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

Injury No.: 03-067308

Employee: Danny Venable

Employer: St. Louis Bridge Construction

Insurer: St. Paul Marine and Fire Insurance Co.

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.[1] We have reviewed the evidence and briefs, heard the parties' oral arguments and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying and supplementing the October 4, 2010, award and decision of the administrative law judge (ALJ). We adopt the findings, conclusions, decision and award of the ALJ to the extent that they are not inconsistent with the findings, conclusions, decision and modifications set forth below.

On September 19, 2005, ALJ Kevin Dinwiddie issued a Temporary or Partial Award, in which he found that the psychiatric disability opinions of Dr. Wolfgram were more credible than Dr. Liss' opinions. ALJ Dinwiddie discredited Dr. Liss' medical causation opinions because Dr. Liss had not reviewed Dr. Mirkin's treatment records or employee's subsequent physical therapy records. ALJ Dinwiddie further found that Dr. Liss' opinions were largely based on medical reports that were not in evidence.

ALJ Dinwiddie found that Dr. Wolfgram's psychiatric disability opinions were supported by the medical records and were more persuasive than those of Dr. Liss. Therefore, based on Dr. Wolfgram's opinions, ALJ Dinwiddie found that employee suffered from an adjustment disorder with depressed mood that is work-related, and that employee's clinical state was temporary and amenable to treatment. ALJ Dinwiddie further ordered employer and insurer to provide treatment consistent with the recommendations of Dr. Wolfgram.

On October 4, 2010, ALJ Grant Gorman issued a Final Award, in which he found that employee is permanently and totally disabled as a result of the primary work injury of July 21, 2003, alone. As his basis for making findings contrary to those of ALJ Dinwiddie, ALJ Gorman specifically found, in accordance with *Dilallo v. City of Maryland Heights*, 996 S.W.2d 675, 676 (Mo. App. 1999) and *Jennings v. Station Casino St. Charles*, 196 S.W.3d 552 (Mo. App. 2006), that "additional significant evidence" had been adduced and received into evidence in the final hearing which was not part of the hardship hearing. ALJ Gorman listed said additional significant evidence as Dr. Slusarski's additional treatment records, Dr. Liss' second deposition testimony he provided after reviewing all of

[1] Statutory references are to the Revised Statutes of Missouri 2002 unless otherwise indicated.

the medical records (which were admitted into the record), and the new and contradictory opinions of Dr. Wolfgram.

While we agree with ALJ Gorman's conclusions that the aforementioned represents additional significant evidence, we find that ALJ Gorman's award should be supplemented with additional facts concerning the depositions of Drs. Liss and Wolfgram and how their second depositions amounted to additional significant evidence.

In Dr. Wolfgram's 2005 deposition, he opined that employee suffered from a depressive reaction to his work injury and that he needed treatment. Dr. Wolfgram concluded that employee's psychiatric condition was temporary and amenable to treatment. However, nearly five years later, Dr. Wolfgram opined in his 2010 deposition that employee's condition was still merely temporary. Dr. Wolfgram went on to state in his 2010 deposition that employee has "multiple mental and physical problems that preexisted the work injury…[and] from a psychiatric standpoint, the work injury does not contribute to work restrictions or the need for psychiatric treatment." Despite this testimony, Dr. Wolfgram actually quoted ALJ Dinwiddie's first award with approval where it said that employee had treatable psychiatric disability **due to the work injury**. Dr. Wolfgram ultimately opined that employee is not currently capable of working due to his psychiatric condition.

Dr. Liss first saw employee in 2005 and diagnosed him with major depression as a result of the work injury and its sequelae. When Dr. Liss testified in 2005 he had not reviewed all of employee's treatment records.

Dr. Liss saw employee four years later. After reviewing all of employee's medical records, Dr. Liss testified in his second deposition that employee did not suffer from preexisting psychiatric illness, but that following his injury in 2003 he suffered from post-traumatic stress and from major depression. Dr. Liss opined that employee needs psychiatric care and is totally disabled from working due to his work-related psychiatric conditions.

We find Dr. Wolfgram's opinions to be contradictory and incredible. Dr. Wolfgram's testimony in his 2010 deposition is significantly different from his testimony in his 2005 deposition. On the other hand, Dr. Liss' testimony was consistent in both of his depositions. In addition, Dr. Liss' second deposition testimony was given after he had reviewed all of employee's medical records; thereby nullifying ALJ Dinwiddie's basis for finding that Dr. Liss' opinions lacked the proper foundation to be credible.

We find, as did ALJ Gorman, that Dr. Wolfgram and Dr. Liss' second depositions represent additional significant evidence sufficient to refute ALJ Dinwiddie's finding that Dr. Wolfgram's opinions are more credible than Dr. Liss'.

In addition to the aforementioned supplementation, we also find that ALJ Gorman's award needs to be modified with respect to the MO HealthNet lien he ordered employer to reimburse the Missouri Department of Social Services. We find that ALJ Gorman erred in finding employer liable for this lien.

Section 287.140 RSMo provides, in pertinent part, as follows:

> [E]mployer shall provide such medical, surgical, chiropractic, and hospital treatment, … as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

No medical evidence was submitted at either the Temporary Hearing on May 20, 2005, or at the Final Hearing on May 11, 2010, indicating that the treatment employee obtained from November 19, 2004, through November 26, 2004, was medically causally related to the work injury of July 21, 2003. Accordingly, as there is no medical evidence to support a finding that the treatment was reasonably necessary to cure and relieve employee from the effects of the injury, employer should not be ordered to reimburse the Missouri Department of Social Services for the same. Therefore, we find that employer is not liable for the MO HealthNet lien.

Award

We affirm, as modified and supplemented herein, ALJ Gorman's award of permanent total disability benefits and future medical treatment.

Any past due compensation shall bear interest as provided by law.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

The award and decision of Administrative Law Judge Grant C. Gorman, issued October 4, 2010, is attached and incorporated to the extent it is not inconsistent with this final award.

Given at Jefferson City, State of Missouri, this 26th day of July 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

_____

William F. Ringer, Chairman

_____

Alice A. Bartlett, Member

_____

Curtis E. Chick, Jr., Member

Attest:

_____

Secretary

AWARD

Employee: Danny Venable

Dependents: None

Employer: St. Louis Bridge Construction

Additional Party: Second Injury Fund

Insurer: St. Paul Marine and Fire Insurance Co.

