Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 12-009601

Employee: Richard Wetzel

Employer: Production Castings, Inc.

Insurer: Farmington Casualty Co.

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Preliminaries
The parties asked the administrative law judge to determine the following issues: (1) whether employer is liable for additional temporary total disability benefits owing to a previous underpayment of same; (2) whether employer is liable for future medical treatment; (3) the nature and extent of any permanent disability; (4) whether any drug testing penalties are applicable in this case; (5) whether employee was terminated for post-injury misconduct for purposes of § 287.170.4 RSMo; and (6) whether employee is entitled to costs under § 287.560 RSMo owing to employer's underpayment of temporary total disability benefits.

The administrative law judge rendered the following determinations: (1) Dr. Volarich's original permanent partial disability rating is probative and most easily reconciled with the balance of the record; (2) Dr. Volarich and Dr. Hurford both credibly endorsed employee's need for ongoing treatment; (3) no penalty is applicable in connection with a positive drug screen; (4) employer is liable for the stipulated amount of underpaid temporary total disability benefits; (5) there is nothing in the record to suggest employee was terminated from employment; and (6) employer did not defend the issue of underpayment of temporary total disability benefits without substantial evidence.

Employee filed a timely application for review with the Commission alleging the administrative law judge erred: (1) in determining employee is not permanently and totally disabled as a result of the work injury; and (2) in determining that employee is not entitled to sanctions pursuant to § 287.560 RSMo.

For the reasons stated below, we modify the award of the administrative law judge referable to the issue of the nature and extent of permanent disability.

Discussion

Nature and extent of permanent disability

The parties have stipulated that employee suffered a compensable work injury on February 14, 2012, when he slipped and fell while carrying a heavy die casting in the course of his work performing die cast maintenance at employer's manufacturing facility. Employee suffered a trimalleolar fracture of the right ankle, and also claims to suffer from an ongoing pain syndrome affecting the right lower extremity. Employer's authorized treating pain management specialist, Dr. Patricia Hurford, diagnosed employee's ongoing complaints as complex regional pain syndrome (CRPS), based on her findings of multiple diagnostic criteria for CRPS during periodic examinations of the employee over the course of several years. On the other hand, employer presents expert medical opinions from Drs. John Krause, Joshua Nadaud, and Edwin Dunteman, each of whom question whether employee continues to suffer (or has ever suffered) from CRPS.

The administrative law judge did not indicate one way or another whether he accepts the diagnosis of CRPS. We are mindful that the parties did not specifically place in dispute any issue of medical causation, but the parties do advance conflicting evidence as to whether the diagnosis of CRPS is appropriate, and have argued the issue in their briefs. It would appear that the appropriate diagnosis of employee's (alleged) ongoing pain condition is a necessary component of any determination of the nature and extent of disability in this case, so we will first address the conflicting medical evidence as to the diagnosis of CRPS.

Dr. Hurford first diagnosed CRPS on August 3, 2012, and she thereafter periodically evaluated employee in the course of providing authorized treatment in connection with this condition. In fact, at the time of the hearing, Dr. Hurford continued to provide authorized treatment to employee for his ongoing complaints affecting the right lower extremity. In contrast, Drs. Nadaud and Dunteman saw employee on only one occasion each. The persuasive expert medical evidence on this record supports a finding that the symptoms of CRPS wax and wane, such that an affected individual may not always exhibit the diagnostic criteria for CRPS at any one time; we so find. It follows that Dr. Hurford's numerous, periodic examinations of employee would likely have provided her a better vantage point from which to evaluate whether a diagnosis of CRPS is appropriate in this case, versus the one-time evaluations from Drs. Nadaud and Dunteman. We so find.

Turning to Dr. Krause's deposition, we note that he challenged Dr. Hurford's diagnosis of CRPS on the basis that he did not find, upon his own post-surgical examinations of the employee, enough criteria for CRPS to endorse that diagnosis. However, Dr. Krause failed to acknowledge Dr. Hurford's notes, which memorialize numerous findings supporting her diagnosis of CRPS, such as discoloration, temperature differences, vasomotor changes, hypoesthesia, and allodynia. When confronted with certain of these notes on cross-examination, Dr. Krause incorrectly suggested that Dr. Hurford didn't really observe any of these findings herself, but instead merely recited

employee's subjective reporting of them.[1] Upon further questioning, Dr. Krause revealed he simply didn't believe employee's complaints of ongoing severe pain in his right lower extremity:

> Q. But if in fact he truly does have that pain, isn't that a sign or symptom of CRPS?
>
> A. If he truly has that pain, it wouldn't be magnified. It would be legitimate. His was magnified.

Transcript, page 830.

While we appreciate Dr. Krause's expert testimony as to medical issues, a testifying employee's credibility (or lack thereof) is an administrative determination within the sole discretion of the fact-finder. See *Blackwell v. Puritan-Bennett Corp.*, 901 S.W.2d 81, 86 (Mo. App. 1995). The administrative law judge did not squarely address the issue of the credibility of employee's pain complaints, or even his general credibility as a witness at the hearing. Consequently, we are unable to rely upon or defer to any finding from the administrative law judge with respect to employee's credibility.

Upon our own careful review of the entire record, we find employee's testimony to be consistent, logical, and persuasive. We discern no basis to reject employee's pain complaints.[2] We find employee credible. Consequently, where Dr. Krause's medical opinion regarding the diagnosis of CRPS appears to turn upon his own choice to disbelieve employee's pain complaints, and where Dr. Krause failed to persuasively explain why he rejected and/or ignored the numerous findings indicative of CRPS documented by Dr. Hurford, we find his testimony to lack sufficient persuasive force on this issue.

Instead, crediting Drs. Hurford, Guarino, and Volarich, we find that employee has CRPS, and that this condition continues to afflict his right lower extremity, causing

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[1] Upon her own physical examination of employee's right lower extremity, Dr. Hurford recorded significant temperature difference, hyperemic changes, hypoesthesia, and severe dysesthesia on July 17, 2012; temperature difference, increased rubor, allodynia, and hypoesthesia on September 6, 2012; temperature difference, discoloration, allodynia, and hypoesthesia on September 19, 2012; temperature difference and vasomotor changes on December 12, 2012; hypopigmentation on November 18, 2013; erythema, dysesthesia, and temperature changes on February 17, 2014; dysesthesia and erythema on March 31, 2014; swelling, allodynia, and dysesthesia on July 21, 2014; and allodynia and dysesthesia on November 4, 2014. See *Transcript*, pages 164-205.

[2] Apparently, employer obtained surveillance footage of employee, which several of the medical experts addressed in their reports and testimony. Owing to employer's failure to offer this surveillance footage as evidence at the hearing in this matter, we are unable to determine whether said footage materially contradicts employee's testimony. In any event, because Dr. Hurford specifically instructed employee to attempt desensitization exercises such as walking and wearing shoes, any footage depicting same would not detract from employee's otherwise persuasive testimony that such activities cause him to experience pain and discomfort. We find most compelling Dr. Hurford's own comments with regard to the surveillance: "[T]he surveillance is not in any way contrary to expected or anticipated behavior." *Transcript*, page 205.

regular flare-ups of hypersensitivity with intractable pain. When his CRPS is particularly painful, employee is unable to stand longer than 45 minutes, and spends most of the day lying down with his right foot elevated on a pillow. He is unable to wear socks or normal shoes for more than half an hour before suffering pain and swelling. At the time employee reached maximum medical improvement, he was 47 years of age, with a recent work history devoted mostly to machine operation and general manufacturing work. Employee is unable to return to such jobs, owing to his inability to withstand prolonged standing, walking, or weight-bearing.

