As explained by Dr. Halfaker, which I accept as true, Mr. Turner's chronic pain and depression render him unreliable. The nature of this unreliability creates an environment in which a perspective employer could not depend on Mr. Turner to be at a specific place at a specific time regardless if the work be part time or full time, and relates solely to the work injury of January 1, 1999. Thus, while Mr. Turner suffered from a preexisting disability in the nature of a learning disability, I find and conclude that the last injury (work injury of January 1, 1999), considered alone, renders Mr. Turner permanently and totally disabled.

Therefore, the employer and insurer are ordered to pay to the employee, Wilson Turner, the sum of \$562.67 per week for the employee's lifetime. The payment of permanent total disability compensation by the employer and insurer is effective as of December 30, 2004, when he reached maximum medical improvement and his condition became permanent. In light of this award finding the employer and insurer liable for payment of permanent total disability compensation, the Claim for Compensation filed against the Second Injury Fund is denied.

An attorney's fee of 25 percent of the benefits ordered to be paid is hereby approved, and shall be a lien against the proceeds until paid. Interest as provided by law is applicable. The Award is subject to modifications as provided by law.

Made by: _____
L. Timothy Wilson
Administrative Law Judge
Division of Workers' Compensation