Hearing Date: May 11, 2010 & June 30,2010

Injury No. 03-067308

Before the
DIVISION OF WORKERS' COMPENSATION
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Checked by: GCG/ln

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: July 21, 2003
5. State location where accident occurred or occupational disease was contracted: St. Charles County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was performing bridge construction when an expansion joint rolled onto him.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Lumbar Spine, Psychiatric Injury
14. Nature and extent of any permanent disability: Permanent total disability
15. Compensation paid to-date for temporary disability: $20,976.12
16. Value necessary medical aid paid to date by employer/insurer? $103,760.39

Employee: Danny Venable Injury No. 03-067308

17. Value necessary medical aid not furnished by employer/insurer? $1,071.24

18. Employee's average weekly wages: $953.46

19. Weekly compensation rate: $635.64 TTD/$347.05 PPD

20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:	$1,071.24 to MO HealthNet
Permanent total disability benefits from Employer beginning March 9, 2004, for Claimant's lifetime.	
22. Second Injury Fund liability:	No
TOTAL:	UNDETERMINED

23. Future requirements awarded: See Award

Said payments to begin as of the date of this award 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:

Bob Keefe

Employee: Danny Venable Injury No. 03-067308

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Danny Venable

Dependents: None

Employer: St. Louis Bridge Construction

Additional Party Second Injury Fund

Insurer: St. Paul Marine and Fire Insurance Co.

Injury No: 03-067308

Before the
DIVISION OF WORKERS' COMPENSATION
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Checked by: GCG/ln

PRELIMINARY STATEMENT

Hearing on the above-referenced case was held before the undersigned Administrative Law Judge on May 11, 2010 and June 30, 2010 at the Division of Workers' Compensation in St. Charles, Missouri. Danny Venable (Claimant) was present, and represented by Bob Keefe. Juan Arias represented St. Louis Bridge Construction Co. (Employer) and St. Paul Fire and Marine Insurance Co. (Insurer). Assistant Attorney General Caroline Bean represented the Second Injury Fund. Mr. Keefe requested a fee in the amount of 25%. The parties submitted post-trial briefs.

Claimant was previously represented by other counsel. Two of those attorneys, Celestine Dotson and Bradley M. Herrin, filed liens with the Division upon withdrawing as counsel of record. Division records indicated each of them was sent notice of the hearing set on May 11, 2010, neither attorney appeared at the hearing to introduce evidence regarding their representation and lien. Sometime after the hearing, Ms. Dotson filed some motions and exhibits requesting the opportunity to present evidence regarding her lien. On June 30, 2010 counsel for the respective parties and Ms. Dotson appeared to address the issue of attorney fees, which had been placed at issue in the original hearing. Ms. Dotson did not allege in the motions or on the record that she did not receive notice of the May 11, 2010 evidentiary hearing. The motion to re-open evidence for the purpose of submitting evidence on the issue of attorney fees was denied on June 30, 2010. A record was made of the proceedings of June 30, 2010.

A hardship hearing was held on May 20, 2005 before Administrative Law Judge Kevin Dinwiddie in this case. After hearing evidence, ALJ Dinwiddie made findings of fact and rulings of law. ALJ Dinwiddie ultimately ordered some additional treatment be provided to Claimant in relation to the July 21, 2003 injury. At the final hearing on May 11, 2010 all parties stipulated to the exhibits from the hardship hearing being received into evidence at the final hearing.

The parties entered into the following Stipulations: Claimant sustained accidental injuries arising out of and in the course of employment on or about July 21, 2003, in St. Charles County, Missouri; Claimant was an employee of Employer; venue is proper in St. Charles County, Missouri; Employer received proper notice of injury; the claim was filed in a timely manner; Claimant earned an average weekly wage of $953.46, resulting in applicable rates of

compensation of $635.64 for total disability and $347.05 for permanent partial disability (PPD). Employer paid $20,976.12 in temporary total disability (TTD) benefits (33 weeks from July 21, 2003 to March 8, 2004); Employer paid medical expenses totaling $103,760.39.

The issues presented for resolution by this hearing are as follows:

1. Extent of permanent disability, whether partial or total

2. Extent of Second Injury Fund liability, if any

3. Employer/insurer's responsibility for future medical treatment, if any

4. Employer/insurer's responsibility for temporary total disability, if any

5. MoHealthNet lien of $1,071.24

6. Liens from two of Claimant's prior attorneys

SUMMARY OF THE EVIDENCE

Only evidence necessary to support this award will be summarized. Any objections not expressly ruled on during the hearing or in this award are now overruled. Certain exhibits offered into evidence may contain handwritten markings, underlining and/or highlighting on portions of the documents. Any such markings on the exhibits were present at the time they were offered by the parties. Further, any such notes, markings and/or highlights had no impact on any ruling in this case.

Claimant offered the following exhibits into evidence:

A. Deposition of Raymond F. Cohen, D.O.
B. Deposition of Jay L. Liss, M.D. of May 6, 2005
C. Compilation of medical records
D. Deposition of David T. Volarich, D.O.
E. Deposition of Jay L. Liss, M.D. of January 22, 2010
F. Division of Workers' Compensation file for Injury Number 83-56884
G. Dr. William Fritz, M.D. medical records
H. St. Anthony's Medical Center medical records
I. Dr. Robert Bernardi M.D. medical records
J. Barnes Jewish West County Hospital medical records
K. Dr. John Ferguson M.D. medical records
M. Richard Slusarski, M.S.W. reports
N. Dr. Peter Mirkin, M.D. and Dr. John Graham M.D. medical records

Exhibits A, B, and C were received into evidence by ALJ Dinwiddie at the hardship hearing, all parties consent to those exhibits being received into evidence in this hearing.

Exhibits D through N listed above were all received into evidence without objection. Exhibit L was withdrawn by Claimant and is not a part of the record.

Employer offered the following exhibits into evidence:

1. Deposition of R. Peter Mirkin, M.D.
2. Deposition of Edwin D. Wolfgram, M.D. of May 12, 2005
3. Deposition of Steve Brunjes
4. Deposition of Edwin D. Wolfgram, M.D. of April 27, 2010
5. Deposition of Bob Hammond
6. Job search list of Claimant

Exhibits 1, 2, and 3 were received into evidence by ALJ Dinwiddie at the hardship hearing, all parties consent to those exhibits being received into evidence in this hearing. Exhibits 4 through 6 listed above were all received into evidence without objection.

The Second Injury Fund offered the following exhibits into evidence:

I. Deposition of James England
II. Deposition of Danny Venable

Exhibit I was received into evidence without objection. Exhibit II was received into evidence over the objection of Claimant.