Having resolved the issue whether employee suffers from ongoing CRPS, we must now revisit the question whether employee is permanently and totally disabled owing to the effects of the work injury.

> The test for permanent total disability is whether the worker is able to compete in the open labor market. The critical question is whether, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition.

Molder v. Mo. State Treasurer, 342 S.W.3d 406, 411 (Mo. App. 2011).

The parties presented conflicting expert vocational testimony with regard to whether any employer would be expected to hire employee in his present physical condition. We note that employer's expert, Donna Abram, was not provided with records from Dr. Hurford after August 22, 2012, including Dr. Hurford's note from January 14, 2013, placing employee at maximum medical improvement and imposing restrictions.[3] After careful consideration, we find unpersuasive Ms. Abram's ultimate opinions in this case, as she was not fully informed of employee's medical history.

Turning to employee's vocational expert, Timothy Lalk, we note his testimony that he brings to this case a familiarity with the vocational implications of CRPS, derived from his training and study of medical records and transcripts from expert medical witness depositions on the topic. Mr. Lalk accepted employee's complaints referable to the diagnosis of CRPS and rendered his vocational recommendations accordingly. Mr. Lalk believes that employee's symptoms and limitations prevent him from successfully competing for any position in the open labor market. After careful consideration, we find Mr. Lalk's analysis to be most persuasive, as it properly takes into account employee's ongoing symptoms and limitations referable to CRPS.

In sum, we believe employee continues to suffer from CRPS affecting the right lower extremity, and we cannot imagine any employer could reasonably be expected to hire employee in his present physical condition resulting from the effects of the work injury. We credit the opinions from Dr. Volarich and Mr. Lalk. We find that employee is permanently and totally disabled owing to the effects of the work injury. We conclude, therefore, that employer is liable to employee, pursuant to § 287.200 RSMo, for the payment of weekly permanent total disability benefits.

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[3] This was despite Ms. Abram expressly requesting updated records from the employer/insurer.

Conclusion
We modify the award of the administrative law judge as to the issue of the nature and extent of disability referable to the work injury.

Beginning January 14, 2013, employer is liable to employee for the payment of permanent total disability benefits at the stipulated weekly benefit amount of $386.68. The weekly payments shall continue for employee's lifetime, or until modified by law.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued July 8, 2016, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

The Commission approves and affirms the administrative law judge's allowance of an 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 24th day of January 2017.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

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

Attest:

Secretary

SEPARATE OPINION
Concurring in Part
Dissenting in Part

After a review of the evidence, I agree with the Commission majority's decision that this employee is permanently and totally disabled as a result of the work injury. For this reason, I concur in the modification of the award of the administrative law judge to allow permanent total disability benefits to employee. However, I write this separate decision because I believe employer should be ordered to pay employee's attorney fees pursuant to § 287.560 RSMo, owing to employer's unreasonable defense in reducing employee's temporary total disability benefits by 50% on the sole basis of a positive drug screen during employee's initial emergency treatment.

It is uncontested that employee was temporarily and totally disabled owing to this catastrophic work injury for approximately 46 weeks following the accident on February 14, 2012. Employer paid employee temporary total disability benefits during this time period, yet reduced his weekly benefit amount by 50%, on the sole basis that a urinalysis performed during employee's initial emergency treatment indicated the presence of marijuana metabolites. Employer argues it was justified in reducing employee's benefits, because employee violated employer's drug-free workplace policy, and his injury was sustained in conjunction with the use of marijuana, such that the penalty under § 287.120.6(1) RSMo applies.

In his award, the administrative law judge concluded that "the evidence of the drug tests [sic] demonstrates that Employer did not defend the issue without substantial evidence." *Award*, page 15. In affirming and adopting the administrative law judge's award with respect to this issue, the Commission majority has now concluded the same: that evidence of a single positive post-accident drug screen, standing alone, justifies an employer's initial choice to pay only half the weekly benefits to which an injured employee is ultimately entitled.

I strongly disagree. In fact, as I will demonstrate below, employer has **never**, during the entire pendency of this matter, advanced evidence sufficient to satisfy the statutory requirements under § 287.120.6(1) for applying a drug penalty. Some background discussion is in order. Section 287.560 RSMo provides, in relevant part, as follows:

> [I]f the division or the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them.

The Commission is authorized under the foregoing section to award attorney fees against any party who brings, prosecutes, or defends proceedings without reasonable grounds: "[t]he 'whole cost of the proceedings' includes all amounts the innocent party expended throughout the proceeding brought, prosecuted, or defended without reasonable grounds, including attorney's fees." *DeLong v. Hampton Envelope Co.*, 149 S.W.3d 549, 555 (Mo. App. 2004)(citation omitted). The penalty under § 287.560 is

intended to ensure that workers' compensation benefits, when due, are paid expeditiously, as originally designed when our state first enacted a workers' compensation law:

> The workmen's compensation law which became effective in 1927 has for its legitimate purpose the amelioration of losses sustained by workmen or employees and his or her dependents received in the proper scope of work all in the interest of employees and the public welfare. … The purpose is to provide a **simple and nontechnical method of compensation** for injuries sustained by employees through accident arising out of and in the course of employment and to place the burden of such losses on industry.

Bethel v. Sunlight Janitor Service, 551 S.W.2d 616, 618 (Mo. 1977)(emphasis added).

In other words, the very purpose underlying Missouri's workers' compensation law is that injured workers receive, without facing a labyrinth of unnecessary litigation, the rather modest compensation to which they are entitled. To effectuate that purpose, the legislature created the penalty under § 287.560, which discourages both employees and employers from taking unreasonable positions, or litigating issues when there is no supporting evidence. Under § 287.560, the Commission is specifically tasked with evaluating whether various claims, defenses, or proceedings are brought "without reasonable ground."

So, what constitutes an unreasonable defense for purposes of § 287.560? The courts have instructed that "[t]he Commission should exercise its discretion to assess the cost of the proceedings under this section where the issue is clear and the offense is egregious." *DeLong v. Hampton Envelope Co.*, 149 S.W.3d 549, 555 (Mo. App. 2004). The first step is to consider whether the "issue is clear." The initial question, then, is whether employer has advanced evidence that would support a finding that employee violated the drug penalty provision under § 287.120.6(1).

Turning to § 287.120.6(1), we find the following language: "[w]here the employee fails to obey any rule or policy adopted by the employer relating to a drug-free workplace or the use of alcohol or nonprescribed controlled drugs in the workplace, the compensation and death benefit provided for herein shall be reduced fifty percent if the injury was sustained in conjunction with the use of alcohol or nonprescribed controlled drugs." In order to prevail on its argument that employee's temporary total disability benefits were properly reduced by 50%, employer was thus required to prove the following three elements at the hearing before the administrative law judge:

1. That employer adopted a drug-free workplace rule or policy.

2. That employee failed to obey said policy.

> 3. That employee's injury was sustained in conjunction with the use of marijuana.