Claimant testified at trial. He was born on August 6, 1959 and is currently fifty years of age. He is six feet tall and he weighs 270 pounds. At the time of the accident on July 21, 2003 he weighed 250 pounds. He completed school through the eleventh grade and then obtained a GED approximately three years later. He has never served in the military. He has been married to his wife Debbie for thirty-three years.

Claimant testified that his current medications include medications for diabetes, high blood pressure and depression. The medications are prescribed by Dr. Polites, who has been his family doctor for about one and a half years. Prior to that his family doctor was Dr. Fritz.

Claimant testified regarding his work history. He had worked as a fork lift driver for seven years. He then worked at a lumber company and drove a log skidder and a fork lift. He then worked for a clothing manufacturer and operated a machine. He then worked in the Gulf of Mexico as a commercial diver laying pipeline and setting platforms. He then worked as an iron worker. He first started working as an iron worker in approximately 1993 or 1994 and he worked as an iron worker up until his accident on July 21, 2003. He had worked as an iron worker for approximately 9 years. He worked out of the union hall for several different employers. He testified that he had never performed any desk jobs and had never worked as an administrator or manager. He testified that all his prior jobs involved physical labor and were considered heavy.

Claimant testified that he was working at St. Louis Bridge for about one and a half years before his accident. He helped to build bridges and he performed iron working. He welded,

burned and set steel. He testified this was heavy work. He earned $27 an hour and worked about 40 hours a week.

Claimant testified that he had a prior back injury while working for H.D. Lee Jean Company. He picked up a bundle of jeans and ruptured a disc. He had pain in his low back and down his right leg. He testified that he received treatment and underwent surgery with Dr. Tsang in Springfield, Missouri. Thereafter, he filed a workers' compensation claim which settled. He testified that after he recovered from his surgery, he had residual stiffness of 20% in his back, but not much pain. He testified that he was able to return to work full duty and thereafter did not miss work because of his back. He was not taking any medications for his back leading up to the 2003 injury.

Claimant testified that on the date of accident, an expansion joint rolled on him and he went to lift it off and had immediate complaints of low back pain. He testified the expansion joint weighed approximately 1700 pounds. He testified that he knew right away that he was hurt. He had pain in his low back and in the upcoming days and weeks he developed numbness in his right leg.

Claimant testified that he was initially seen for treatment at an urgent care center and was subsequently seen by a Company doctor at Unity Corporate Health. He then underwent an MRI, and then Dr. Peter Mirkin took over his care. Dr. Mirkin initially recommended physical therapy and he underwent a steroid injection in his back by Dr. Graham. Dr. Mirkin then recommended surgery which took place on September 30, 2003 at St. Anthony's Medical Center. The surgery consisted of a fusion of his bottom three vertebra and included a bone graft from his hip. He testified that following the surgery he developed severe neck pain. He testified that he told his doctors about his neck pain and they ran some tests. He was eventually released from further care by Dr. Mirkin. He testified that he underwent some physical therapy, including work therapy. In March, 2004, he was released to return to work with a permanent forty pound lifting restriction.

Claimant testified that his weekly TTD checks stopped as of March 8, 2004, and thereafter he did not apply for unemployment. He testified that he contacted his employer, but was told that they had no work available within his restrictions. He testified that he contacted his union, but they had nothing for him as well. He testified that he receives a union disability.

Claimant testified that when he was released he was sent by his attorney to see Dr. Cohen. He then began seeing Dr. Fritz, who treated his depression, pain and diabetes. He testified that he subsequently saw Dr. Ferguson in Springfield, in November, 2004. He testified that Dr. Ferguson recommended additional physical therapy for him. He testified that he was then seen by Dr. Liss and Dr. Wolfgram. He testified that Dr. Wolfgram recommended aqua therapy.

Claimant testified that there was a previous trial on May 20, 2005 and that the Judge subsequently ordered psychiatric care. He testified that he then received treatment with Mr. Slusarski, who came to his house. He saw Mr. Slusarski for about nine visits. He testified that the treatment was not helpful. Claimant testified that aqua therapy was offered to him at ProRehab in Fenton, Missouri, but he lives in St. Clair, Missouri, about thirty-five miles away, so he did not go to the aqua therapy.

Claimant testified that he received a vocational evaluation by James England. He subsequently was seen by Dr. Bernardi for his neck. He saw Dr. Volarich. He received another vocational evaluation by Bob Hammond.

Claimant testified that he sees Dr. Polites about once every three months. He testified that his current source of income is his iron workers' disability and social security disability.

Claimant testified that he has constant pain and he is up all night long. He has pain in both legs. He is unable to bend over. He is unable to squat and get back up. He is unable to walk very long. He can't run. He testified that prior to the 2003 accident he was able to bowl, water ski and jog. He testified that he does not walk his dogs. He is able to walk about 150 to 200 feet. He no longer bowls or plays softball. He still goes fishing about one to two times a year. He testified that he lives on the Meramec River. He is still able to hunt. He only deer hunts about one to two times a year. When he deer hunts, he will drive into a field and wait. He testified that he continues to cut grass and has three riding lawn mowers. He testified that he is a member of the First Baptist Church and he attends church once a week.

Claimant testified that he watches around 15 to 16 hours of television a day. He testified that he is able to lift a gallon of milk without any problem with his left arm. He has low back pain. He testified that he is moody and angry. He testified that he hollers at his wife and his grandkids get on his nerves. He testified that he is groggy on his mediations and he has concentration problems. He testified that he does not like to read. He testified that prior to the 2003 accident everyone liked him and now he has no friends because they do not like his mood and call him grouchy.

Claimant testified that he has contacted construction companies and stores about possible employment. He testified that he contacted about fifty employers. He testified that the iron work companies told him that he was too disabled or that they were not hiring.

Ms. Debra Venable testified on behalf of Claimant. She testified that she has been married to Claimant for thirty-three years. She testified that he recovered well after his 1983 accident and thereafter he had no personality changes. She testified that since the 2003 accident, things have gone downhill. She testified that her husband argues all the time. All he does is sleep and watch television with the volume turned up loudly. She testified that her husband was not rude before the 2003 accident. Prior to the 2003 accident, he was fun-loving, easy-going and he sang. Now, she testified that he sits in a recliner chair. He gets up very crabby, does his blood sugar and watches television. He walks around the house and does not do any chores. She testified that he does trim the edges of the lawn.

Dr. David Volarich testified by deposition on behalf of Claimant on January 8, 2010 (Exhibit D). Dr. Volarich diagnosed a disk herniation at L5-S1 to the right with aggravation of preexisting postoperative changes at L4-5 causing right leg radiculopathy, status post revision laminectomies at L4-5 and L5-S1 with fusion, instrumentation and bone grafting from L4-5 through S1; postlaminectomy syndrome; and postoperative fluid collection at L4-5 posteriorly, resolved. Dr. Volarich testified that the July 21, 2003 event was a substantial and the prevailing

factor in causing those diagnoses. Dr. Volarich also diagnosed preexisting herniated nucleus pulposus L4-5, causing right leg radiculopathy, status post laminectomy and discectomy with decompression of both the L4-5 and L5-S1 levels on the right; and adjustment disorder with depression.

Dr. Volarich rated Claimant at 60% of the whole body at the lumbosacral spine due to the disk herniation at L5-S1 to the right and aggravation of preexisting L4-5 prior surgical repair and the degenerative disc disease and degenerative joint disease that required two-level posterior laminectomy, discectomy and fusion with instrumentation. The rating accounted for this injury's contribution to Claimant's back pain, lost motion and ongoing lower extremity radicular symptoms and complaints of weakness, particularly to the right leg.

Dr. Volarich opined Claimant had preexisting 15% PPD rated at the lumbosacral spine due to the historic laminectomy and discectomy at L4-5 with exploration of the L5-S1 disk space. The rating accounted for Claimant's preexisting symptoms of stiffness and occasional soreness in the back without radicular symptoms. Claimant also had disability as a result of his depression, but Dr. Volarich deferred to psychiatric evaluation for that assessment. Dr. Volarich testified that Claimant was permanently and totally disabled as a direct result of his work-related injuries of July 21, 2003 in combination with his preexisting lumbar syndrome, and that Claimant was totally disabled absent his complaints referable to the cervical spine. Dr. Volarich specifically testified that the last injury in and of itself would not, absent the preexisting conditions, be sufficient to make Claimant totally disabled. Dr. Volarich noted that Claimant's back was in a compromised state from his prior back surgery. Further, Claimant had preexisting degenerative disc disease, degenerative joint disease, postoperative changes and scarring that all predisposed the 2003 injury to cause much more problems, had it not been for those preexisting conditions.

Dr. Volarich thought that Claimant would need future medical care as a result of the July 21, 2003 injury. Regarding the need for future medical treatment, Dr. Volarich testified to the following:

> Q (By Mr. Keefe) Within reasonable medical certainty, do you feel that Mr. Venable will require future medical care as a result of the 7/21/03 work injury?
>
> A Yes.
>
> Q What medical care do you recommend for him?
>
> A I recommend that he continue with medications to control his back pain syndrome. When I saw him, he was not taking anything. He told me he couldn't afford any medication at the time. But over-the-counter nonsteroidals would be a benefit to help control some of his symptoms. I also felt that he'd benefit from treatments at a pain clinic to help control his lumbar radicular syndrome. Epidural steroid injections, foraminal nerve root blocks, trigger point injections, TENS units, and similar treatments would all help those conditions. I thought he needed to be treated for his depression as well.
>
> Q The workers' compensation law requires that the need for future care be probable rather than just possible. Could you explain to the judge your

opinion as to whether future medical care is a possibility for Mr. Venable or whether it is a probability?

A I think it's a high probability. He has postlaminectomy syndrome, which means that he still has significant complaints even after his fusion. He still has back pain, he still has radicular symptoms, paresthesias, weakness, etc. He will require additional care.

Dr. R. Peter Mirkin testified by deposition on behalf of Employer and Insurer on May 18, 2005 (Exhibit 1). Dr. Mirkin performed a fusion surgery on Claimant on September 30, 2003. Dr. Mirkin testified there were no complications during the surgery. Dr. Mirkin testified that Claimant did well after the surgery and was started on a physical therapy program. Postoperative x-rays confirmed a solid fusion. Dr. Mirkin testified that Claimant told him that he did not think he was going to go back to full work. Dr. Mirkin recommended some conditioning therapy and then a functional capacity evaluation (FCE). Dr. Mirkin testified he was feeling that Claimant would very likely be able to return to work as an ironworker, but it depended on Claimant's motivation. Dr. Mirkin further testified that during the course of treatment of Claimant, there was no indication that Claimant was having problems with depression. Dr. Mirkin testified that the FCE showed that Claimant could work in the medium capacity, which is forty to fifty pounds of lifting. The FCE reported that Claimant nearly met the requirements for full duty in his current job based on the employer's job requirements. The FCE indicated that Claimant may have had some symptom magnification behavior. Dr. Mirkin then imposed a permanent restriction of forty pounds and released Claimant from his care. Dr. Mirkin assessed Claimant with 10% PPD secondary to the July 21, 2003 incident. Dr. Mirkin thought Claimant had 15% PPD secondary to his preexisting surgery and some degenerative changes partially as a result of that surgery.

Dr. Liss testified initially on behalf of Claimant on May 6, 2005 (Exhibit B). Dr. Liss diagnosed major depression. Dr. Liss felt that Claimant was totally disabled, but that his condition could improve with treatment. Dr. Liss testified that Claimant was in need of medical intervention and psychiatric care. Dr. Liss testified that based on chronology, the depression has to be related to his pain, because it occurred afterwards and was a major part of his disability. Dr. Liss noted that Claimant did not have any major psychiatric treatment, illness or history before his injury. Dr. Liss saw no evidence that Claimant would be malingering or exaggerating his symptoms. Dr. Liss noted that Claimant's depression was worsening and the prognosis was not good for a full recovery or valid success with treatment. Dr. Liss testified that depression is treatable.

Dr. Liss testified again on behalf of Claimant on January 22, 2010 (Exhibit E). Dr. Liss diagnosed major depression and post trauma stress disorder. Dr. Liss testified that the July 21, 2003 accident at work was a substantial cause as well as a prevailing factor in causing Claimant's major depression and his posttraumatic stress. Dr. Liss felt that Claimant was unable to work. Regarding permanent disability, Dr. Liss testified on direct examination as follows:

Q In light of Mr. Venable's posttraumatic stress and his depression, can he work?

A No, sir.

Q What prevents him from working?

> A Well, these two illnesses not only interfere with his ability to persist at a job and his physical problems to persist at a job, they affect his intellectual abilities; his cognitive functioning, his memory and concentration. He would be dangerous in any type of job that would go back to his previous job, and he couldn't do anything at a desk type of job.