With regard to the first element, the record before us does contain a drug-free workplace rule or policy. It provides, in relevant part, as follows:

> The manufacture, distribution, dispensing, possession, sale, purchase, or use of a controlled substance, illegal drug or drug paraphernalia on company property is prohibited. …
>
> If any employee, whether he/she is full time or part time, is injured at work and he/she or the company management feels he/she should be treated by a physician, he/she must do so. At this time, he/she must take a drug urinalysis. …
>
> If an employee voluntarily takes the drug urinalysis and it is positive, whether he/she took the drug urinalysis due to an "injury/accident" or through random selection process, the employee will be given five days to make a decision concerning the following options.
>
> 1. He/She may take a leave of absence to enter a drug rehabilitation center (Enrollment must take place within one week after the employee is informed of the positive results). Once the employee is through the rehabilitation program, and the company is notified in writing that he/she has successfully completed the program, he/she will be able to return to work after providing a negative drug test.
>
> 2. He/She may decline professional help. However, approximately thirty days from the date the employee is informed of the positive result, he/she must be tested again. Production Castings will set the exact date and time. If the results of this test are positive or if he/she refuses to take the drug urinalysis, they will be terminated immediately. If the results are negative, he/she can continue working for Production Castings. …
>
> Any employee who receives two positive drug urinalysis while employed at Production Castings will be terminated.

Transcript, page 659-61.

It was employer's burden to prove that employee "failed to obey" the foregoing policy. Thus, we must carefully review the language of employer's policy, to determine whether employee failed to comply with any of its requirements. Employee is not accused of manufacturing, distributing, dispensing, possessing, selling, purchasing, or using any controlled substance, illegal drug or drug paraphernalia on employer's property. Instead, employer's position is that employee "failed to obey" its drug-free workplace policy when he provided a post-accident urinalysis that was deemed positive for

marijuana metabolites. But employer's policy does not state that a positive post-accident drug screen constitutes a violation of the policy; instead, this event merely triggers the two specified options, from which the employee may choose. The only relevant penalty under employer's written policy comes after an employee provides two positive drug test results.

It is uncontested that employee submitted to a post-accident urinalysis; thus, he did not "fail to obey" that portion of employer's policy requiring him to do so. The sample he provided was deemed positive for marijuana metabolites, so employee opted, pursuant to employer's policy, to take a second drug test. Again, there can be no contention that employee "failed to obey" any aspect of employer's policy up to this point. As it turns out, employee's second drug screening came back negative. As a result, in the words of Leonard Taylor, employer's human resource manager for the past 27 years: "[t]here's nothing – he comes back as he was before. There's no penalty to anybody that is able to pass the second drug test." *Transcript*, page 640. It follows that employer has failed to prove the second of the three requisite statutory elements to justify a 50% reduction of compensation under § 287.120.6(1), because employee did not fail to obey employer's policy in any respect, and in fact, *complied* with employer's policy by taking a second test, which was deemed negative.

At this point, it would appear that the "issue is clear," i.e., that the drug penalty should never have been applied. But even if we ignore Mr. Taylor's testimony and the express terms of employer's own policy, and assume employee "failed to obey" some (unstated) aspect of employer's policy by providing an initial positive urinalysis, the record before us is bereft of any evidence whatsoever of the third element under § 287.120.6(1): that employee's injury was sustained "in conjunction with the use" of marijuana. This element requires employer to show that employee's use of marijuana and the occurrence of his work injury "coexisted in time or space," or in other words, occurred at the same time. *Nolan v. Degussa Admixtures, Inc.*, 246 S.W.3d 1, 4 (Mo. App. 2008). Employer has never identified **any** evidence that would support such a finding.

Mr. Taylor specifically denied that employer had any evidence in its possession to suggest employee was using marijuana, or under the influence of drugs, at the time the work injury occurred. The medical records generated during employee's initial emergency treatment do not contain any suggestion that employee appeared under the influence of any intoxicant, or that he smelled of marijuana. Employer did not advance any expert medical or toxicological testimony to interpret the drug test result itself, or to suggest that it should be seen as demonstrating employee's injury occurred "in conjunction with" employee's use of marijuana.

Speaking of the drug test result, I note that the document provided by employer lacks many of the typical indicia of reliability we expect in litigated cases, such as a chain-of-custody certification or a medical review officer's signature. This single piece of paper merely suggests, if believed, that someone named Lorisa Pennell determined that a urine sample she analyzed on February 16, 2012, belonged to employee, and that the urine sample contained "70 ng/mL" of "marijuana metabolite." *Transcript*, page 658.

Especially in the absence of a chain-of-custody certification or medical review officer's signature, I find such evidence insufficient to prove that this employee's work injury "coexisted in time or space" with his purported use of marijuana.

In sum, because the record does not contain evidence that would be sufficient, if believed, to support findings that employee violated employer's drug-free workplace policy, or that his injury was sustained in conjunction with his use of illegal drugs, we must conclude that the "issue is clear," and that it was therefore unreasonable for employer to reduce his benefits or argue that the drug penalty provision under § 287.120.6(1) is applicable in this case. The only remaining question is whether employer's offense was "egregious." See *DeLong*, 149 S.W.3d at 555.

Again, the parties have agreed that for almost a full year following his severe right foot and ankle fracture at work, employee was temporarily and totally disabled, and thus unable to secure gainful employment or provide for his family. Without any evidence whatsoever that employee violated any provision of its drug-free workplace policy, or that employee's injury occurred in conjunction with his use of illegal drugs, this employer wrongfully reduced his temporary total disability benefits by 50%, and has maintained the position that it was justified in doing so, all the way through the hearing before the administrative law judge, and now before this Commission, requiring employee's attorney to answer this patently unreasonable argument. In essence, employer ignored both the law of Missouri and the express terms of its own policy, and jeopardized this severely injured worker's financial security in the process. I am convinced employer has acted egregiously, and that costs under § 287.560 are warranted.

To be clear, I do not condone the use of illegal drugs, and I respect every employer's right to establish and enforce an effective drug-free workplace policy. It is my duty as a member of this Commission, however, to vouchsafe the beneficent purposes underlying our workers' compensation laws by sanctioning parties who wrongfully multiply litigation and take unreasonable positions. Stated simply, there is no provision of the Missouri workers' compensation law that would entitle an employer to unilaterally discount, on the sole basis of a single positive drug screen, the compensation to which an employee is otherwise unquestionably entitled. Yet, in failing to sanction this employer for doing just that, the administrative law judge and now the Commission majority have implicitly condoned this behavior. This establishes a terrible precedent for Missouri workers, and I cannot join in that part of the Commission's decision.

Instead, I would modify the award of the administrative law judge, and conclude that because employer unreasonably defended this case on the basis of a drug penalty for which there never was any evidentiary support, employer must pay employee his attorney fees pursuant to § 287.560. Because the Commission majority has decided otherwise, I respectfully dissent.

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Curtis E. Chick, Jr., Member

Issued by DIVISION OF WORKERS' COMPENSATION

AWARD

Employee: Richard Wetzel

Injury No.: 12-009601

Dependents: N/A

Before the
Division of Workers' Compensation
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Employer: Production Castings, Inc.

Additional Party: N/A

Insurer: Farmington Casualty Co.