Dr. Liss testified that there is no treatment for post trauma stress disorder. Dr. Liss testified that depression can be modified, but not cured. Dr. Liss testified that Claimant can be helped somewhat with medication and some counseling, but not to any level of enjoyment of life or functioning because of the severity of the illness. Dr. Liss indicated that Claimant needed to be on medication. Nonetheless, Dr. Liss testified that psychiatric treatment was not really going to have much of an effect at this point on Claimant's psychiatric condition. He said, once you have depression, you always have it.

Dr. Wolfgram initially testified on behalf of Employer and Insurer on May 12, 2005 (Exhibit 2). Dr. Wolfgram diagnosed Claimant with adjustment disorder with depressed mood and anxiety; pain disorder associated with psychological factors; nicotine dependence; and alcohol dependence, now in remission. Dr. Wolfgram did not include a diagnosis of malingering, however, he felt that Claimant was exaggerating his symptoms for monetary gain, because of the litigation. Dr. Wolfgram testified that malingering would mean purposely deceitful in pursuit of secondary gain. Dr. Wolfgram testified that Claimant was a likeable guy, but it would be understandable if there was some feeling that the worse he did the more injured he would be and there was some cultivation of that on Claimant's part. Dr. Wolfgram further testified that Claimant did very well in therapy, but that he saw Claimant as not continuing to move forward, and Dr. Wolfgram was concerned that the litigation had something to do with that. Dr. Wolfgram testified that the July 21, 2003 accident played a role in all of the physical conditions. Dr. Wolfgram further testified that Claimant's diagnoses had no particular affect such that Claimant had any disablement due to the psychiatric problems. There was no permanent partial disability or partial temporary disability that would reach levels of clinical significance. Dr. Wolfgram testified that none of the diagnoses, the depressed mood and the pain were disabling, not even of a temporary nature. Dr. Wolfgram testified that he thought Claimant was at MMI as of the 2/25/04 physical therapy report. Dr. Wolfgram testified that Claimant's diagnoses were temporary and amenable to treatment. Dr. Wolfgram testified that Claimant needed physical activity. Dr. Wolfgram proposed aqua aerobics, which would be much better for Claimant's back. Dr. Wolfgram noted that termination of litigation would be helpful. Dr. Wolfgram did not feel that pain medications or antidepressants were necessary. Dr. Wolfgram further testified that Claimant would benefit from counseling along with a physical therapy program. Dr. Wolfgram felt that Claimant was a very favorable candidate. Dr. Wolfgram testified that the July 21, 2003 accident would not be a substantial factor in the need for any treatment from a psychiatric point of view.

Dr. Wolfgram testified again by deposition on behalf of Employer and Insurer on April 27, 2010 (Exhibit 4). Dr. Wolfgram testified that he initially saw Claimant on March 29, 2005. That evaluation was the subject of Dr. Wolfgram's previous deposition of May 12, 2005. Following the March 29, 2005 evaluation, Dr. Wolfgram saw Claimant again on November 15, 2005. Dr. Wolfgram testified that at that time, he was invited to participate in Claimant's care,

but he did not accept that position. Dr. Wolfgram testified that he felt that Claimant was non-participatory and that he could not effectively treat him. Dr. Wolfgram noted that Claimant had abandoned all responsibility for his own medical care. Dr. Wolfgram testified that he then reviewed additional materials two years later on November 9, 2007. At that point, Dr. Wolfgram concluded that Claimant did not have a psychiatric condition of a significant nature. Dr. Wolfgram indicated that Claimant had many problems that were a consideration of treatment, but these were problems that had actually started at the age of 30. Dr. Wolfgram testified that he then met with Claimant again on March 25, 2010. Dr. Wolfgram reviewed additional materials and noted there was no remarkable change from the new additional material. Dr. Wolfgram diagnosed Claimant with nicotine dependence; maladaptive health behaviors affecting general medical condition; adjustment disorder with depressed mood and anxiety; and pain disorder associated with psychological factors. Dr. Wolfgram further testified that he considered the possibility of malingering.

Dr. Wolfgram found that there was no permanent partial psychiatric disability, no permanent total psychiatric disability and no temporary psychiatric disability related to the work injury. Dr. Wolfgram noted that there were all kinds of problems, but they were not related to the work injury. Rather, they preexisted and were ongoing. Dr. Wolfgram further testified that the work injury did not contribute to work restrictions or the need for psychiatric treatment. Dr. Wolfgram did recommend physical rehabilitation and termination of litigation. Dr. Wolfgram acknowledged that five years ago when he diagnosed adjustment disorder with depressed mood and anxiety, he recommended treatment for Claimant. Now, five years later, Dr. Wolfgram acknowledged that the treatment certainly had not worked and now there was a deep entrenchment in the litigation process. Dr. Wolfgram noted that he was still hopeful for Claimant, but right now, there was a big problem and that was Claimant's view because of the litigation. Dr. Wolfgram acknowledged that Claimant's condition was so bad that it precluded land based and thus weight bearing activities. Dr. Wolfgram conceded that someone who is in such poor shape that they cannot do weight bearing or land based activities is not likely to be able to work at very many jobs in that condition. Dr. Wolfgram testified that Claimant has had all of these problems since the age of 30. In that regard, Dr. Wolfgram opined that the back injury was not a significant event.

Dr. Wolfgram reiterated that the work injury did not cause Claimant to have a psychiatric illness or condition. Dr. Wolfgram admits that Claimant did suffer from a condition as a result of the work injury, but only as it focused on the issues of treatment. Dr. Wolfgram opined that it was not permanent. Dr. Wolfgram testified that Claimant's need for psychiatric treatment does not arise from the work injury, as these issues preexisted the work injury, and there was no doubt about that. Dr. Wolfgram acknowledged that Claimant was not ready to go back to the workforce yet.

The deposition of Bob Hammond was taken on behalf of the Employer and Insurer on April 23, 2010 (Exhibit 5). Mr. Hammond is a vocational consultant. Mr. Hammond was asked to identify whether Claimant had the physical attributes and transferable skills to perform work and to identify what that work would be. Mr. Hammond reviewed medical records and other documents. Mr. Hammond met with Claimant and subsequently performed a transferable skills analysis. Mr. Hammond testified that he identified some direct and indirect transferable skills

that would allow Claimant to return to employment. The direct transferability skills included Claimant's knowledge of the welding industry, soldering, any work with welding materials, welding activities, any precision work, and skills in fabrication. Mr. Hammond identified jobs of repairer, electronics assembler, and bench worker as falling within Claimant's direct transferable skills. Mr. Hammond testified that indirect transferable skills were at either entry level or above entry level and that Claimant could perform a wide variety of things at light duty, such as cashiering activities, parking lot attendant, security guard, telephone answerer, or telemarketer positions.

Mr. Hammond opined that if one assumed the sedentary capacity, that Claimant would be able to perform bench assembly, assembly of lighting, semiconductor bonder, or semiconductor inspector. If he assumed Claimant could work at a higher level, then he could perform light duty activities such as security guard, some soldering activities, welding inspecting, some bench welding and bench assembly positions that would involve running a mechanized welder and a mechanized cutter. Mr. Hammond acknowledged that he relied on Dr. Wolfgram's opinion in part in forming his opinion that Claimant could work. He relied on his understanding that Dr. Wolfgram stated that Claimant had no mental health issues interfering with work.

The deposition of James England was taken on behalf of the Second Injury Fund on May 3, 2010 (Exhibit I). Mr. England testified that he met with Claimant one time back in January, 2007. Mr. England testified that Claimant cooperated and seemed pleasant and he did not notice any particular signs of discomfort. Mr. England testified that Claimant did not have to get up and move around. Mr. England further testified that for some reason, Claimant would not look right at him and avoided eye contact. Mr. England further noted that Claimant sat for around 45 minutes before they started testing, which was inconsistent with the amount of time that Claimant had estimated that he could sit. Mr. England gave Claimant the reading and math portions of the Wide Range Achievement Test and Claimant scored at the post-high school level on reading and at the 8th grade level on math. Mr. England testified that Claimant had gone through aqua therapy at ProRehab. Claimant told Mr. England that his primary pain was in his shoulder and neck, along with weakness in the right arm going out into the hand. Claimant also had some right leg spasms in his calf at night. Claimant told Mr. England that his low back would get sore if he bent over too much. Claimant complained to Mr. England of numbness in both feet and indicated it was hard for him to reach overhead with his right arm. Claimant told Mr. England that he normally gets up to move after about five minutes of sitting, but that Claimant appeared to able to sit for about 45 minutes to an hour in Mr. England's office. Mr. England opined that looking at the restrictions from the doctors that Claimant would not be able to go back to being an ironworker, because that does require more than a medium level of exertion and that was the highest level that was approved by any of the doctors. However, just assuming the results of the FCE or the restrictions of Dr. Mirkin, then Claimant would be able to perform a pretty wide variety of work up through the medium level of exertion, which would encompass about 90% of the jobs.

Mr. England further testified that even looking at the recommendations of Dr. Cohen, there would still be some kinds of sedentary to light, unskilled entry-level service employment that would allow him flexibility of moving about through the day such as security work, some kinds of cashiering, and customer service. Mr. England further opined that if Claimant could do

medium work, then forklift operation, which is something he had done in the past would be a possibility. Mr. England testified that the only way that he could conclude that Claimant was totally unable to work would be to consider the psychiatric limitations rather than the physical ones, as indicated by Dr. Liss. Mr. England then opined that if what Dr. Volarich indicated was correct, particularly the restriction that indicated the need to get into a recumbent fashion during the day, then Claimant would not be able to work. Mr. England is not aware of any jobs in the open labor market where the need to lie down exists. Mr. England also noted that Dr. Volarich recommended quite a few restrictions which were felt to preexist the 2003 injury; however, if Claimant had followed those restrictions, there is no way Claimant could have done ironwork. Mr. England noted that this seemed inconsistent with the fact that Claimant was able to do quite a bit beyond those recommended restrictions before the 2003 injury, or he would not have been able to be an ironworker. Mr. England testified that Dr. Liss' updated report did not really change things, because it was pretty much what he said in the first report. Mr. England testified that it was his understanding that Dr. Wolfgram felt that Claimant was capable of working, but if Dr. Wolfgram did not feel Claimant was capable of working, that could change his opinions.

FINDINGS OF FACT AND RULINGS OF LAW

Based on the competent and substantial evidence presented, including the testimony of Claimant and other witnesses, my personal observations, expert medical and vocational testimony, and all other exhibits received into evidence, I find:

Under Missouri law, it is well-settled that the claimant bears the burden of proving all the essential elements of a workers' compensation claim, including the causal connection between the accident and the injury. **Grime v. Altec Indus.**, 83 S.W.3d 581, 583 (Mo.App. W.D.2002); see also **Davies v. Carter Carburetor**, 429 S.W.2d 738, 749 (Mo.1968); **McCoy v. Simpson**, 346 Mo. 72, 139 S.W.2d 950, 952 (1940). While the claimant is not required to prove the elements of his claim on the basis of "absolute certainty," he must at least establish the existence of those elements by "reasonable probability." **Sanderson v. Porta-Fab Corp.**, 989 S.W.2d 599, 603 (Mo.App. E.D.1999) (citing **Cook v. Sunnen Prods. Corp.**, 937 S.W.2d 221, 223 (Mo.App. E.D.1996)). However, the employee must prove the nature and extent of any disability by a reasonable degree of certainty. **Downing v. Willamette Industries, Inc.**, 895 S.W.2d 650, 655 (Mo. App. 1995); **Griggs v. A. B. Chance Company**, 503 S.W.2d 697, 703 (Mo. App. 1974).

The Temporary or Partial Award made by ALJ Kevin Dinwiddie on September 19, 2005 is not incorporated or adopted in this Award. Additional significant evidence has been adduced and received into evidence in the final hearing which was not part of the hardship hearing. Additional treatment has been provided by Mr. Slusarski, and those records are in evidence. Additionally, ALJ Dinwiddie found that certain treatment records were not in evidence and had not been reviewed by Dr. Liss when making his credibility determinations. Claimant's treatment records are in evidence, and have been reviewed by Dr. Liss. Lastly, ALJ Dinwiddie's conclusions do not appear to be in conformity with Dr. Wolfgram's opinions, as expressed in his most recent deposition testimony. To modify a temporary award, the ALJ in the final award must find there was "additional significant evidence" not before the ALJ at the temporary award.

Dilallo v. City of Maryland Heights, 996 S.W.2d 675, 676 (Mo.App. E.D.1999); **Jennings v. Station Casino St. Charles**, 196 S.W.3d 552 (Mo.App. E.D. 2006).

Permanent Partial or Permanent Total Disability.