Hearing Date: April 4, 2016

Checked by: JED

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: February 14, 2012 (stipulated)
5. State location where accident occurred or occupational disease was contracted: St. Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
    Employee slipped and fell while carrying heavy casting on shoulder.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: right foot (and calf)
14. Nature and extent of any permanent disability: 75% of the right calf (160 week level)
15. Compensation paid to-date for temporary disability: $9,048.34
16. Value necessary medical aid paid to date by employer/insurer? $59,340.96

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17. Value necessary medical aid not furnished by employer/insurer? none

18. Employee's average weekly wages: $580.00

19. Weekly compensation rate: $386.68/$386.68

20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

under-paid TTD (stipulated amount)	$ 7,965.48
120 weeks of PPD from Employer	46,401.60
TOTAL:	$54,367.08

22. Second Injury Fund liability: N/A

23. Future requirements awarded: Yes (see narrative Award)

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

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

James Hoffmann
Richard Lecinski

Issued by DIVISION OF WORKERS' COMPENSATION

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Richard Wetzel	Injury No.: 12-009601
Dependents:	N/A	Before the **Division of Workers' Compensation** Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Employer:	Production Castings, Inc.	
Additional Party:	N/A	
Insurer:	Farmington Casualty Co.	
Hearing Date:	April 4, 2016	Checked by: JED

This case involves a compensable right ankle injury resulting to Claimant on the reported accident date of February 14, 2012. Employer/Insurer admits Claimant was employed on that date and that any liability is fully insured. The Second Injury Fund is not a party to the claim. Both parties are represented by counsel.

Issues for Trial

1. underpaid temporary total disability benefits (stipulated amount);
4. nature and extent of permanent disability;
5. liability for future medical treatment; and
6. penalties under Sections 287.120.6, 287.170.4 and 287.560.

FINDINGS OF FACT

1. Claimant, age 51, is not married and has no dependents. He ambulated into the court room in no apparent distress. Claimant wore sandals exposing his right foot injury including a four inch medial surgical scar and a six-inch lateral surgical scar of the ankle, he appeared to have a blistering on his instep, the instep appeared to be swollen or thickened 12.5 to 15%, and some discoloration was noted.

2. Claimant graduated from high school in 1983. He worked a number of skilled labor jobs, among others, and in the fall of 2006, at age 41, he enrolled at Southwestern Illinois College in a medical assistant curriculum. Claimant withdrew in 2008 for financial reasons and returned to work. Claimant stated he had a 3.5 G.P.A. over several semesters including courses in billing and coding.

3. Prior to working for Employer, Claimant's work history included working in a warehouse at Zanders Sporting for a year filling orders using a tow motor; driving a tractor trailer for 6 months for Swift Transportation; working on DVD packaging and labeling machines for 4 years at Technicolor Universal Media; working on a die cast machine for 9 years at Spartan Light Metal Products; and running a punch press machine and doing assembly work on a punch press machine for 8 years at Schneider General. Claimant was unemployed for approximately a year immediately prior to working for Employer.

4. Claimant worked the night shift performing duties of a die maintenance worker including cleaning the dies, replace pins, and performing repairs. Claimant described the work as very physically demanding.

5. At approximately 2:00 AM on February 14, 2012, while working for the Employer, Claimant slipped and fell while he was carrying a heavy die casting. Claimant was taken by ambulance to the emergency room.

Treatment Record

6. Claimant was diagnosed with a bi-malleolar fracture, given opiates for pain, placed in a cast and told he would need surgery. (Exhibit 1, SSM St. Clare Hospital Records). Prior to being released from the hospital, Claimant provided a urine sample for Employer and said post-injury urinalysis was positive for "marijuana metabolites." (Exhibit A, sample collected on 2/15/12).

7. On February 17, 2012, Dr. John Krause diagnosed Claimant's injury as a right ankle tri-malleolar fracture dislocation. (Exhibit 2, Dr. Krause Records, Binder p. 41). On February 21, 2012, Dr. Krause performed an open reduction and internal fixation surgery. (Id. at 42-43). On March 21, 2012, Claimant continued to have swelling and aching, diffuse tenderness across his midfoot, and he had an area of irritated skin on his dorsal foot. (Id. at 57). On April 4, 2012, Claimant presented to Dr. Krause with pain in his medial mid-foot and forefoot, an eschar dorsally on his foot, small area of full thickness skin loss and diffuse tenderness along his medial midfoot. (Id. at 60).

8. On April 22, 2012, Claimant returned to work on light duty. Employer created a position for Claimant that required that he sit in a chair inspecting small parts before the parts were painted. Claimant stated he was in pain and that he had problems staying awake as a result of a lack of sleep at night. Claimant stated he was criticized by the Employer for working too slowly and was laid off. Claimant's TTD benefits were reinstated in June 2012 and terminated on January 20, 2013 after Dr. Hurford deemed Claimant to be at MMI on January 14, 2013. (During this period, Employer only paid 50% of Claimant's TTD rate, asserting a reduction for positive drug testing.)

9. On May 11, 2012, Claimant reported to the Work Center and during the evaluation he reported constant pain along the anterior and medical aspect of the right ankle; numbness of the great toe and 2nd digit of the right foot; extreme sensitivity along the side of the right foot (Exhibit 5). Notes included a healing blister in the dorsal aspect of the right foot and "reddish

purple coloring of the right foot." The physical therapists stated that Claimant was cooperative and "it is felt that he provided acceptable effort." (pp. 299-300.)

10. On June 18, 2012, Claimant informed Dr. Krause that he continued to have pain and he continued to complain primarily of hypersensitivity around his medial incision; Dr. Krause's examination revealed hypersensitivity around his medial malleolus and medial hindfoot, but not proximal to the ankle, and Claimant "appears to have sensibility in the saphenous nerve distribution". (Id. at 74). Dr. Krause noted the therapist's impression that she believed his symptoms are legitimate and that he is making slow, steady progress with therapy. Dr. Krause's assessment included "hypersensitivity medial right ankle incision." He gave Claimant Voltaren gel and continued Claimant on physical therapy and scar massage for the hypersensitivity and for range of motion. (Id.).

11. In a report dated July 10, 2012, Claimant's physical therapist writes of Claimant's pain and sensitivity and marked limitations in Claimant's functional abilities due to reports of increased pain. (Exhibit 5, Records from the Work Center, p. 292). Under observations, the physical therapists noted that Claimant "intermittently demonstrates reddish purple coloring of right foot." (Id. at 291).

12. On July 11, 2012 Claimant informed Dr. Krause that his pain was getting worse and Dr. Krause noted:

> He has diffuse hypersensitivity around his medial and lateral ankle and dorsal midfoot. He has no significant swelling or no overt changes of complex regional pain syndrome.

(Exhibit 2, p. 77). Given Claimant's persistent hypersensitivity, Dr. Krause recommended a pain management consultation and he referred Claimant to Dr. Patricia Hurford. (Id.). As of July 11, 2012, Dr. Krause had Claimant on light duty with the following restrictions: sitting work with intermittent standing, no prolonged standing, full weight bearing, and no running. (Id. at 79).

13. On July 17, 2012, Claimant saw Dr. Hurford. Dr. Hurford observes "swelling, discoloration and hyperhidrosis" and she recorded significant temperature differences in the lower extremities (82.2 and 77.8 degrees). Dr. Hurford noted "evidence of causalgia with significant vascular changes, hyperhidrosis, atrophy, mild edema, severe dysesthesia, allodynia and hypoesthesia", "recommended aggressive edema control, desensitization, contrast baths, exposure treatment, flexibility exercises, stress loading, aerobic conditioning, and tobacco cessation" and prescribed various medications. (Exhibit 3, 91-92).