Section 287.020.7 RSMo. (2000) defines total disability as the "inability to return to any employment and not merely... [the] inability to return to the employment in which the employee was engaged at the time of the accident." The words "inability to return to any employment" means "that the employee is unable to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment." **Kowalski v. M-G Metals and Sales, Inc.**, 631 S.W.2d 919, 922 (Mo. App. 1982). The words "any employment" mean "any reasonable or normal employment or occupation; it is not necessary that the employee be completely inactive or inert in order to meet this statutory definition." **Id.** at 922; **Brown v. Treasurer of Missouri,** 795 S.W.2d 479, 483 (Mo. App. 1990). The primary determination for permanent-total disability is whether the claimant is able to compete in the open labor market given her physical condition and situation. **Messex v. Sachs Elec. Co**., 989 S.W.2d 206, 210 (Mo.App. E.D. 1999).

Claimant has presented a prima facie case regarding permanent total disability. He suffered a work injury; he presented medical and psychiatric evidence that he is in fact permanently and totally disabled. The defense in this case is based on the fact that Claimant is exaggerating his injuries and is not credible; and that the evidence of permanent total disability is not credible. Employer has presented evidence and argument on a number of facts in order to advance this position.

Ultimately, this case, and the opinions expressed by the physicians and vocational specialists, rests on the credibility of Claimant's reporting of complaints. Admittedly, the testimony and the facts in the record for both parties make this case very close.

Section 287 RSMo. underwent significant changes through legislative amendments which took effect August 28, 2005. Therefore, it must be determined which law applies to injuries sustained prior to August 28, 2005. **Article I, §13 of the Missouri Constitution** provides: That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities can be enacted.

There are two exceptions to the rule that a statute shall not be applied retrospectively. First, where the statute is only procedural and does not affect any substantive right of the parties and, second, where the legislature manifests a clear intent for retrospective application. **Gershman Investment Corp. v. Duckett Creek Sewer Dist., 851 S.W.2d 765 (Mo.App.1993)**. Section 287, as amended, does not contain a manifestation of legislative intent for retroactive application. Therefore, for any provision of §287 to apply retroactively, it must only be procedural in scope, as the retroactive application of statutory provisions which affects substantive rights violates the constitution. **Fletcher v. Second Injury Fund**, **922 S.W.2d 402, 406 (Mo.App.1996)**.

The distinction between substantive and procedural law is that substantive law relates to the rights and duties giving rise to the cause of action, while procedural law is the machinery used to effect the suit. **Wilkes v. Missouri Highway and Transp. Com'n, 762 S.W.2d 27, (Mo. banc 1988)**. Substantive statutes take away or impair vested rights acquired under existing law, or create a new obligation or impose a new duty. **Brennecka v. Director of Revenue, 855 S.W.2d 509, 511 (Mo.App.1993)**.

Prior to the 2005 amendments, §287.800 stated "All of the provisions of this chapter shall be liberally construed with a view to the public welfare, and a substantial compliance therewith shall be sufficient to give effect to rules, regulations, requirements, awards, orders or decisions of the division and the commission, and they shall not be declared inoperative, illegal or void for any omission of a technical nature in respect thereto." The appellate courts have construed this to mean all doubts be resolved in favor of a claimant. 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). All provisions of the Workers' Compensation Act must be liberally construed; accordingly we resolve all doubts in favor of employee. § 287.800 RSMo. **Hall v. Wagner Division-McGraw-Edison**, 755 S.W.2d 594, 596 (Mo.App.1988); **Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute**, 793 S.W.2d 195, 198 (Mo.App.1990). Yet, a liberal construction cannot be applied in order to excuse an element lacking in the claim. **Johnson** at 398**.**

A statutory provision which requires that doubts be resolved in favor of a particular party is a substantive statute, as the claim vests when the injury occurs. Applying the 2005 revision of § 287.800 would impair the cause of action itself, therefore, § 287.800 as it existed at the time of Claimant's injury applies to this case. As stated previously, Claimant has established a prima facie case, in that he is not lacking evidence on any essential element. There is evidence both supporting and contradicting Claimant's credibility, resolving the doubts in favor of Claimant supports a finding that he is permanently and totally disabled as described in § 287.020.7.

It is undisputed that Claimant suffered a work related injury on July 21, 2003. Claimant suffered an injury to his back as a result of the incident. The injury to his back required surgery, and resulted in a two level fusion. The work restrictions placed on Claimant by Dr. Mirkin render him unable to return to his former employment. The restrictions recommended by Dr. Volarich are more restrictive, and would limit Claimant to even more sedentary work.

The opinions of Dr. Liss regarding Claimants inability to work for psychiatric reasons are the most credible. Dr. Liss testified:

> Q In light of Mr. Venable's posttraumatic stress and his depression, can he work?
>
> A No, sir.
>
> Q What prevents him from working?
>
> A Well, these two illnesses not only interfere with his ability to persist at a job and his physical problems to persist at a job, they affect his intellectual abilities; his cognitive functioning, his memory and concentration. He

would be dangerous in any type of job that would go back to his previous job, and he couldn't do anything at a desk type of job.

His opinion is supported by the treatment records of Mr. Slusarski. In his treatment summary, Mr. Slusarski notes:

> It was apparent from the outset and that Mr. Venable has considerable difficulty processing and retaining information that is new to him. I explained in session #1 how the therapeutic process works and the logistics of our meetings and asked if he had any questions to which Mr. Venable replied that he had none. I then asked if he understood what I had told him to which he replied, "No, not really."
>
> Q What don't you understand?
>
> A Most of what you said. I have a hard time understanding stuff like that.

On the contrary, Dr. Wolfgram's opinions are unclear even as they relate to diagnosis. On direct exam he stated:

> Q I want to go ahead and hand you then what's been marked as Employer's Exhibit No. 10 and ask you to identify that.
>
> A Yes. This is a note that I prepared on April 20th, 2010, an addendum note regarding Danny Venable.
>
> Q What were your findings according to your report?
>
> A That there's no permanent partial psychiatric disability and there is no permanent total psychiatric disability and that there is no temporary psychiatric disability. Not, that -- all of that as related to the work injury. There are all kinds of problems here, but not as related to the work injury. They preexisted and they continue –
>
> MS. BEAN: I'm going to – again, I'm going to object, and I think this goes beyond the scope of this Doctor's expertise and goes beyond the scope of the psychiatric evaluation.
>
> Q (By Mr. Arias) Subject to that, go on if you can or if you have anything further.
>
> A I have nothing further to add.