14. On August 3, 2012, Dr. Hurford's records indicate that "[her] impression is unchanged, status post trimalleolar fracture and surgical correction with complex regional pain disorder [CRPS] resulting and affecting the right lower extremity." (Id. at 94). On September 6, 2012, Dr. Hurford noted "POSITIVE allodynia, hypoesthesia with palpation of lower extremity", 80.7 degrees on right lower extremity and 83.6 degrees Fahrenheit on the left, and "increased rubor distal right lower extremity." (Id at 97-98). On September 19, 2012, Dr. Hurford noted that despite the treatment Claimant has only had minimal improvement, Claimant reported significant sleep disruption, pain 6/10, and Dr. Hurford observed cool distal lower extremity with

discoloration, positive allodynia and hypesthesia with palpation. On November 14, 2012, Dr. Hurford noted Claimant was having marked increase in pain complaints. (Id. at 100-103).

15. On December 12, 2012, Dr. Hurford noted Claimant had "a baker sign of the lower extremity with a 5 [degree] temperature difference at the foot and 1.5 at the knee with the right being cooler. Pseudo motor and vasomotor changes were noted and a scar on the dorsum that is still healing. Pulses are palpated. He has restricted range of motion due to pain." (Id. at 106). Dr. Hurford's assessment included CRPD, opioid dependency, and mood disorder secondary to pain; and Dr. Hurford diagnosed long term pain management and permanent restrictions. (Id. at 107).

16. On January 14, 2013, Dr. Hurford finds that Claimant is at MMI except for pain management and she places Claimant on permanent restrictions of alternate sitting/standing and no climbing ladders or operating machinery. (Id. at 110).

17. On December 20, 2012, notes from PRORehab include "decreased hair growth noted right dorsal foot" and "decreased skin temperature noted over the dorsal right foot." (Exhibit 6, p. 331, 337).

18. On January 30, 2013, Claimant returned to see Dr. Krause. Dr. Krause's records indicate that Dr. Hurford had diagnosed Claimant with complex regional pain syndrome (CRPS) in July 2012. Claimant reported to Dr. Krause that he was on permanent restrictions and that he has been taking pain medications. (Exhibit 2, p. 81). Dr. Krause's records expressly note no abnormal hair growth and slight coolness in the right lower extremity compared to the left. Dr. Krause states that Claimant demonstrates "magnified tenderness diffusely around his medial ankle when examining him," but after flipping to the prone position, Claimant "did not have the exquisite tenderness around his medial ankle when his attention was distracted." (Id.) Dr. Krause's assessment was "History of complex regional pain syndrome without overwhelming objective signs on exam today." Because the signs were not "overt," Dr. Krause ordered a FCE. He kept Claimant on Dr. Hurford's restrictions. (Id.)

19. On February 15, 2013, Dr. Krause wrote that he received a FCE report indicating that Claimant failed multiple validity criteria, participated less than fully in the FCE and that Claimant's "volitional display of strength can be equalled [sic] or exceeded by the therapist index finger on a force gauge." (Id. at 83). Dr. Krause wrote that based on his last exam and the FCE report, it is his opinion that Claimant was at MMI and released to full duty without restrictions. (Id.). On April 18, 2013, Dr. Krause assigned a 10% permanent partial disability of the right ankle. (Id. at 86).

20. Four weeks later, on May 21, 2013, Claimant returned to see Dr. Hurford. The records indicate that Dr. Hurford reviewed the FCE report and Dr. Krause's report. Further,

> We discussed his abnormal drug screen and treatment recommendations. At this point, he has been off medicines. His pain ratings are 5.

21. (Exhibit 3, p. 112). Dr. Hurford letter report dated May 21, 2013 states:

> Given his ongoing, significant distal right lower extremity symptoms and abnormal urine drug screen, I have recommended work status as per Dr. Krause's (regular duty), continue desensitization techniques, use of neuropathic cream which he has available to him, resumption of his prior Cymbalta, no opioid analgesics, given the abnormal use previously noted on his drug screen."

(Id. at 112). Dr. Hurford deferred to Dr. Krause in regards to return to work without restrictions, but continued to treat Claimant for his pain.

22. On June 4, 2013, Dr. Hurford documents discoloration but no temperature variance. Claimant was "at MMI with the exception of management of his pain condition, " continue restrictions, and she states:

> Abnormal drug screen negates refills on opiod analgesic; would consider drug screening on the patient at follow-up, if there is any appearance of medication misuse or disuse.

(Id. at 114-115, 122-123, 125).

23. On November 18, 2013, Dr. Hurford states that Claimant is unable to wear a shoe which he was previously able to do and she documents a hypopigmented area in the dorsum of the right foot. (Id. at 119).

24. Claimant's June 16, 2014 urine sample came back that he was negative for amitriptyline but positive for marijuana metabolites. (Id. 122). In addition, Dr. Hurford states that prior to this test, Claimant's last prescription was written on March 31, 2014 and therefore he did not have any Elavil or amitriptyline for use. (Id. at 130). At the time the sample was taken, Claimant was given the medicine and he is taking it regularly. (Id.). On July 21, 2014, Dr. Hurford documents swelling, continued allodynia and dysesthesia with palpation and some synovitis. (Id.). On November 4, 2014, Claimant reported to Dr. Hurford that "in the last month or so his pain actually improved somewhat" and that he can intermittently wear socks, however he is still limited in the regular shoe wearing. (Id. at 132). Dr. Hurford states that that in her medical opinion that Claimant has been encouraged and not restricted in walking and standing so the surveillance (of Claimant walking, standing during a cigarette breaks, and moving across a road at a faster pace) is not in any way contrary to expected or anticipated behavior. Dr. Hurford states that she has encouraged and recommended continued activities and forced use and desensitization.

25. On July 17, 2014, Dr. Daniel Phillips saw Claimant for the purpose of conducting electrical diagnostic studies, however during the initial examination there were marked jump responses to superficial right foot palpation and "it was clear that it was impractical to proceed." (Exhibit 8, , p. 348).

26. On July 21, 2014, Dr. Hurford notes the absence of either Elavil or amytriptyline in the drug screen and references the last prescription date of March 31, 2104, "... and therefore had no available for use, and this medicine did not show up in his drug screen." (p. 130.)

27. On January 26, 2015, Dr. Hurford states: "Post-operatively he had persistent severe pain, poor wound healing in the dorsum of his foot, positive allodynia, dysesthesia, skin and vascular changes that have been documented consistent with a complex regional pain syndrome diagnosis." (Id. at 144). During this visit, Dr. Hurford documents cold distal temperatures on the right, hair pattern growth on the dorsum of the foot is diminished, decreased distal hair pattern growth in the forelegs bilaterally, allodynia, dysesthesia, pulses are palpated, range of motion is limited due to pain symptoms, weight bearing is slightly antalgic due to pain condition, and Claimant was not wearing a sock on his right foot but did have a boot on which was different than prior visits. (Id.).

28. On February 22, 2016, Claimant was seen by Dr. Hurford who noted that Claimant did not make his scheduled appointment and had been out of medicines for three weeks with marked increase in pain now ascending in the leg (pain 6/10). (Exhibit I, Supplement to Record of Dr. Hurford). Dr. Hurford notes positive allodynia, dysesthesia, pain with range of motion and mild trophic skin changes. (Id.). The business records of Insurer indicate that Claimant received thirty Amitriptylin 100 mg tabs and thirty Amitriptulin 75 mg tabs on August 30, 2015. (Exhibit C, Medication Payments).

29. Claimant testified that he is not able to work due to his CRPS and is depressed due to chronic pain. Claimant's typical day involves either lying or sitting half the day. He has trouble sleeping as the pain wakens him every night. He can walk about 15 minutes before his pain becomes severe.

30. Claimant has asked for future medical care for his ongoing pain and depression. Claimant continues to receive pain management from Dr. Hurford.

31. At the request of Claimant's counsel, Dr. Anthony H. Guarino of Barnes Jewish West County Hospital Pain Management Center reviewed the medical records and examined the Claimant on April 4, 2014. It is Dr. Guarino's opinion that Claimant "has complex regional pain syndrome which is directly related to the work injury of 2/14/12." (Exhibit 7, p. 345). Dr. Guarino states that he feels that Claimant "would have a difficult time finding labor in an open market, but do not want to hold myself out as an expert in determining what can be done in the open market for this man with a chronic pain problem." (Id.). Dr. Guarino lists numerous therapeutics that could possibly benefit Claimant. Finally, Dr. Guarino states that Claimant "cannot do any occupation at this time where it is required for him to be on his feet for more than 15 minutes." (Id. at 346).

32. At the request of Employer's counsel, Dr. Joshua Nadaud of Mid County Orthopaedic Surgery & Sports Medicine examined Claimant on February 24, 2014. (Exhibit H, Report of Dr. Joshua Naduad, p. 1). Dr. Naduad states that Claimant "rates his pain at a 7-10/10 pain, although he sits in the office in no distress" and he found Claimant to be "Alert and oriented x3, pleasant and cooperative. No evidence of any depression." (Id. at p. 1 and 3). Dr. Naduad report states: "The patient has some hypersensitivity anterior on the ankle, actually in fact in the anterior aspect of the dorsum of the ankle and foot. There are no signs of any complex regional pain syndrome. There is no discoloration. There is really no sweating. The patient withdraws his foot at just light touch." (Id. at 3). It is Dr. Nadaud opinion that Claimant suffers from a "right ankle

trimalleolar ankle fracture treated with open reduction, internal fixation in 2012 with some hypersensitivity on the foot." (Id.). Dr. Naduad states Claimant "is maximally medically improved with the regards to the orthopedic conditions and the conditions related to the ankle fracture that was sustained at the work place in February of 2012" and "there is no need for any additional orthopedic treatment at this time." (Id.).

Opinion Evidence

Dr. Volarich

33. Claimant offered the deposition of Dr. David Volarich as Exhibit 10. Dr. Volarich reviewed all of Claimant's medical records and examined Claimant on May 6, 2013. Physical findings included ability to walk barefoot without foot drop, limp or ataxia, only half squat. Skin was slightly cooler on right than left and "duskier or darker" in color. He diagnosed the severe fracture and CRPS but admitted he did not know the exact criteria and agreed Dr. Hurford did not find temperature variance, discolor or hair loss on July 29, 2013. (Id. at 41-42, 51-52.)

34. Dr. Volarich reviewed in detail how Dr. Hurford's observations of Claimant (inability to wear shoe or sock, hypersensitivity, pain, temperature variance, touch allodynia, discoloration of the skin, hyperhidrosis, atrophy, mild edemea, dysesthesia, hypoesthesia, and failure to respond to treatments, etc) are consistent with CRPS. (Id. at 17-20 and 30-31). Dr. Volarich embraced Dr. Duetemen's CRPS explanation that causalgia or CRPS Type II is when a nerve is damaged leading to the CRPS and Dr. Volarich agrees that Type II CRPS "tends toward the more painful and difficult to control aspects of CRPS" and is a painful long term condition". (Id. at 20-21.) He noted Dr. Hurford's notes of Claimant's pain ratings at 5/10 on November 18, 2013. (Id. at 37; Exhibit 3, p. 119.)

35. Dr. Volarich testified that he would not order an FCE for a patient with CRPS but did not specifically challenge the findings contained within the FCE report. Dr. Volarich believed that determining FCE validity criteria is a subjective interpretation. (Id. at 33). After the physical therapist alleged that Claimant failed 4 of 8 validity criteria, Dr. Krause released Claimant without restrictions and Dr. Hurford deferred to Dr. Krause for permanent restrictions. Dr. Volarich testified that he discerned no basis for removing the restrictions. (Id. at 34-35). Dr. Volarich testified that Dr. Hurford's observations of Claimant were still consistent with CRPS. (Id. at 35-37). Dr. Volarich had no opinion on Claimant's misuse and nonuse of medications as recorded in Dr. Hurford's treatment records (above):

> I don't know anything about that.

(Id. 35-36, 47.)

36. Dr. Volarich diagnosed CRPS secondary to the ankle fracture and surgery. (Id. at 42). Dr. Volarich admitted Dr. Hurford's July 29, 2013 examination lacked significant element of CRPS. (Id. at 52.) Dr. Volarich assigned a 75 percent PPD at the level of the right calf and recommended a vocational evaluation. Dr. Volarich recommended future medical care, including pain management. (Id. at 43-44). Finally, Dr. Volarich reviewed Mr. Lalk's report and

concluded that Claimant was permanently and totally disabled as a result of the reported injury. (Id. at 45). His supplemental report simply states he reviewed Mr. Lalk's report including Mr. Lalk's opinion that vocational rehabilitation services were not recommended. (Id. at *Deposition Exhibit C*.)

Dr. Krause

37. Employer offered the deposition of Dr. John Krause, treating orthopedic surgeon, as Exhibit F. Dr. Krause diagnosed a tri-malleolar fracture and performed surgery with internal fixation. (Id. p. 34-35). Dr. Krause explained to Claimant that he could not guarantee a good outcome. (Id. at 36). Claimant had significant problems post-surgery.

38. Dr. Krause identified criteria for complex regional pain syndrome. Classic findings include "purple discoloration, swelling, shininess of the skin, loss of hair. Not just pain that you can't explain. You need to see those objective physical exam findings that he didn't have on July 11 [2012]." (Id. at 18.) Dr. Krause testified that while Claimant had the coolness in the leg, you expect that because the leg is always cooler after surgery when they have swelling. (Id. at 24). Dr. Krause stated that Claimant did not have the shiny skin, the abnormal hair growth, the discoloration or any off the findings that are your typical RSD type. (Id.). Dr. Krause testified that Claimant had no obvious signs of complex regional pain syndrome. (Id. at 52). However, Dr. Krause agreed that pain getting worse and hypersensitivity can be signs of CRPS. (Id. at 53).

39. Dr. Krause testified that there isn't a distinction between Reflex Sympathetic Dystrophy ("RSD") and Complex Regional Pain Syndrome ("CRPS") and that CRPS is the term used today and RSD is more of an older term. Dr. Krause testified that he does not know of an established set of well accepted diagnostic criteria for the diagnosis of reflex sympathetic dystrophy or complex regional pain syndrome. (Id. at 28-29). Dr. Krause agreed that Dr. Hurford diagnosed Claimant with causalgia which is CRPS Type 2, that this type of CRPS follows a distinct nerve injury, and that Dr. Hurford had Claimant on permanent restrictions and pain medications. (Id. at 55 and 48). Dr. Krause testified that he was not provided with Dr. Hurford's January 14, 2013 work Status Report that put Claimant at MMI except for pain management with restrictions of alternate sitting/standing, no climbing ladders or operating machinery. (Id. at 74).