Later, during cross examination he stated:

> Q So he still has the adjustment disorder, he still has the depressed mood, and he still has the anxiety five years later after you diagnosed it in 2005?
>
> A There's no way that you can tell what he's got now.
>
> Q Okay. So you don't think he has these problems now?
>
> A I've indicated there's no way of knowing at this time. In other words, we now have a 900-pound gorilla, and nothing is going to stop it unfortunately.
>
> Q So –

A So, you know, he could have it, but there's no way of knowing now. You've got something that's overwhelming that occupies everything.

Q So in your April 16th, 2010 report in which you said he had the same diagnoses as he did five years earlier, are you now changing that opinion and telling us you don't think he does?

A Well, it certainly has to be modified in light of all that we – that we've seen happen. And as I've indicated, those things could still be there, but there's no way of seeing into them at this particular time.

So it's impossible to know for sure, but for purpose of communication, I would want individuals to know in 2010 that I'm aware what I said in 2005, and those are worthy of mention, but again, with the caveat that now we have – we have five more years and we could see all the things that have happened.

So it could be that I made an error in saying that they're still there. If that's going to confuse the issue, then I would change my mind on that.

Dr. Wolfgram states there is no way of knowing what Claimant's condition is, but that its "overwhelming" and "occupies everything." Dr. Wolfgram's opinions are not based on a sufficient evidentiary foundation, and are not persuasive.

The vocational opinions of Mr. England and Mr. Hammond, by their own admission, are based at least in part on the belief that Dr. Wolfgram is of the opinion that Claimant is currently able to work. However, Dr. Wolfgram also testified to the following:

Q Would you say that until he gets the kind of rehabilitation that you have talked about, he's not really ready to go back in the work force yet, is he?

A I think the litigation needs to be resolved before rehabilitation can occur, that's one thing that I've learned.

Q Right. But he's not really ready to go back in the work force yet?

A No.

To the extent that the vocational opinions are based upon the opinions of Dr. Wolfgram, they are also not credible.

Based on the opinions of Dr. Liss, and taking into account Claimant's educational and employment background, and the permanent restrictions recommended by Dr. Mirkin and Dr. Volarich, it is reasonably certain that Claimant was and remains unemployable in the open labor market, and is therefore permanently and totally disabled as a result of the July 21, 2003 work-related injury to his lumbar spine and the resulting major depression and post trauma stress disorder.

Claimant reached maximum medical improvement and was released from medical care for his low back on March 1, 2004; I further find that Claimant became permanently and totally disabled as of March 1, 2004. Although ALJ Dinwiddie ordered additional treatment, the effect of that treatment was negligible, and did not alter his employability in that both Dr. Liss and Dr. Wolfgram currently agree Claimant is unable to enter the work force. The obligation to pay

permanent disability compensation commences under Section 287.160.1 RSMo. (2000) on the date when the claimant's permanent disability begins. **Kramer v. Labor & Indus. Rel. Com'n**, 799 S.W.2d 142, 145 (Mo. App. 1990); **Hall v. Wagner Div.-McGraw-Edison**, 782 S.W.2d 441, 443-44 (Mo. App. 1989). The permanent total disability payments shall therefore commence effective March 9, 2004, which represents the first day after the last TTD payment, and shall continue to be paid in accordance with the provisions of this award and Section 287.200 RSMo. The applicable weekly rate for permanent total disability benefits is $635.64 as determined by stipulation of the parties.

Temporary Total Disability

Based on the determination of the commencement of permanent total disability benefits, there are no outstanding TTD benefits due.

Future Medical

It is sufficient to show that the need for additional medical treatment by reason of a compensable accident is a reasonable probability. **Mathia v. Contract Freighters, Inc.,** 929 S.W.2d 271, 277 (Mo.App.1996). Future medical care must flow from the accident, via evidence of a medical causal relationship between the condition and the compensable injury, if the employer is to be held responsible. **Mickey v. City Wide Maintenance**, 996 S.W.2d 144, 149 (Mo.App. W.D.1999). A claimant is not required to produce "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). 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).

Dr. Liss testified Claimant could benefit from additional counseling and taking anti-depressant medications. Dr. Volarich testified it was highly probable that Claimant would need additional pain medications for pain relief in his low back. Employer is to provide future medical treatment as described by Dr. Liss and Dr. Volarich.

Second Injury Fund Liability

Prior to the injury, Claimant was working full duty with no physical restrictions in heavy demand job. Further, there is no evidence he suffered from depression, post trauma stress disorder, or any psychological condition that affected his work or home life. Claimant is permanently and totally disabled as a result of the physical and psychiatric injuries from the last injury alone. There is no Second Injury Fund Liability in this case.

MO HealthNet Lien

The Missouri Department of Social Services filed a lien in the amount of $1,071.24 for payments made for medical services provided to Claimant between November 19, 2004 and November 26, 2004. The Itemized list provided with the notice indicated the treatment provided was related to Claimant's back. No evidence to the contrary was presented at the hearing, and none of the parties addressed this issue in their post trial briefs. By virtue of §287.266 Employer is ordered to reimburse the Missouri Department of Social Services the amount of $1,071.24.

Attorney Fee Liens

The Division is charged with approving reasonable attorney fees. Section 287.260.1 RSMo. The factors to be considered in determining reasonable value of attorney's fees in Missouri are time, nature, character and amount of services rendered, nature and importance of the litigation, degree of responsibility imposed on or incurred by the attorney, the amount of money or property involved, the degree of professional ability, skill and experience called for and used, and the result achieved. **Cervantes v. Ryan**, 799 S.W.2d 111, 115 (Mo.App. 1990).

The attorneys who had filed liens, Bradley M. Herrin and Celestine Dotson failed to appear at the hearing of May 11, 2010 to protect their lien and present evidence regarding services rendered. Ms. Dotson's motion to re-open evidence filed on May 28, 2010 was denied on the record on June 30, 2010. A written ordered was filed and made a part of the Division's records. Mr. Herrin and Ms. Dotson's requests for liens for attorney fees are denied.

Attorney Bob Keefe is granted a lien in the amount of 25% of all sums recovered hereunder, as and for necessary legal services provided.

Made by: /s/ GRANT C. GORMAN
GRANT C. GORMAN
Administrative Law Judge
Division of Workers' Compensation

This award is dated and attested to this 4th day of October, 2010.

/s/ NAOMI PEARSON
NAOMI PEARSON
Division of Workers' Compensation