Dr. Dunteman

40. Employer offered the deposition of Dr. Edwin Dunteman, board certified in anesthesiology and pain management, as Exhibit G. He examined Claimant on May 14, 2014. Dr. Dunteman did not find Claimant to be overly uncomfortable; did not observe any pain behavior when Claimant took off and put on his sandals; did not observe any discoloration, thin shiny skin, or swelling; did not observe any remarkable pain while Claimant was standing or walking; did not observe Claimant have a response to the ethyl chloride test; but did observe considerable withdrawal response to light palpation. (Id. at 19-26). In addition, based on his review of a surveillance video of Claimant and his observations of Claimant during his evaluation, it was Dr. Dunteman's opinion that Claimant suffers from symptom magnification. (Id. at 18-19). Dr. Dunteman thought symptom magnification was complicating the ability to

evaluate Claimant, however this was not purely a physical issue as the behavior and emotion can play into it. (Id. at 26).

41. Dr. Dunteman's diagnosis is not CRPS, but possibly an injury to the superficial peroneal nerve that's across the top of the foot possibly caused by the cast being too tight as opposed to surgical procedures. (pp. 27, 75). Dr. Dunteman requested a triple phase bone scan and an EMG. Dr. Dunteman stated that if Claimant is suffering from a nerve injury then treatment options would exist (either decompress or cut the nerve). (pp. 28-29). Dr. Dunteman is of the opinion that Claimant can return to full duty, possibly after some reconditioning. (Id. 29-30). It is Dr. Dunteman's opinion that on the day he examined Claimant this did not appear to be CRPS. (Id. at 74).

Vocational Evidence

Mr. Lalk

42. Claimant offered the deposition of Timothy G. Lalk, LRC, as Exhibit 11. Mr. Lalk reviewed Claimant's medical records, met with Claimant and provided a vocational assessment report. His testimony opens, after some protocol, but without any discussion of his evaluation, with an anecdote from Claimant about how "some controversy" in which Dr. Krause called Claimant a liar and how CRPS is easily cured. (p. 11-12.) Mr. Lalk stated that Claimant informed him that during his last visit Dr. Krause on January 30, 2012, Dr. Krause was very upset with Claimant, called Claimant a liar, dismissed Dr. Hurford's CRPS diagnosis and restrictions, allegedly made the claim that CRPS was easily cured, and at that time ordered the FCE. (Id. at 11-12). Mr. Lalk testified that he has come across prior FCEs performed by Mr. Zuccarello and in most of the reports Mr. Zuccarello alleges failed validity criteria or malingering (probably in 80-90% of reports he has seen of Mr. Zuccarello's). (Id. 12-13).

43. Mr. Lalk and Claimant discussed Claimant's ongoing problems and symptoms including burning pain in the right foot, shoes or socks make his foot feel like it is on fire, being barefoot with an elevated foot is the most tolerable position, that Claimant needs to change positions usually after an hour to either a recliner or lying down, that some days are worse than others, he avoids kneeling and squatting. , and that Claimant gets nauseated usually after taking his medication in the morning and as a result sometimes he has to lie down 1 to 3 hours. (Id. at 15-18). Claimant informed him that since the injury Claimant has never slept more than 6 hours in a night, he does desensitization exercises and can do house chores slowly over time, around lunch he takes a walk for exercise, and he generally stays at home during the day except to shop. (Id. at 19-20).

44. Mr. Lalk opined that Claimant is not able to secure and maintain employment in the open labor market and would not be able to compete for any position. (Id. at 21-22). Mr. Lalk explained that Claimant would need to tell a potential employer that he has a medical condition and needs accommodations and Mr. Lalk wouldn't expect any reasonable employer to provide those accommodations. (Id. at 24).

Ms. Abram

45. Employer offered the deposition of Donna Abram, VRC, as Exhibit E. Ms. Abram reviewed the medical record, Mr. Lalk's report and interviewed Claimant. She stated Claimant was personable and would interview well. She noted his college courses as "a foundation that could be built on. And he verbally stated that he was open to any return to work idea that I might be able to develop." (Id. p. 9-10) Ms. Abram testified that Claimant did not report sleeplessness to her and could not discuss how Claimant's sleep issue interferes with his daily activities. (Id at 23-24). Ms. Abrams testified that she did not have Dr. Hurford's notes from 1/14/13 placing Claimant at MMI with pain management and restriction as she did not receive any records dated after 8/22/12 despite her request for updated records. (Id. at 30-31).

46. Ms. Abraham's states that Claimant's assets include his prior ability to successfully compete college-level courses towards medical billing and coding, his first line supervisory experience, and his ability to use his smart phone and computer for basic tasks. Ms. Abram believed Claimant's interest and aptitude suggested, and the doctors' limitations, placed Claimant in the sedentary range and she believed that medical billing and coding would be an excellent match for Claimant. (Id. at 10-15). Ms. Abram stated that he could finish his training online and then work from home online. Ms. Abram's explained that the online training is a step that Claimant needs to complete in order to open an opportunity for Claimant to look for work. (Id. at 39). She listed job samples and had a plan of action.

RULINGS OF LAW

Nature and Extent of Permanent Disability

It is undisputed that Claimant sustained severe injury to his right foot resulting in chronic pain requiring pain management, which continues to be tendered by Employer. Claimant offered Dr.Volarich's opinion that he sustained 75 percent PPD of the right leg at the calf (160 week level). In his initial report, Dr. Volarich did not find Claimant was permanently and totally disabled on the basis of his review and physical examination. The medical/surgical record was undisputed and Claimant neither challenged his providers' care nor sought private treatment. Also, Dr. Volarich admitted his examination and the contemporaneous examination by Dr. Hurford lacked significant criteria for a CRPS diagnosis. A substantial portion of Dr. Volarich's direct examination simply details the noted symptoms during 2012. (pp. 17-26) This emphasis is not probative of either Claimant's improvement by mid-2013 or of the issue of permanent disability. Nevertheless, Claimant offered vocational opinion evidence that focused on an assertion that the surgeon maligned Claimant and that the FCE was biased. Upon review of this report, which concluded Claimant was unemployable, Dr. Volarich changed his opinion from permanent partial disability to find Claimant was permanently and totally disabled as a result of the reported injury.

However, Mr. Lalk's conclusions lack credibility for several reasons. Mr. Lalk's testimony, after protocols, opens with a discussion of an alleged incident between Dr. Krause and Claimant which is unmentioned in the record except for Claimant's interview with Mr. Lalk and

his subsequent trial testimony. Apparently, Dr. Krause was upset that the pain management physician, Dr. Hurford, independently diagnosed CRPS. It is unclear in the evidentiary record if communication protocols were not followed or whether the pain manager was qualified to make the diagnosis. In all events, Claimant's own medical expert, Dr. Volarich, as well as Dr. Krause, Dr. Dunteman, and even Dr. Hurford each found critical criteria lacking in May-July 2013 for diagnosing ongoing CRPS. The record, both medical and forensic, suggest it had abated.

In another instance, Mr. Lalk found the therapist administering the FCE to be biased and usually finding patients to lack validity criteria. Mr. Lalk is alone in this position. Dr. Volarich, Claimant's own medical expert, made no such observation. Again, as with Dr. Krause, no challenge was made to change providers. He admitted on cross-examination that the only FCEs prepared by this therapist that he has seen are cases in litigation, i.e. disputed cases.

Despite this unusual advocacy, Mr. Lalk did not mention Claimant's college success or aberrant drug screens of misuse or disuse, or Claimant's diagnosis of opioid dependency. Claimant's return to school at age 41 is impressive and consistent with Ms. Abram's opinion that he is both interested and capable. His 3.5 GPA is quite noteworthy and, again, consistent with Ms. Abrams assessment for training and re-employment. Claimant demonstrated unusual aptitude for learning new matter. Opioid dependency and compliance with medical treatment is addressed by Chapter 287 and warrants comment by an expert witness who finds unemployability independent of expert medical opinion.

Further, his testimony contained numerous omissions on routine matters. His testimony did not explain why he did not administer any tests: "There was no need for that." If Claimant tested consistent with his 3.5 GPA, such results would not support an opinion of unemployability. Elsewhere, he states:

> What I've come to conclude though is that based upon his description of his level of activity and the symptoms that he's experiencing, I've indicated that with his symptoms and limitations Mr. Wetzel is not able to secure and maintain employment in the open labor market and would not be able to compete for any position. The description of the symptoms would not allow him to work in even a – well, in even a sedentary type position.

These statements are not reconcilable with either the 2013 treatment record or Dr. Volarich's own finds and admissions; he made no attempt to do so. Mr. Lalk does not explain why Claimant's symptoms prevent sedentary employment. In review of Dr. Krause's MMI note (above), Mr. Lalk states, "… but I was not skeptical that there was an implication based upon what I saw in the medical records, the chronology, and the change in Dr. Wetzel's (sic) diagnosis and treatment." Mr. Lalk identifies no notes corroborative of the "liar" accusation, explains no chronology, and enunciates no change in treatment. The restrictions were maintained and Claimant continued to treat with Dr. Hurford as he does through this trial date. His purported discernment of an "implication" is unfounded in either the treatment record or his own argument. Significantly, Mr. Lalk conceded employability if Dr. Hurford's restrictions, and Dr. Volarich's restrictions were assumed. (pp. 19-22, 32, 34.) Supplements to these omissions are not found in his narrative report either. It cannot be fairly stated that Mr. Lalk's efforts even shifted the burden of proof to Ms. Abrams.

However, Ms. Abram's opinions, in this case, are more persuasive than Mr. Lalk's opinions. More importantly, Dr. Volarich's permanent total disability opinion is undercut by these defects in Mr. Lalk's testimony. While Dr. Volarich reasonably deferred to a vocational expert in this case, his reliance on Mr. Lalk's analysis was misplaced upon review of these omissions. Accordingly, Dr. Volarich's original PPD rating is probative and most easily reconciled with the balance of the record.

Future Medical Treatment

A claimant is entitled to future medical treatment if he shows by reasonable probability that the future medical treatment is needed to "cure and relieve.…the effects of the injury." Section 287.140.1, RSMo. 2005; Concepcion v. Lear Corporation, 173 S.W.3d 368, 372 (MO.W.D. 2005). A claimant is not required to show "conclusive" testimony or evidence to support a claim for future medical benefits; it is sufficient if the evidence shows by "reasonable probability" that he is in need of additional medical treatment by reason of the work-related accident. Landers v. Chrysler Corp., 963 S.W.2d 275, 283 (MO.App.E.D. 1997). In Dean v. St. Luke's Hospital, 936 S.W.2d 601 (Mo. App. W.D. 1997), the court held that the standard for proof of entitlement to an allowance of future medical treatment is the claimants must show by "reasonable probability" that they will need future medical treatment.

In Mathia v. Contract Freighters, 929 S.W.2d 271, 277 (Mo.App. S.D. 1996), the court stated:

> The right to obtain future medical treatment should not be denied merely because it has not yet been prescribed or recommended as of the date of a workers' compensation hearing, regardless of whether there is evidence that its future need will be reasonably probable. Likewise, such future care to "relieve" should not be denied simply because a claimant may have achieved maximum medical improvement, a finding not inconsistent with the need for future medical treatment.

The type of treatment authorized can be for relief from the effects of the injury even if the condition is not expected to improve. Landman v. Ice Cream Specialties, Inc., 107 S.W.3d 240, 248 (Mo. banc 2003). Here, the severe injury and ongoing pain management bespeak the proof of Claimant's entitlement to future medical benefits. Dr. Volarich and Dr. Hurford both credibly endorsed Claimant's need for ongoing treatment.

Penalties Under Sections 287.120.6, 287.170.4 and 287.560.

Section 287.120.6 provides for either a 50 percent reduction in benefits, or forfeiture, where the injury was sustained "in conjunction with," or was the proximate cause of the injury, respectively. Here, the Insurer reduced Claimant's TTD benefit by 50 percent based upon a post accident drug screen.

Leonard Taylor, Employer's Human Resource Manager, testified that Claimant passed his pre-employment drug test on January 26, 2012 and Claimant began working on January 30, 2012. (Exhibit 12, p. 21). Claimant's post-accident urinalysis was positive for marijuana metabolites and morphine based opiates and said report concludes that Claimant was "Positive – For Marijuana". (Exhibit A, Lab Results for Urine collected on 2/15/12). The morphine based opiates are explained by Claimant's pain relief in the emergency room. (Exhibit 1, p. 15-16).

Leonard Taylor testified that Claimant elected to be retested and the retest was negative. (Exhibit 12, see *Deposition Exhibit C*). Mr. Taylor testified that because Claimant passed the retest he remains an employee and there is no penalty. Mr. Taylor further acknowledged, "I know that somebody smoked. In order for somebody to be positive, it would be in their system. *When* that occurred, I have no idea." (Id. at p. 32). When asked if anyone informed him that Claimant looked high or somehow under the influence of anything at the time he was hurt, Mr. Taylor responded: "Nobody stated that. That was never discussed basically." He had no knowledge of a drug related causation defense. Thus, no penalty is inapplicable.

This is a misapplication and Employer is liable for the stipulated amount of the under-paid temporary total disability benefits.

* * *

Section 287.170.4 provides that neither temporary total disability nor temporary partial disability benefits are payable where Claimant was terminated for post-injury misconduct. On April 22, 2012, Claimant returned to work on light duty. Claimant stated there was a lack of work and he was criticized for his lack of productivity. Claimant was laid off and his TTD benefits were reinstated in June 2012. TTD benefits were terminated on January 20, 2013 after Dr. Hurford deemed Claimant to be at maximum medical improvement (MMI) on January 14, 2013. However, the benefits were paid with a 50 percent reduction for "misconduct." Here, nothing in the record suggests Claimant was terminated from employment. His benefits were merely terminated after attaining MMI on January 14, 2013.

* * *

Section 287.560 provides for costs and fees for unreasonable prosecution or defense of a Claim. Claimant seeks attorney fees attendant reimbursement of his stipulated TTD, above. Here, Employer tendered without complaint or challenge substantial medical benefits and continues to do so consistent with open medical benefits. Notice and demand to Employer for reinstatement of full TTD benefits for the miscalculation is administrative in nature. Apparently, this misunderstanding and miscalculation was not the subject of a Motion or hardship hearing. It is undisputed that Claimant has positive drug screens. Indeed, both of Claimant's experts avoided this recurrent subject-matter. TTD rates are miscalculated often enough and no precedent is cited for award of fees and costs in this circumstance. While Claimant is awarded the underpaid TTD benefits, the evidence of the drug tests demonstrates that Employer did not defend the issue without substantial evidence.

Conclusion

Accordingly, on the basis of substantial and competent evidence contained within the whole record, Claimant is found to have sustained a 75 percent PPD of the right lower extremity at the 160 week level. Claimant is entitled to future medical benefits to cure and relieve the effects of the injury. Reimbursement of underpaid TTD in the stipulated amount of $7,965.48 is allowed.

Date: _____ Made by: _____

JOSEPH E. DENIGAN
Administrative Law Judge